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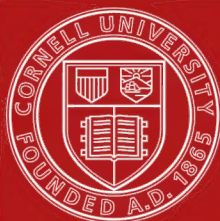
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THE LAW
GOVERNING
SALES OF GOODS
AT COMMON LAW
AND UNDER THE
UNIFORM SALES ACT

BY
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PREFACE.

If some years of study and teaching of the law of sales are not sufficient excuse for venturing to invade with a new book a field already occupied by writers of such distinction as the authors of the leading English and American treatises on the law of sales, I may plead further a desire to explain and support the provisions of the Sales Act which I drafted at the instance and under the supervision of the Commissioners for Uniform State Laws. These Commissioners have been appointed by nearly all the States of the Union for the purpose of bringing about, so far as is desirable and possible, uniformity of law in the several States. They meet annually in conference, and thus far their chief accomplishment is the Negotiable Instruments Law which has now been enacted by more than two-thirds of the States. The original draft of an "Act to make Uniform the Law of Sales" was prepared by me in 1902-1903, at their instance. It was printed in the summer of 1903 and distributed, with a request for criticism, to teachers of the law of sales, writers, and other experts on the subject. Some criticisms were received and with the light of these criticisms, and my own further reflection, a revised draft was presented to the Commissioners in the summer of 1904. This draft was gone over section by section at this conference. Doubtful points and proposed changes in wording were carefully considered. A revised draft was again presented in 1905, and with slight changes once more in 1906. At the meeting of the conference at St. Paul in the summer of 1906, the draft was finally adopted by the Commissioners and recommended for passage. During the following winter it was enacted in Arizona, New Jersey and Connecticut, and a year later in Massachusetts, Rhode Island and Ohio. It seems reasonable to hope that other States may follow the example thus set.

In order to explain the Act and perhaps furnish an aid to its uniform construction, I first planned to prepare a book giving the

Statute with brief annotations. I soon became satisfied, however, that any complete understanding and proper construction of the codification of a subject having so long a history as sales must be based on a thorough knowledge of the law prior to the codification, and also of any reasons for changing what had been previously established, or for preferring one side of the argument upon a controverted point. I have accordingly prepared a book which is not simply a commentary on the Sales Act, but is also a full treatise on sales under the Common Law. Where a comparison of the rules of the Civil Law seemed likely to be serviceable I have also ventured upon such comparison, though I have not attempted a full treatment of the whole subject of sales under the Civil Law. I have allowed myself considerable freedom in the statement of my own views of the law and the reasons for them, and have not hesitated to criticize decisions of the courts where they seemed opposed to principle or to the convenience of trade. I have tried, however, not to allow my own opinions to interfere with the exactness of my statement of the actual decisions, and I have made full annotations containing not simply citations of authorities but, also, wherever it seemed useful, quotations from the opinions of courts or summaries of the facts of the important cases, in order that the reader might have at hand the means of testing the correctness of my conclusions. In the preparation of the chapter devoted to "Delivery by the Buyer and Retention of Possession by the Seller," I have been assisted by Joseph H. Iglehart, Esq., of the Indiana Bar.

SAMUEL WILLISTON.

CAMBRIDGE, *February*, 1909.

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SALES OF PERSONAL PROPERTY.

PART I.

FORMATION OF THE CONTRACT.

CHAPTER I.

DEFINITIONS AND GENERAL PRINCIPLES.

- Section 1. Terms defined in Sales Act.
2. Explanation of definitions.
 3. Sales by deeds.
 4. Sales by operation of law.
 5. Mutual assent generally necessary.
 6. Sales and contracts to sell.
 7. Absolute and conditional contracts and sales.
 8. Conditions subsequent.
 9. Parties to a bargain.

SECTION 1. Terms defined in Sales Act.—

I. TERMS DEFINED.

Sec. 1. CONTRACTS TO SELL AND SALES.— (1.)

A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

(2.) A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

(3.) A contract to sell or a sale may be absolute or conditional.

(4.) There may be a contract to sell or a sale between one part owner and another.

This section differs considerably from the first section of the English Sale of Goods Act.¹

The reasons for the change in terminology appear in the following sections.

§ 2. **Explanation of definitions.**—The most fundamental distinction in the law of sales is between a contract to sell in the future and a present sale. The distinction is often expressed by the terms “executory” and “executed” sales. Whether a bargain between parties is a contract to sell or an actual sale depends upon whether the property in the goods is transferred. If it is transferred there is a sale, an executed sale, even though the price be not paid. Conversely, though the price be paid there is but a contract to sell (not very happily called an executory sale) if the property in the goods has not passed. The phrase “contract of sale” has been introduced to some extent into our books from the Roman Law^{1a} and the use of the phrase in the English Sale of Goods Act seems likely to give it a permanent place. Like most terms imported from the Roman Law the words do not exactly fit our conditions. In the classical Roman Law a mere agreement could not transfer the title in goods to the buyer.² The distinction essential in our law between a contract which by its operation immediately transfers title and one which does not could not exist. Every bargain in the Roman Law, therefore, might indifferently be called a contract to sell, a contract of sale, or a sale. This is not so in England and America. As used in

¹(1). A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another.

(2.) A contract of sale may be absolute or conditional.

(3.) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled

the contract is called an “agreement to sell.”

(4.) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

^{1a}Blackburn’s adoption of the phrase for the title of his book on sales is probably chiefly responsible for the currency of the expression. Blackburn borrowed it from Pothier, extracts from whose *Contrat de Vente* were translated and included by the English author in his book.

²Moyle, *Contract of Sale in the Civil Law*, 3.

the Sale of Goods Act the term includes both contracts to sell and executed sales,³ but in the decisions it is sometimes used as the equivalent of sale only.⁴ The meaning conveyed by the term is thus uncertain and its use is, therefore, better avoided.

§ 3. **Sales by deeds.**— Either a contract to sell goods or a sale may be by deed as well as by parol. Such transactions are not usually carried out with the formality of a deed, but general assignments under seal of a debtor's entire property including goods are common, and bills of sale of particular articles are not infrequently made under seal in jurisdictions where seals still have their common-law effect. In such cases reference must be had to the law governing covenants and deeds of conveyance to determine how the effect of the transaction differs from a parol agreement of the same tenor.

§ 4. **Sales by operation of law.**— There are certain cases where the law transfers title to goods or imposes an obligation upon the owners to transfer it irrespective of any agreement of the parties. These cases are not regarded as sales or contracts to sell, although the obligations are similar in legal effect. Thus where a defendant pays a judgment in trespass,⁵ trover,⁶ or detinue,⁷ for the full value of the plaintiff's goods, the title to the goods passes to the defendant.⁸ Again in certain cases one who has been wrongfully dispossessed of his goods may waive the tort and recover the value of the goods on the theory of a fictitious sale.⁹ The election of the plaintiff to waive the tort in effect makes the wrongdoer the rightful owner of the goods. These are instances of actual trans-

³ Section 62 so defines it.

⁴ "Inasmuch as a sale is a contract or agreement it is frequently spoken of as a 'contract of sale,' or an 'agreement of sale,' two phrases which in the law mean no more and no less than the word 'sale.'" *White v. Treat*, 100 Fed. Rep. 290, 291. In *Low v. Pew*, 108 Mass. 347, 349, 11 Am. Rep. 357, the term is also used as meaning sale as contrasted with agreement to sell.

⁵ *Jenkins Cent. Cas.* No. 88.

⁶ *Brinsmead v. Harrison*, L. R. 6 C. P. 584, 588; *Miller v. Hyde*, 161 Mass. 472, 37 N. E. 760, 25

L. R. A. 42, 42 Am. St. Rep. 424.

⁷ "The theory of the judgment in an action of detinue is that it is a kind of involuntary sale of the plaintiff's goods to the defendant." *Ex parte Drake*, 5 Ch. D. 866.

⁸ As to whether satisfaction of the judgment is necessary in order to effect a transfer of title, see *Ames, The Disseisin of Chattels*, 3 Harv. L. Rev. 326; *Miller v. Hyde*, 161 Mass. 472, 37 N. E. 760, 25 L. R. A. 42, 42 Am. St. Rep. 424.

⁹ *Keener on Quasi-Contracts*, 159 et seq.

fers of title without agreement of the parties. Instances of an obligation to transfer title similarly imposed by law may be found wherever one who has voluntarily parted with a title has a right to regain it because of fraud, mistake, duress, or nonperformance of an obligation upon which the right to the goods depended.¹⁰ Where rescission of executed sales is allowed for breach of warranty, the converse case, an obligation to take title, is presented.¹¹

§ 5. **Mutual assent generally necessary.**—Save in exceptional cases sales and contracts to sell are based on mutual assent, and, therefore, the intention of the parties determines the nature and terms of the bargain. The principles of mutual assent which govern all simple contracts find illustration here. In the formation of a bargain intention of the parties does not mean secret intention nor generally even intention manifested to third persons, but only the intention manifested to the other party. If the offerer understood “the transaction to be different from that which his words plainly expressed, it is immaterial, as his obligations must be measured by his overt acts.”¹² An extreme illustration of this principle is furnished by an offer to buy or sell sent by telegraph, and owing to a mistake of the telegraph company, delivered to the person addressed with some of the terms changed. An acceptance in good faith by the latter creates a binding bargain, according to the weight of authority.¹³ By selecting the telegraph as an agency of communication the offerer makes himself responsible for the offer actually delivered. So where the parties made a sale of a stock of merchandise except “dry goods,” and dispute afterward arose as to what was included within the exception, it was held proper to instruct the jury that the meaning was to prevail against

¹⁰ See *infra*, § 567 *et seq.*

¹¹ See *infra*, § 608.

¹² *Mansfield v. Hodgdon*, 147 Mass. 304, 17 N. E. 544.

¹³ *W. U. Tel. Co. v. Shotter*, 71 Ga. 760; *W. U. Tel. Co. v. Flint River Co.*, 114 Ga. 576, 40 S. E. 815; *Ayer v. W. U. Tel. Co.*, 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353; *Haubelt v. Rea & Page Mill Co.*, 77 Mo. App. 672. But see *contra*, *Postal Tel. Co. v. Schaefer*, 110 Ky. 907, 62 S. W. 1119; *Shingleur v. W. U. Tel. Co.*,

72 Miss. 1030, 18 So. 425, 30 L. R. A. 444, 48 Am. St. Rep. 604; *Pepper v. W. U. Telegraph Co.*, 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699. If the mistake was evident upon the face of the telegram or known to the receiver, he cannot, however, hold the sender bound by its terms. *Germain Fruit Co. v. W. U. Tel. Co.*, 137 Cal. 598, 70 Pac. 658, 59 L. R. A. 575; *Central of Georgia Ry. Co. v. Gortatowsky*, 123 Ga. 366, 51 S. E. 469.

either party in which he had reason to suppose the words were used.¹⁴ With such cases should be compared the well-known case of *Raffles v. Wichelhaus*.¹⁵ In that case the plaintiff contracted to sell cotton "to arrive ex Peerless" from Bombay. There were two vessels of this name, one of which sailed from Bombay in October, the other in December. The plaintiff intended the latter and the defendant the former. It was held that there was no contract binding the parties. In this case it will be noticed that each party had used words apt to express his meaning, and, therefore, could properly insist upon that meaning. If a reasonable man in the position of the parties ought to have known that "ex Peerless" under the circumstances in which those words were used could only refer to one of the ships, the decision should have been different. But where wholly ambiguous words are used, if the parties reasonably use or understand the words in different senses, there is no contract.¹⁶

§ 6. **Sales and contracts to sell.**—The ordinary cases with which the law has to deal are either cases of a present transfer of title or of contracts that the seller will thereafter make a transfer of title. An intermediate class, however, is possible. The seller may agree now, that the property in the goods shall pass at some time in the future without further volition on his part. In an ordinary contract to sell the seller agrees that at a future time he will assent to the transfer of the property. In the intermediate case the assent to the transfer is given at the time the bargain is made, but the transfer is not to be immediate. The distinction is analogous to that between a present grant of an estate

¹⁴ *Wood v. Allen*, 111 Iowa, 97, 82 N. W. 451. See also *Smith v. Hughes*, L. R. 6 Q. B. 597; *Preston v. Luck*, 27 Ch. D. 497; *Van Praagh v. Everidge*, [1902] 2 Ch. 266; *Thompson v. Ray*, 46 Ala. 224; *Newsome v. Brazell*, 118 Ga. 547, 45 S. E. 397; *Phillip v. Gallant*, 62 N. Y. 256; *Tucker v. Preston*, 60 Vt. 473, 11 Atl. 726; *J. A. Coates & Sons v. Buck*, 93 Wis. 128, 67 N. W. 23.

¹⁵ 2 H. & C. 906.

¹⁶ *Falck v. Williams*, [1900] A. C. 176. See also *Peerless Glass Co. v. Pacific Crockery Co.*, 121 Cal. 641, 54

Pac. 101; *Lamar Elevator Co. v. Craddock*, 5 Col. App. 203, 37 Pac. 950; *Hartford, etc., R. R. Co. v. Jackson*, 24 Conn. 514, 63 Am. Dec. 177; *Rowland v. New York, etc., R. R. Co.*, 61 Conn. 103, 23 Atl. 755, 29 Am. St. Rep. 175; *Rupley v. Daggett*, 74 Ill. 351; *Brant v. Gallup*, 5 Ill. App. 262; *Clay v. Rickets*, 66 Iowa, 362, 23 N. W. 755; *Hogue v. Mackey*, 44 Kan. 277, 24 Pac. 477; *Frazer v. Small*, 59 Hun, 619; *Cape Fear Lumber Co. v. Matheson*, 69 S. C. 87, 48 S. E. 111. See further *infra*, § 653 *et seq.*

in remainder in real property and a contract to convey the property at the termination of the particular estate. Whether this intermediate kind of transaction should be classified as a sale or a contract to sell is open to argument, but it seems to partake more of the nature of a sale than a contract in that title is transferred by force of the original bargain and the seller is not under an obligation to make the transfer in the future. This designation is, moreover, in harmony with the general usage exemplified in the term "conditional sales," which furnish the only common illustration of these bargains. There seems to be little judicial discussion throwing light upon the subject, though the matter has been touched upon by text-writers. It is probable, in view of the general assumption to this effect, that at least so far as concerns goods unspecified at the time of the bargain some subsequent act of appropriation by the seller is necessary to transfer the property in the goods even though the parties expressed an intention that title should pass when the goods became specific or at some other time.¹⁷ Where goods are specified at the time of the bargain it seems possible to create a situation where the property in the goods will pass at a future time without action. This is true of conditional sale.¹⁸ And it seems possible to create estates in remainder in specific chattels, which will vest the property in the remainderman at the appointed time.¹⁹

§ 7. **Absolute and conditional contracts and sales.**—As in every other kind of contract, so in a contract to sell there may be inserted such conditions as the parties agree upon. Even though no conditions are expressed, they may be implied; for instance, that the property shall not be transferred until the price is paid, or *vice versa*. Similarly conditions may accompany a sale. Though the property is transferred by a sale, obligations may be still outstanding and unperformed by the seller, as an obligation to do work upon the goods or an obligation to deliver them, and such obligations like other contractual obligations may be conditional either by agreement of the parties or by implication of law. But not only may these subsidiary obligations in a sale be conditional but the transfer of the legal title itself may be. The

¹⁷ See *infra*, §§ 132, 274.

¹⁸ See *infra*, § 332.

¹⁹ Gray on Perpetuities (2d ed.), § 789 *et seq.*

typical case of conditional sale is a sale in which the transfer of title is conditional upon the payment of the price. Though sales upon other conditions may readily be imagined, the practice of selling goods with a retention of the title until payment of the price is so common that the ordinary meaning of the term "conditional sale" is confined to sales upon this particular condition. In such sales the goods are habitually delivered to the buyer but the title retained by the seller until payment. These cases present, as was said in the previous section, a typical case of a sale to take effect in the future by force of its own terms without further expression of assent by the seller, or indeed in spite of his dissent.²⁰

§ 8. **Conditions subsequent.**—A sale may be subject to a condition subsequent, as well as to a condition precedent. A condition precedent makes it necessary that something shall happen prior to the vesting of the property in the buyer. A condition subsequent divests by its happening a title which has already vested. The typical case of this sort is a contract of "sale or return." In such a transaction the property in the goods vests in the buyer subject to an option on his part to return them within a specified or reasonable time.²¹ A contract to sell may in terms at least be subject to a condition subsequent, but the legal effect of such a condition is generally that of a condition precedent. Thus, if A. agrees to sell B. goods on January 1st, subject to a proviso that if war is declared before that date the contract shall be thereby terminated, the contract is by its terms to exist until and unless something happens, which will thereupon terminate the contract. But the legal effect of this bargain is not altered for any purpose except pleading if it be put with a condition precedent as follows: A. agrees to sell and B. to buy goods on January 1st, if war has not been previously declared. Other conditions subsequent in form in contracts may similarly be restated in the form of conditions precedent. This results from the fact that there can rarely be any material difference between the termination or divesting of a contract by a condition subsequent on the one hand and the impossibility of liability arising on the contract because a condition precedent has not happened and cannot

²⁰ See *infra*, § 332.

²¹ See *infra*, §§ 270-273.

happen on the other. It is only where a transfer of property, whether real or personal, has been made that conditions subsequent become important.

As between the parties there seems no reason to question the possibility of making any condition subsequent to a sale that may be agreed upon, provided that the object of the condition is not against public policy.²² Where the rights of third parties become involved, however, it seems obvious that some limitation must be put upon the agreement of the parties. Thus, if in order to prevent retail dealers from cutting prices, manufacturers should sell goods to dealers, not with a contract that the dealer should not sell below a certain price, as is commonly done,²³ but with a condition subsequent that in case of such a sale or attempted sale, the property should revert in the manufacturer, it may be doubted whether the manufacturer could maintain any right against the subpurchaser even though the court did not regard the attempt of the manufacturer to maintain prices as contrary to public policy.

§ 9. **Parties to a bargain.**—A man cannot ordinarily buy his own goods, though there may be at least apparent exceptions to this rule. On an execution sale a debtor may buy his own goods, and the rules which forbid trustees and other fiduciaries from buying in their individual capacity property which they hold as fiduciaries are based rather on equitable than legal difficulties. It is doubtless true that in any purchase of his own goods, no transfer of title can take place. All that is possible is to relieve the goods or the owner of them from the claims of others. This may be the true explanation also of a sale by one joint owner to another, since each joint owner is supposed to own *per tout* as well as *per mie*. But whatever may be the essence of the transfer there is no question as to the possibility of one part owner vesting with his rights of property another part owner.

²² In *Lilienthal v. Suffolk Brewing Co.*, 154 Mass. 185, 28 N. E. 151, 12 L. R. A. 821, 26 Am. St. Rep. 234, a sale was made with the condition subsequent that if the price named differed from the market price, the sale should be void.

²³ See *infra*, § 674; *Bobbs-Merrill Co. v. Snellenburg*, 131 Fed. Rep. 530; *Garst v. Hall & Lyon Co.*, 170 Mass. 588, 61 N. E. 219, 55 L. R. A. 631, and note.

CHAPTER II.

CAPACITY OF PARTIES.

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§ 10. Provisions of Sales Act as to capacity.—

Sec. 2. CAPACITY — LIABILITY FOR NECESSARIES.—Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Where necessities are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery.¹

The classes of person, who by the general law have a limited capacity to contract and to transfer and acquire property are

Infants,
Insane persons,
Drunken persons,
Married women,
Corporations.

§ 11. **Infant's capacity, general rule.**—An infant, that is a minor, is not wholly incapable of contracting, or of transferring or holding property, but the law attaches to the bargains which he makes the right to avoid them.² By statute in England³ this rule is changed and contracts for the sale of goods other than necessities to infants are made absolutely void. This legislation has not, however, been followed in the United States. It was also formerly frequently stated that all contracts with an infant which were necessarily disadvantageous to the infant were absolutely void.⁴ The contracts usually included under this heading,

¹This section follows section 2 of the English Act except that the words "the sale and" which precede the last word in the section are omitted as introducing a possible ambiguity.

²See cases below, *passim*. In Alabama by Civil Code (1896), § 833, the court may relieve an infant of the disabilities of nonage, if it seems

for his advantage. See *Ketchum v. Faircloth-Segrest Co.* (Ala.), 46 So. 476.

³37 & 38 Vict., c. 62, commonly called the Infants' Relief Act. It is noticeable that this statute makes void only sales to infants, not sales by them.

⁴See 1 Parsons on Contracts, *295, note (u).

however, were not sales or contracts to sell,⁵ and the best modern authorities treat all the contracts of an infant as voidable, not void.⁶ The fact that money or property transferred by an infant was given him for the purpose by a third person does not prevent him from avoiding the transaction.⁷

§ 12. **Voidable means valid until avoided.**—Most of the disputed questions in the law of infancy turn upon the legal meaning of the word “voidable” as applied to an infant’s acts. The natural meaning of the word imports a valid act which may be avoided, rather than an invalid act which may be confirmed, and the weight of authority as well as reason point in the same direction. Moreover, so far as executed transfers of property are concerned the authority of the decisions clearly supports this view.⁸ As to executory contracts to sell, a distinction has been sometimes taken, and the doctrine has been laid down that such bargains are wholly invalid until confirmed.⁹ This distinction has been severely criticised,¹⁰ and must be regarded as unfounded. Probably the courts which first adopted it meant little more than this: An executed sale transfers title and a transfer of title is an important thing even though it may be avoided; on the other hand an executory contract is only important if it is ultimately performed or creates a liability for nonperformance. Now inasmuch as the performance of the contract by the infant or his liability for nonperformance are wholly dependent upon his own choice until and unless he ratifies the contract after coming of age, it seems accurate to say that there is until then no contract. But though the distinction is doubtless fine between no contract and a contract

⁵ See 1 Parsons on Contracts, *295.

⁶ See 18 Am. St. Rep. 574, note; Wald’s Pollock on Contracts (3d Am. ed.), 60.

⁷ Thornton v. Holland, 87 Miss. 470, 46 So. 19.

⁸ Roof v. Stafford, 7 Cow. 179; Johnson v. Packer, 1 Nott & McC. 1. The numerous decisions as to an infant’s conveyance of real estate, which cannot be distinguished on principle from a sale of personal property, might also be cited. They

are collected in 16 Am. & Eng. Encyc. (2d ed.) 282.

⁹ Morton v. Steward, 5 Ill. App. 533, 535; Minock v. Shortridge, 21 Mich. 304, 315; Edmunds v. Mister, 58 Miss. 765; Edgerly v. Shaw, 25 N. H. 514, 516, 57 Am. Dec. 349; State v. Plaisted, 43 N. H. 413. But see Gillenwaters v. Campbell, 142 Ind. 529, 534, 41 N. E. 1041.

¹⁰ See the able note in 18 Am. St. Rep. 573, 579.

which the promisor may perform or not at his pleasure, it is of legal importance. In the case of a note or formal document this is obvious. If the note has no validity until confirmed it is hard to explain how it can be negotiated, and similarly a covenant if it has any validity as such must derive it from the sealing and delivery when it was made, not from a subsequent parol ratification. Ratification may and does deprive the infant of a right to avoid his deed,¹¹ but it cannot fairly be regarded as the making of it. Even in the case of simple contracts, though the matter is less obvious the same principle holds. If an infant's executory promise amounts to nothing until ratified it is impossible to see how it can be consideration for the counter promise of an adult, but that it is so was early and conclusively settled.¹² Again when an infant's promise is ratified the action is brought on the original promise. Unless that promise had then some legal validity this practice is not defensible. In other ways, as will be seen from what follows, it is important to make the distinction in question.

§ 13. *Infant's privilege is personal.*—The right to avoid his contracts and conveyances is given an infant for his protection, and should not be stretched beyond what his needs require. Therefore, the right is confined to the infant himself or his legal representatives.¹³ Neither creditors¹⁴ nor trustees or assignees in bankruptcy¹⁵ nor assignees by purchase¹⁶ are included in this designation, but heirs¹⁷ or personal representatives¹⁸ are, and probably a guardian.¹⁹

¹¹ *Irvine v. Irvine*, 9 Wall. 617.

¹² *Holt v. Ward* Clarencieux, 2 Strange, 937; *Atwell v. Jenkins*, 163 Mass. 362, 40 N. E. 178, 28 L. R. A. 694; *Union Life Ins. Co. v. Hilliard*, 63 Ohio St. 478, 491, 59 N. E. 230, 81 Am. St. Rep. 644; *O'Rourke v. John Hancock Ins. Co.*, 23 R. I. 457, 462, 50 Atl. 834, 57 L. R. A. 496.

¹³ *Trustees v. Anderson*, 63 Ind. 367; *Holmes v. Rice*, 45 Mich. 142, 7 N. W. 772; *Monaghan v. Agriculture Ins. Co.*, 53 Mich. 238, 18 N. W. 797; *Harvey v. Briggs*, 68 Miss. 60, 8 So. 274, 10 L. R. A. 62;

Shaffer v. Detie, 191 Mo. 377, 90 S. W. 131; *Bordentown v. Wallace*, 50 N. J. L. 13, 11 Atl. 267; *Beardsley v. Hotchkiss*, 96 N. Y. 201; and cases cited in the following notes.

¹⁴ *Kingman v. Perkins*, 105 Mass. 111; *Yates v. Lyon*, 61 N. Y. 344.

¹⁵ *Mansfield v. Gordon*, 144 Mass. 168, 10 N. E. 773; *Sayles v. Christie*, 187 Ill. 420, 438, 58 N. E. 480.

¹⁶ *Riley v. Dillon*, 148 Ala. 283, 41 So. 768.

¹⁷ *Gillenwaters v. Campbell*, 142 Ind. 529, 41 N. E. 1041; *Harvey v. Briggs*, 68 Miss. 60, 8 So. 274, 10 L. R. A. 62; *O'Rourke v. Hall*, 38

§ 14. **Whether the privilege may be exercised against a subsequent purchaser in good faith.**—Though the transaction is merely voidable, it is unlike sales voidable for fraud or other equitable ground in this respect: a *bona fide* purchaser for value without notice that the seller acquired title from an infant cannot, at common law, retain the goods if the latter elects to rescind his transfer of title.²⁰ The personal privilege of the infant, being a legal right, can be exercised against any one. This rule has, however, been changed in the Sales Act.²¹ which makes no exception to the rule that a *bona fide* purchaser for value from one who has a voidable title acquires a good title.

§ 15. **How disaffirmance may be made.**—Any act which clearly shows an intent to disaffirm a contract or sale is sufficient for the purpose. Thus a notice by the infant of his purpose to disaffirm²² a resale of goods previously conveyed by him,²³ or a tender of goods conveyed to him,²⁴ or a plea of infancy in an action upon the infant's obligation,²⁵ is sufficient. An action to recover goods transferred is, however, probably insufficient without previous

N. Y. App. Div. 534; *Walton v. Gaines*, 94 Tenn. 420, 29 S. W. 458; *Veal v. Fortson*, 57 Tex. 482.

²⁰ *Jefford v. Ringgold*, 6 Ala. 544; *Shropshire v. Burns*, 46 Ala. 108; *Parsons v. Hill*, 8 Mo. 135; *Tillinghast v. Holbrook*, 7 R. I. 230.

¹⁹ *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117. Compare *Irvine's Heirs v. Crockett*, 4 Bibb, 437; *Oliver v. Houdlet*, 13 Mass. 237.

²⁰ *Hill v. Anderson*, 13 Miss. 216; *Downing v. Stone*, 47 Mo. App. 144. Similarly in the case of real estate. *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409; *Buchanan v. Hubbard*, 96 Ind. 1; *Jenkins v. Jenkins*, 12 Iowa, 195, 200; *Brantley v. Wolf*, 60 Miss. 420; *McMorris v. Webb*, 17 S. C. 558, 43 Am. Rep. 629. And a purchaser for value of an infant's note will be defeated by a plea of

infancy. *Howard v. Simpkins*, 70 Ga. 322.

²¹ Sec. 24. See *infra*, § 348.

²² *Long v. Williams*, 74 Ind. 115; *Roberts v. Wiggin*, 1 N. H. 73, 75, 8 Am. Dec. 38.

²³ *State v. Plaisted*, 43 N. H. 413; *Chapin v. Shafer*, 49 N. Y. 407; *State v. Howard*, 88 N. C. 650. These were cases where an infant sold personal property which he had previously mortgaged. There are numerous decisions to the same effect where an infant makes a conveyance of real estate which he had previously conveyed by deed or mortgage. See 18 Am. St. Rep. 665.

²⁴ *Hoyt v. Wilkinson*, 57 Vt. 404.

²⁵ *Sparr v. Florida Southern Ry.*, 25 Fla. 185, 6 So. 60; *Strain v. Wright*, 7 Ga. 568; *Schrock v. Crowl*, 83 Ind. 243; *Freeman v. Nichols*, 138 Mass. 313, 314.

demand or other indication of disaffirmance.²⁶ Though a sale voidable for fraud may be thus avoided,²⁷ the case may be distinguished on the ground that the fraud is itself a wrong, and if the remedy is practically convenient and gives effectual relief, the wrongdoer should not be heard to complain.

§ 16. **When the privilege may be exercised.**—It was early settled that an infant's conveyance of realty could be avoided only after he attained his majority, though it has been said he may enter during his minority and receive the rents and profits.²⁸ In the case of personal property it is well settled, however, that a sale may be avoided during his minority by an infant seller²⁹ or

²⁶ It is the prevailing though not uniform rule in regard to real estate conveyed by an infant that he may bring ejectment or other proceeding to regain possession without previous demand. 18 Am. St. Rep. 667, 668; *Smith v. Ryan*, 191 N. Y. 452, 84 N. E. 402. So in *Stack v. Cavanaugh*, 67 N. H. 149, 155, 30 Atl. 350, an action for the recovery of money, the action was held maintainable without previous demand. And an infant was allowed to disaffirm a release given by him by merely bringing an action on the claim released in *St. Louis, etc., Ry. v. Higgins*, 44 Ark. 293. But in *Betts v. Carroll*, 6 Mo. App. 518, it was held that replevin of personal property would not lie unless there had been some act of disaffirmance before the action. This decision is questioned in 18 Am. St. Rep. 668, but as to actions sounding in tort it seems sound on principle and reasonable from a practical standpoint. An action of tort should not lie until a tort has been committed; and until disaffirmance by the infant retention of the property is not wrongful. It is anomalous if bringing the action itself gives rise to the

cause of action, or an essential element of it. Nor should the fiction of relation be pressed so far as to enable the infant to make the defendant a tort-feasor in the past. See *Drude v. Curtis*, 183 Mass. 317, 67 N. E. 317, 62 L. R. A. 755.

²⁷ See *infra*, § 567.

²⁸ See cases cited in 18 Am. St. Rep. 670, note; *Watson v. Ruderman*, 79 Conn. 687, 66 Atl. 515; *Wallace v. Leroy*, 57 W. Va. 263, 267, 50 S. E. 243, 110 Am. St. Rep. 777. But see *Chandler v. Simmons*, 97 Mass. 508, 510, 93 Am. Dec. 117.

²⁹ *Shipman v. Horton*, 17 Conn. 481; *Shipley v. Smith*, 162 Ind. 526, 528, 70 N. E. 803; *Beickler v. Guenther*, 121 Iowa, 419, 422, 96 N. W. 895; *Bailey v. Barnberger*, 11 B. Mon. 113; *Towle v. Dresser*, 73 Me. 252; *Bloomington v. Chittenden*, 74 Mich. 698, 42 N. W. 166; *Starr v. Watkins*, (Neb.) 111 N. W. 363; *Carr v. Clough*, 26 N. H. 280, 59 Am. Dec. 345; *Stafford v. Roof*, 9 Cow. 626; *Bool v. Mix*, 17 Wend. 119, 31 Am. Dec. 285; *Bartholomew v. Finemore*, 17 Barb. 428. See also *Miller v. Smith*, 26 Minn. 248, 2 N. W. 942, 37 Am. Rep. 407; *Chapin v. Shafer*, 49 N. Y. 407.

buyer.³⁰ Though an infant may thus avoid his sales, purchases, or contracts during infancy he can make no effective ratification until he becomes of age,³¹ for an infant's ratification clearly can be no more effectual than his original bargain.

§ 17. **The whole transaction must be disaffirmed.**—An infant cannot disaffirm so much of a transaction as is unfavorable to him and treat the remainder as effectual. If he disaffirms his obligation to pay the price, he thereby necessarily disaffirms his title to the consideration he received for that obligation.³² If he disaffirms his obligation to pay for goods delivered to him upon a conditional sale, he thereby forfeits any title and right to the possession of the goods which the bargain gave to him.³³ Similarly if he purchases property and mortgages it back for the price, if he avoids the mortgage he avoids his own title to the property,³⁴

³⁰ *Riley v. Mallory*, 33 Conn. 201; *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53; *Robinson v. Weeks*, 56 Me. 102, 107; *Edgerton v. Wolf*, 6 Gray, 453; *McCarthy v. Henderson*, 138 Mass. 310; *Hall v. Butterfield*, 59 N. H. 354, 357, 47 Am. Rep. 209; *Hoyt v. Wilkinson*, 57 Vt. 404.

³¹ *Chandler v. Simmons*, 97 Mass. 508, 510, 93 Am. Dec. 117. And see *infra*, § 20.

³² *Strain v. Wright*, 7 Ga. 568; *Thomason v. Phillips*, 73 Ga. 140; *Carpenter v. Carpenter*, 45 Ind. 142; *Shirk v. Shultz*, 113 Ind. 571, 15 N. E. 12; *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Fitts v. Hall*, 9 N. H. 441; *Heath v. West*, 28 N. H. 101; *Skinner v. Maxwell*, 66 N. C. 45; *Wallace v. Leroy*, 57 W. Va. 263, 267, 50 S. E. 243, 110 Am. St. Rep. 777. In *Evans v. Morgan*, 69 Miss. 328, 12 So. 270, an infant engaged in trade became indebted for merchandise and when sued for the price avoided liability by pleading infancy. Thereafter he made a fraudulent sale of his property including the merchandise in question to his

father. The sellers of the merchandise were allowed in a suit in equity to reclaim the property and because unable to identify it, because mingled with other property to subject the whole to a lien for its value. So in *Betts v. Carroll*, 6 Mo. App. 518, creditors of the seller were allowed to attach property in the infant's hands after disaffirmance. In *Drude v. Curtis*, 183 Mass. 317, 67 N. E. 317, 62 L. R. A. 755, both parties were infants. The buyer who had paid a portion of the price sued to recover it and attached the goods which had been the subject of the sale. It was held that the defendant's privilege excused him from liability either in tort or contract.

³³ *Bennett v. McLaughlin*, 13 Ill. App. 349; *Robinson v. Berry*, 93 Me. 320, 45 Atl. 34; *Drude v. Curtis*, 183 Mass. 317, 67 N. E. 317, 62 L. R. A. 755.

³⁴ *Heath v. West*, 28 N. H. 101. See also *MacGreal v. Taylor*, 167 U. S. 688, 17 S. Ct. 961, 42 L. ed. 326; *United States Corp. v. Ulrickson*, 84 Minn. 14, 86 N. W. 613, 87 Am. St. Rep. 326.

and if he sells property so mortgaged, the purchaser necessarily takes it subject to the mortgage.³⁵

§ 18. **Other consequences of disaffirmance.**—When the infant exercises his privilege and rescinds a sale to or by him, the title and rights of the parties in the goods are restored to the original status, as if no sale had taken place. Thus if an infant while still a minor disaffirms a purchase by him and restores the property, he cannot thereafter reclaim it on the ground that he avoids his disaffirmance.³⁶ The disaffirmance is not regarded as a transfer of title by the infant, but rather as a destruction or wiping out of the original transfer to him.³⁷

§ 19. **Restoration of consideration.**—From what has been said it is evident that if an infant has received consideration for a transfer of money or goods by him, and still has that consideration, he cannot disaffirm his transfer without vesting a right in the other party to recover the consideration. It does not follow, however, logically that the infant must tender it back as a condition precedent of his right to disaffirm. Rather it would seem that his privilege allows him to disaffirm the whole transaction, leaving upon each party the burden of demanding and regaining what he has parted with.³⁸ If the infant, having used or parted

³⁵ *Ottman v. Moak*, 3 Sandf. Ch. 431; *Curtiss v. McDougal*, 26 Ohio St. 66; *Knaggs v. Green*, 48 Wis. 601, 4 N. W. 760, 33 Am. Rep. 838. And see *Weed v. Beebe*, 21 Vt. 495.

³⁶ *Edgerton v. Wolf*, 6 Gray, 453. But see *Newry, etc., Ry. v. Coombe*, 3 Ex. 565; *Northwestern Ry. v. McMichael*, 5 Ex. 114, 127.

³⁷ See, however, § 15, note 26.

³⁸ *Eureka Co. v. Edwards*, 71 Ala. 248, 46 Am. Rep. 314 (unless the suit is in equity); *Sanger v. Hibbard*, 104 Fed. Rep. 455, 43 C. C. A. 635; *Carpenter v. Carpenter*, 45 Ind. 142; *Clark v. Van Court*, 100 Ind. 113, 50 Am. Rep. 771; *Chandler v. Simmons*, 97 Mass. 508, 514, 93 Am. Dec. 117; *Drude v. Curtis*, 183 Mass. 317, 318, 67 N. E. 317, 62 L. R. A. 755; *Dawson v. Helmes*, 30 Minn. 107, 14 N. W.

462; *Millsaps v. Estes*, 137 N. C. 535, 50 S. E. 227, 70 L. R. A. 170, 107 Am. Sc. Rep. 476. See also *St. Louis, etc., Ry. v. Higgins*, 44 Ark. 293, and cases in the two following notes. But other decisions require the infant to offer to surrender the consideration, or any part of it which is in his possession, as a condition of disaffirmance. *Re Hunsenberg*, 153 Fed. Rep. 768; *Zuck v. Turner Harness Co.*, 106 Mo. App. 566; *Starr v. Watkins (Neb.)*, 111 N. W. 363; *Jones v. Valentines School*, 122 Wis. 318, 320, 99 N. W. 1043. See also *Gilkinson v. Miller*, 74 Fed. Rep. 131. So in *Lane v. Dayton, etc., Co.*, 101 Tenn. 581, 48 S. W. 1094, it was held that an infant could not avoid an accord and satisfaction without first offering to return the consideration he

with the property while still an infant, no longer possesses it, by the weight of authority, and upon principle he may avoid either an executory promise³⁹ or an executed transfer⁴⁰ given by him in exchange. The hardship of such a case upon the adult has produced a number of decisions holding that the infant cannot disaffirm a transaction executed on both sides unless he can and does put the other party *in statu quo*.⁴¹ It has with more reason been

had received, if he still had it. But see *Gilkinson v. Miller*, 74 Fed. Rep. 131. See also decisions in note 41, *infra*, In *Starr v. Watkins* (Neb.), 111 N. W. 363, it was held that the infant need not make a formal tender before the action. Readiness to surrender at the trial sufficed.

³⁹ *White v. Sikes*, 129 Ga. 508, 59 S. E. 228; *Brandon v. Brown*, 106 Ill. 519, 527; *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Miller v. Smith*, 26 Minn. 248, 2 N. W. 942, 37 Am. Rep. 407; *Nichols, etc., Co. v. Snyder*, 78 Minn. 502, 81 N. W. 516; *Brantley v. Wolf*, 60 Miss. 420; *Kitchen v. Lee*, 11 Paige, 107, 42 Am. Dec. 101; *Mustard v. Wohlford*, 15 Gratt. 329, 76 Am. Dec. 209; *Bedinger v. Wharton*, 27 Gratt. 857; *International Text-Book Co. v. McKone*, 133 Wis. 200, 113 N. W. 438.

⁴⁰ *Tucker v. Moreland*, 10 Pet. 58, 73, 74; *Manning v. Johnson*, 26 Ala. 446, 62 Am. Dec. 732; *Eureka Co. v. Edwards*, 71 Ala. 248, 46 Am. Rep. 314; *American Mortgage Co. v. Dykes*, 111 Ala. 178, 18 So. 292, 56 Am. St. Rep. 38; *Southern Cotton Oil Co. v. Dukes*, 121 Ga. 787, 49 S. E. 788; *Carpenter v. Carpenter*, 45 Ind. 142; *Dill v. Bowen*, 54 Ind. 204; *Beickler v. Guenther*, 121 Iowa, 419, 96 N. W. 895; *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *Morse v. Ely*, 154 Mass. 458, 28 N. E. 577, 26 Am. St. Rep. 263; *White v. New Bedford, etc., Co.*, 178 Mass. 20, 59 N. E. 642; *Gillis v. Goodwin*, 180 Mass. 140, 61 N. E. 813, 91 Am. St. Rep. 265;

Simpson v. Prudential Ins. Co., 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. Rep. 560; *Brantley v. Wolf*, 60 Miss. 420; *Harvey v. Briggs*, 68 Miss. 60, 8 So. 274, 10 L. R. A. 62; *Craig v. Van Bebber*, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569; *Ridgeway v. Herbert*, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. Rep. 464; *Clark v. Tate*, 7 Mont. 171, 14 P. 761; *Bloomer v. Nolan*, 36 Neb. 51, 53 N. W. 1039, 38 Am. St. Rep. 690; *Englebert v. Troxell*, 40 Neb. 195, 58 N. W. 852, 26 L. R. A. 177, 42 Am. St. Rep. 665; *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233; *Cresinger v. Welsh*, 15 Ohio, 156, 45 Am. Dec. 565; *Lemmon v. Beeman*, 45 Ohio St. 505, 15 N. E. 476; *Bullock v. Sprowls*, 93 Tex. 188, 54 S. W. 661, 47 L. R. A. 326, 77 Am. St. Rep. 849; *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194; *Wiser v. Lockwood*, 42 Vt. 720. For the effect of infancy of both parties, see *Drude v. Curtis*, 183 Mass. 317, 67 N. E. 317, 62 L. R. A. 755.

⁴¹ See *Holmes v. Blogg*, 8 Taunt. 35, 508; *Re Taylor*, 8 De G. M. & G. 254; *Bozeman v. Browning*, 31 Ark. 364 (overruled by *St. Louis, etc., Ry. v. Higgins*, 44 Ark. 293); *Bailey v. Barnberger*, 11 B. Mon. 113; *Johnson v. Insurance Co.*, 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 45 Am. St. Rep. 473; *Braucht v. Graves-May Co.*, 92 Minn. 116, 99 N. W. 417; *Kerr v. Bell*, 44 Mo. 120; *Bartlett v. Bailey*, 59 N. H. 408; *Hall v. Butterfield*, 59 N. H. 354, 47 Am.

held by courts of equity that equitable relief will not be given to an infant unless he himself does equity by restoring what he has received.⁴² But if the infant has used, lost, or destroyed what he received, in many jurisdictions equitable relief will not be denied because of the infant's failure to restore the consideration or its value.⁴³

§ 20. **Ratification.**—If, as has been previously suggested, an infant's contract is valid until avoided, ratification does not create a right against the infant; it merely terminates the privilege which the law allows him of avoiding a bargain he made while under age. This cannot be effectually done until after the infant has come of age.⁴⁴ From that time, however, any manifestation by him of an intent to regard the bargain as binding will deprive him of his privilege.⁴⁵ Therefore, if an infant after coming of age

Rep. 209; *Rice v. Butler*, 160 N. Y. 578, 55 N. E. 275, 47 L. R. A. 303, 73 Am. St. Rep. 703; *Mutual Milk Co. v. Prigge*, 112 N. Y. App. Div. 652, 98 N. Y. Supp. 458; *Smith v. Evans*, 5 Humph. 70; *Lane v. Dayton, etc., Co.*, 101 Tenn. 581, 48 S. W. 1094; *Stuart v. Baker*, 17 Tex. 417; *Folts v. Ferguson*, 77 Tex. 301, 13 S. W. 1037; *Bedinger v. Wharton*, 27 Gratt. 857. In South Dakota this rule prevails by statute, but a contract from which the infant can derive no advantage, as one of suretyship, may be rescinded without restoring the original status. *Helland v. Colton State Bank (S. D.)*, 106 N. W. 60. In England an infant who has used or consumed goods for which he has paid money under a contract void under the Infants' Relief Act, 1874, § 1, cannot recover back from the vendor the money so paid. *Valentini v. Canali*, 24 Q. B. D. 166.

⁴² *Eureka Co. v. Edwards*, 71 Ala. 248, 46 Am. Rep. 314; *Bryant v. Pottinger*, 6 Bush. 473; *Hillyer v. Bennett*, 3 Edw. Ch. 222; *Smith v. Evans*, 5 Humph. 70; *Folts v. Ferguson*, 77 Tex. 301, 13 S. W. 1037; *Bedinger v. Wharton*, 27 Gratt. 857; *Wallace v.*

Leroy, 57 W. Va. 263, 267, 50 S. E. 243, 110 Am. St. Rep. 777. But see *Millsaps v. Estes*, 137 N. C. 535, 516, 50 S. E. 227, 70 L. R. A. 170, 107 Am. St. Rep. 476.

⁴³ *Stull v. Harris*, 51 Ark. 294, 11 S. W. 104, 2 L. R. A. 741; *Reynolds v. McCurry*, 100 Ill. 356; *Brantley v. Wolf*, 60 Miss. 420; *Bedinger v. Wharton*, 27 Gratt. 857. In *Millsaps v. Estes*, 137 N. C. 535, 546, 50 S. E. 227, 70 L. R. A. 170, 107 Am. St. Rep. 476, the statement is made that equity will grant relief to the infant and then the other party "will be permitted to recover" what he has parted with if the infant still retains it or its proceeds.

⁴⁴ *Sanger v. Hibbard*, 104 Fed. Rep. 455, 456. 43 C. C. A. 635; *Chandler v. Simmons*, 97 Mass. 508, 510, 93 Am. Dec. 117; *Stack v. Cavanaugh*, 67 N. H. 149, 30 Atl. 350.

⁴⁵ In Maine, by statute, contracts of an infant, except for necessities or land, are unenforceable unless the infant after coming of age ratifies them in writing. Rev. St. c. 113, § 2. See *Lamkin v. Le Doux*, 101 Me. 581, 64 Atl. 1048.

sells, uses, or even retains for an unreasonable time goods received by him during infancy under a contract, he cannot thereafter avoid the bargain.⁴⁶ If the infant's bargain is wholly executory, the mere failure to repudiate the bargain until a claim is made under it seems insufficient to indicate that the right to avoid the contract has been given up.⁴⁷ Ignorance of the party ratifying that his infancy gave him a legal defense is generally held to be immaterial,⁴⁸ but ignorance of the fact that he was an infant when the transaction was originally entered into invalidates

⁴⁶ *McCarthy v. Nicrosi*, 72 Ala. 332, 47 Am. Rep. 418; *Southern Cotton Oil Co. v. Dukes*, 121 Ga. 787, 49 S. E. 788; *Pursley v. Hays*, 17 Iowa, 310; *Robinson v. Hoskins*, 14 Bush, 393; *Boody v. McKenney*, 23 Me. 517; *Hilton v. Shepherd*, 92 Me. 160, 42 Atl. 387; *Boyden v. Boyden*, 9 Metc. 519; *Koerner v. Wilkinson*, 96 Mo. App. 510, 70 S. W. 509; *Robbins v. Eaton*, 10 N. H. 561; *Williams v. Mabree*, 3 Halst. Ch. 500; *State v. Rousseau*, 94 N. C. 355; *Mission Ridge Co. v. Nixon* (Tenn.), 48 S. W. 405. It was held otherwise, however, as to lumber built into a house in *Bloomer v. Nolan*, 36 Neb. 51, 53 N. W. 1039, 38 Am. St. Rep. 690. See also *Lynch v. Johnson*, 109 Mich. 640, 67 N. W. 908. There are numerous cases which should be compared with these, holding that in the case of real estate mere lapse of time short of the Statute of Limitations will not cut off the right to avoid a conveyance in the absence of other circumstances sufficient to raise an equitable estoppel. *Irvine v. Irvine*, 9 Wall. 617, 627, 19 L. ed. 800; *Sims v. Everhardt*, 102 U. S. 300, 312, 26 L. ed. 87; *Kountz v. Davis*, 34 Ark. 590; *Wells v. Seixas*, 24 Fed. Rep. 82; *Richardson v. Pate*, 93 Ind. 423, 47 Am. Rep. 374; *Davis v. Dudley*, 70 Me. 236, 35 Am. Rep. 318; *Prout v. Wiley*, 28 Mich. 164; *Donovan v.*

Ward, 100 Mich. 601, 59 N. W. 254; *Wallace v. Latham*, 52 Miss. 291, 297; *Shipp v. McKee*, 80 Miss. 741, 92 Am. St. Rep. 616; *Cresinger v. Welch*, 15 Ohio, 156, 45 Am. Dec. 565; *Gillespie v. Bailey*, 12 W. Va. 70, 29 Am. Rep. 445. It is submitted that the following contrary decisions (also relating to land), state a rule sounder in theory and better in practice. *Hastings v. Dollarhide*, 24 Cal. 195; *Bentley v. Greer*, 100 Ga. 35, 27 S. E. 974; *Goodnow v. Empire Lumber Co.*, 31 Minn. 468, 18 N. W. 283, 47 Am. Rep. 798, and cases cited; *Robinson v. Allison*, 192 Mo. 366, 91 S. W. 115; *Searcy v. Hunter*, 81 Tex. 644, 17 S. W. 372, 26 Am. St. Rep. 837; *Lawder v. Larkin*, (Tex. Civ. App.) 94 S. W. 171; *Stone v. Wolfe*, (Tex. Civ. App.) 109 S. W. 981.

⁴⁷ See *Nichols, etc., Co. v. Snyder*, 78 Minn. 502, 81 N. W. 516; *Tupp v. Pederson*, 78 Minn. 524, 81 N. W. 1103.

⁴⁸ *American Mtge. Co. v. Wright*, 101 Ala. 658, 14 So. 399; *Bestor v. Hickey*, 71 Conn. 181, 41 Atl. 555; *Clark v. Van Court*, 100 Ind. 113, 50 Am. Rep. 774; *Morse v. Wheeler*, 4 Allen, 570; *Taft v. Sergeant*, 18 Barb. 320; *Ring v. Jamison*, 66 Mo. 424; *Anderson v. Soward*, 40 Ohio St. 325, 48 Am. Rep. 687. *Contra*, *Trader v. Lowe*, 45 Md. 1; *Turner v. Gaither*, 83 N. C. 357, 35 Am. Rep. 574; *Hinely v. Margaritz*, 3 Pa. St.

the ratification.⁴⁹ Such admission or part payment of a debt as is generally held sufficient to avoid the bar of the Statute of Limitations ought more clearly in the case of infancy to determine the right to avoid an obligation. But the weight of authority is otherwise,⁵⁰ though many of the decisions are early ones, made at a time when the legal nature of an infant's contract had not yet been clearly formulated. A promise made to a third person has also been held insufficient.⁵¹

§ 21. **Liability for necessities.**—It is well settled that an infant is liable for goods that are necessary, considering his position and station in life. This liability, though often treated as arising from the promise of the infant, seems to be rather a *quasi-contractual* obligation. This is shown by several classes of cases. An infant is liable not for the price he may promise to pay, but for the actual value of the necessities;⁵² he is liable even though he

428; *Hatch v. Hatch's Estate*, 60 Vt. 160, 13 Atl. 791. See also *Sayles v. Christie*, 187 Ill. 420, 443, 58 N. E. 480.

⁴⁹ *Ridgeway v. Herbert*, 150 Mo. 606, 614, 51 S. W. 1040, 73 Am. St. Rep. 464.

⁵⁰ *Thrupp v. Fielder*, 2 Esp. 628; *Kendrick v. Neisz*, 17 Colo. 506, 30 Pac. 215; *Catlin v. Haddox*, 49 Conn. 492, 44 Am. Rep. 249; *Ford v. Phillips*, 1 Pick. 302; *Hale v. Gerish*, 8 N. H. 374; *Baker v. Kennett*, 54 Mo. 82; *Goodsell v. Myers*, 3 Wend. 479. *Contra*, *American Mtge. Co. v. Wright*, 101 Ala. 658, 14 So. 399; *Snyder v. Gericke*, 101 Mo. App. 647, 74 S. W. 377. Where a payment was made after her majority by an infant but it appeared to be made as a matter of bounty, not in pursuance of an obligation, it was rightly held no ratification in *Parsons v. Teller*, 188 N. Y. 318, 80 N. E. 930.

⁵¹ *Bigelow v. Grannis*, 2 Hill, 120; *Sayles v. Christie*, 187 Ill. 420, 441, 58 N. E. 480; *Chandler v. Glover's Adm.*, 32 Pa. St. 509.

⁵² An infant "is held on a promise implied by law, and not strictly speaking on his actual promise. The law implies the promise to pay from the necessity of his situation just as in the case of a lunatic. In other words, he is liable to pay only what the necessities were reasonably worth, and not what he may improvidently have agreed to pay for them." *Trainer v. Trumbull*, 141 Mass. 527, 530, 6 N. E. 761; *Hyer v. Hyatt*, 3 Cranch C. C. 276; *Gregory v. Lee*, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618; *Ayers v. Burns*, 87 Ind. 215, 44 Am. Rep. 759; *Locke v. Smith*, 41 N. H. 346; *Parsons v. Keyes*, 43 Tex. 557; *Jones v. Valentines' School*, 122 Wis. 318, 320, 99 N. W. 1043.

See also *Guthrie v. Morris*, 22 Ark. 411; *Cooper v. State*, 37 Ark. 421; *Earle v. Reed*, 10 Metc. 387; *Dubose v. Wheddon*, 4 McCord, 221; *Haines' Adm. v. Tarrant*, 2 Hill (S. C.), 400; *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176; *Bradley v. Pratt*, 23 Vt. 378. In the cases cited in this paragraph it was held

was too young to understand the bargain into which he entered;⁵³ he is not liable upon an executory contract to buy necessities.⁵⁴ It has been urged in opposition to the theory that the infant's obligation is *quasi-contractual* that so to hold involves the consequence that the infant must lose the benefit of a favorable bargain if the agreed price was less than the real value.⁵⁵ This objection is without force, however. It assumes that when it is said that an infant's obligation to pay for necessities is *quasi-contractual* that the bargain which the parties actually made is void. But such is not the case. The bargain is voidable and that only by the infant. If the infant elect to stand by the contract he may do so as well where necessities are the subject of the contract as where they are not.⁵⁶ What is meant by saying the infant is liable only *quasi-contractually* for necessities is that he may avoid his contracts to pay for necessities just as he may other contracts, but that if he does so a liability will be imposed upon him by the law which he cannot avoid.

§ 22. What are necessities.—It is a question of fact in each case whether goods purchased by an infant are necessary. Illustrations may be given of what kinds of goods have been held necessary or the reverse, but it should be remarked that the same thing may be necessary to one person under certain circumstances and

that where an infant gives a note for necessities, he is liable on the note, but the recovery will be reduced to the amount the necessities were actually worth. Other jurisdictions hold that an infant is not liable on a bill, note, or bond, as such, whatever the consideration. *Re Soltyskoff*, [1891] 1 Q. B. 413; *Morton v. Steward*, 5 Ill. App. 533; *Henderson v. Fox*, 5 Ind. 489; *Ayers v. Burns*, 87 Ind. 245, 44 Am. Rep. 759; *Beeler v. Young*, 1 Bibb, 519; *McCrillis v. How*, 3 N. H. 348; *Fenton v. White*, 1 Southard, 111; *Swasey v. Vanderheyden*, 10 Johns. 33; *Bouchell v. Clary*, 3 Brev. 194; *McMinn v. Richmonds*, 6 Yerg. 9.

⁵³ *Hyman v. Cain*, 3 Jones L. 111.

⁵⁴ *Gregory v. Lee*, 64 Conn. 407, 30

Atl. 53, 25 L. R. A. 618; *Wallin v. Highland Park Co.*, 127 Iowa, 131; *Wells v. Hardy*, 21 Tex. Civ. App. 454, 51 S. W. 503; *Pool v. Pratt*, 1 D. Chip. 252, 254; *Jones v. Valentines' School*, 122 Wis. 318, 99 N. W. 1043; *International Textbook Co. v. McKone*, 133 Wis. 200, 113 N. W. 483.

⁵⁵ *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176. See *Meechem on Sales*, § 122.

⁵⁶ *Holt v. Ward Clarencieux*, 2 Strange, 937; *Atwell v. Jenkins*, 163 Mass. 362, 40 N. E. 178, 28 L. R. A. 694, 47 Am. St. Rep. 463; *Union Life Ins. Co. v. Hilliard*, 63 Ohio St. 478, 491, 59 N. E. 230, 81 Am. St. Rep. 641; *O'Rourke v. John Hancock Ins. Co.*, 23 R. I. 457, 462, 50 Atl. 834, 57 L. R. A. 496, 91 Am. St. Rep. 643.

unnecessary to another person under other circumstances.⁵⁷ Necessaries seem to be limited by the courts as closely as possible, and so far as the purchase of goods is concerned generally come under the heads of food⁵⁸ or clothing⁵⁹ of a reasonable kind, purchased for the use of the infant himself or of his family.⁶⁰ In England the law seems less strict than in this country. Jewelry to present to the betrothed of a wealthy infant,⁶¹ a watch,⁶² a horse,⁶³ a racing bicycle,⁶⁴ have all been held or said, in England, to be necessities under special circumstance. It may be doubted if American judges would generally accept these results,⁶⁵ though it should be noticed that the Sales Act follows the English act in its language and certainly recognizes that things may be regarded as necessary for the child of wealthy parents which would not be for others. Medical services are recognized to be necessary⁶⁶ and it may be safely assumed that medicine in proper cases would be.⁶⁷ It is not likely that, because a physician recommended horseback exercise, most American courts would hold, as an English court has done,⁶⁸ that a horse thereby might become necessary in the legal sense.⁶⁹ Lodging is necessary.⁷⁰

§ 23. **What are not necessities.**—Under ordinary circumstances the purchase of a house is not necessary,⁷¹ nor work and

⁵⁷ *Epperson v. Nugent*, 57 Miss. 45, 47, 34 Am. Rep. 434; *Rivers v. Gregg*, 5 Rich. Eq. 274, 278.

⁵⁸ *Barnes v. Barnes*, 50 Conn. 572; *Price v. Sanders*, 60 Ind. 310, 314; *Rivers v. Gregg*, 5 Rich. Eq. 274, 278.

⁵⁹ *Barnes v. Toye*, 13 Q. B. D. 410; *Anderson v. Smith*, 33 Md. 465; *Lynch v. Johnson*, 109 Mich. 640, 67 N. W. 908; *Gay v. Ballou*, 4 Wend. 403, 21 Am. Dec. 158.

⁶⁰ *Cantine v. Phillips*, 5 Harr. (Del.) 428; *Anderson v. Smith*, 33 Md. 465; *Chapman v. Hughes*, 61 Miss. 339.

⁶¹ *Jenner v. Walker*, 19 L. T. (N. S.) 398. But see *Hewlings v. Graham*, 34 L. T. 497.

⁶² *Barnes v. Toye*, 13 Q. B. D. 410, 414; *Peters v. Fleming*, 6 M. & W. 42.

⁶³ *Hart v. Prater*, 1 Jur. 623.

⁶⁴ *Clyde Cycle Co. v. Hargreaves*, 78 L. T. 296.

⁶⁵ See the following section.

⁶⁶ See *Strong v. Foote*, 42 Conn. 203; *Price v. Sanders*, 60 Ind. 310, 314. See also *Williams v. Bonner*, 79 Miss. 664, 31 So. 207.

⁶⁷ *Glover v. Ott*, 1 McCord, 572.

⁶⁸ *Hart v. Prater*, 1 Jur. 623. See also *Clowes v. Brooke*, 2 Strange, 1101.

⁶⁹ See, however, *Aaron v. Harley*, 6 Rich. L. 26.

⁷⁰ *Price v. Sanders*, 60 Ind. 310, 314; *Rivers v. Gregg*, 5 Rich. Eq. 274, 278.

⁷¹ This is clear from the fact that repairs on a house belonging to an infant, though essential to the preservation of the property, have been held not necessary. *Tupper v. Cad-*

materials for the building of a house.⁷² Clothing of unusual elegance is clearly not essential,⁷³ but exceptional clothing may be treated as necessary on the marriage of an infant.⁷⁴ Nor such food as confectionery and fruit.⁷⁵ Liquors⁷⁶ and tobacco⁷⁷ obviously are not necessities, nor a horse,⁷⁸ a carriage,⁷⁹ a bicycle,⁸⁰ or ordinarily traveling expenses.⁸¹ "The law does not contemplate that a minor shall open a shop and become a trader, or the proprietor of a business which involves the making of a variety of contracts," therefore, articles essential for the conduct of a business in which the infant is engaged are not necessities,⁸² but the same judge from whom the preceding words are quoted adds, "If they had been hand tools to a reasonable amount, such as are

well, 12 Metc. 559, 46 Am. Dec. 704; *Wallis v. Bardwell*, 126 Mass. 366; *West v. Gregg's Adm.*, 1 Grant, 53. And see the following note.

⁷² *Price v. Sanders*, 60 Ind. 310, 314; *Price v. Jennings*, 62 Ind. 111; *Wornack v. Loar*, 11 Ky. L. Rep. 6, 11 S. W. 438; *Horstmeyer v. Connors*, 56 Mo. App. 115; *Allen v. Lardner*, 78 Hun, 603; *Freeman v. Bridger*, 4 Jones L. 1; *Phillips v. Lloyd*, 18 R. I. 99, 25 Atl. 909.

⁷³ *Makarell v. Bachelor*, Cro. Eliz. 583; *Gayle v. Hayes' Adm.*, 79 Va. 542, 547.

⁷⁴ *Garr v. Haskett*, 86 Ind. 373; *Sams v. Stockton*, 14 B. Mon. 232; *Jordan v. Coffield*, 70 N. C. 110, 113.

⁷⁵ *Brooker v. Scott*, 11 M. & W. 67. Compare *Wharton v. Mackenzie*, 5 Q. B. 606.

⁷⁶ *Glover v. Ott*, 1 McCord, 572.

⁷⁷ *Bryant v. Richardson*, L. R. 3 Ex. 93, note.

⁷⁸ *Beeler v. Young*, 1 Bibb, 519; *Gayle v. Hayes' Adm.*, 79 Va. 542, 547; *Skrine v. Gordon*, 9 Ir. Rep. C. L. 479. Compare cases cited in the preceding section.

⁷⁹ *Howard v. Simpkins*, 70 Ga. 322; *Heffington v. Jackson* (Tex. Civ. App.), 96 S. W. 108.

⁸⁰ *Pyne v. Wood*, 145 Mass. 558, 14 N. E. 775; *Gillis v. Goodwin*, 180 Mass. 140, 61 N. E. 813, 91 Am. St. Rep. 265; *Rice v. Butler*, 160 N. Y. 578, 55 N. E. 275, 47 L. R. A. 303, 73 Am. St. Rep. 703. Otherwise in England. *Clyde Cycle Co. v. Hargreaves*, 78 L. T. 296.

⁸¹ *McKanna v. Merry*, 61 Ill. 177. See *Breed v. Judd*, 1 Gray, 455, 458.

⁸² *Ryan v. Smith*, 165 Mass. 303, 43 N. E. 109. To the same effect see *Whittingham v. Hill*, Cro. Jac. 494; *Dilk v. Keighley*, 2 Esp. 480; *Sanger v. Hibbard*, 104 Fed. Rep. 455, 43 C. C. A. 635; *House v. Alexander*, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189; *Decell v. Lewenthal*, 57 Miss. 331, 34 Am. Rep. 449; *Rainwater v. Durham*, 2 Nott & McC. 524, 10 Am. Dec. 637; *Wallace v. Leroy*, 57 W. Va. 263, 50 S. E. 243, 110 Am. St. Rep. 777. But otherwise under the statutes of some States. *Ullmer v. Fitzgerald*, 106 Ga. 815, 32 S. E. 869; *Jimmerson v. Lawrence*, 112 Ga. 340, 37 S. E. 371; *Re Brice*, 93 Fed. Rep. 942 (Iowa). And see *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209.

ordinarily provided by a journeyman, and necessary for use in his trade or business, the case would be different.”⁸³

§ 24. **Money advanced for the purchase of necessities.**—It was ruled by Buller, J., at *Nisi Prius* in 1783 that money lent, though lent for the express purpose of enabling an infant to purchase necessities, and though actually expended in accordance with this purpose cannot be recovered,⁸⁴ “as the plaintiff thereby put it in the defendant’s power to misapply the money.” The same rule has been stated as a *dictum* in a few cases in this country.⁸⁵ There are also early English cases, but these, though cited by the American decisions, fully involve the point in one instance only, and in that single instance the decision is contrary to the rule for which the case is cited.⁸⁶ If the question arose in equity it was

⁸³ *Ryan v. Smith*, 165 Mass. 303, 43 N. E. 109.

⁸⁴ *Probart v. Knouth*, 2 Esp. 472, note.

⁸⁵ *Beeler v. Young*, 1 Bibb, 519, 521; *Swift v. Bennett*, 10 Cush. 436, 438; *Bradley v. Pratt*, 23 Vt. 378, 386. But see *Randall v. Sweet*, 1 Denio, 460, 461.

⁸⁶ The early decisions are *Rearsby and Cuffer’s Case*, Godb. 219; *Darby v. Boucher*, 1 Salk. 279; *Earle v. Peale*, 1 Salk. 386; *Ellis v. Ellis*, 3 Salk. 197. In *Rearsby and Cuffer’s Case*, a prohibition was granted prohibiting the Court of Requests from entertaining a suit for money which the plaintiff had laid out for necessities for the defendant, “because as it was said he might have an action of debt at the common law, upon the contract for the same, because they were things for his necessary livelihood and maintenance.” In *Darby v. Boucher* the case was thus put: “One lends an infant money, who employs it in paying for necessities, whether in that case the infant be liable; and it was held clearly by the Chief Justice that the infant is not liable, for it is upon the lending that the contract must arise,

and after that time there could be no contract raised to bind the infant, because after that he might waste the money, and the infant’s applying it afterward for necessities will not by matter *ex post facto* entitle the plaintiff to an action.” It is to be noticed that it is not stated in this case that the money was lent for the purpose of buying necessities. In *Earle v. Peale* a replication to a plea of infancy that the money was lent for necessities was held bad. The court said: “He may buy necessities, but he cannot borrow money to buy, for he may misapply the money, and, therefore, the law will not trust him but at the peril of the lender who must lay it out for him, or see it laid out, and then it is his providing, and his laying out so much money for necessities for him.” In this case the question which the court was primarily considering was that of liability for money lent for necessities and not used for that purpose—not that of liability for money both lent and spent for necessities. This further appears from another report of the case in 10 Mod. 67, where the court says: “In this case the lending for

early settled and is well established that the infant would be held liable.⁸⁷ In jurisdictions where equitable rules are applicable in all actions, recovery must also be allowed.⁸⁸ Moreover, if a surety for an infant's liability for necessities pays the claim, he may recover what he has paid from the infant,⁸⁹ and similarly the infant has been held liable for money paid at his request to satisfy a debt for necessities.⁹⁰ Finally, if the money is actually applied by the lender in the purchase of necessities for the infant it is well settled that the infant is liable.⁹¹ If, therefore, the creditor cannot recover at law for money lent and expended for necessities, the reason must be purely technical. No sound technical reason exists. If the infant's liability for necessities is *quasi-contractual* the principles governing the case ought to be based on the enrichment of the infant and his duty as a matter of justice to reimburse the person to whom this enrichment is owing. Judged by these principles there is no valid distinction

such a purpose is only put in issue, which might be maintained without showing how the money was actually laid out; that if the fact was so, the plaintiff should have declared for money so laid out, and not so lent." The only case where the question of money both lent and spent for necessities was clearly passed upon is the last of those cited above, *Ellis v. Ellis*. In this case (also reported in 12 Mod. 197, Comb. 482, 1 Ld. Raym. 344) it was held that "an infant is chargeable for money lent, if it is laid out for necessities, according to his degree, but all that is at the peril of the lender." This decision was decided before *Earle v. Peale*, though the report of it in Salkeld's and Modern Reports is subsequent, but there is nothing in *Earle v. Peale* which can be regarded as overruling *Ellis v. Ellis*. There are no recent English decisions on the point in courts of law. In *Bateman v. Kingston*, 6 L. R. Ir. 328, the lender was not allowed to recover on an interest-

bearing note though the money had been expended by the infant for necessities, but the difficulty the court found was to allow recovery on an interest-bearing note, irrespective of what the consideration for it was. See *Re Soltykoff*, [1891] 1 Q. B. 413.

⁸⁷ *Marlow v. Pitfield*, 1 P. Wms. 558; *Thurstan v. Nottingham Soc.*, [1903] A. C. 6; *Price v. Sanders*, 60 Ind. 310; *Hickman v. Hall's Adm.*, 5 Litt. 338, 342; *Watson v. Cross*, 2 Duvall, 147, 149; *Bradley v. Pratt*, 23 Vt. 378, 386. See also *Ostrander v. Quin*, 84 Miss. 230, 36 So. 257, 105 Am. St. Rep. 426.

⁸⁸ *Price v. Sanders*, 60 Ind. 310.

⁸⁹ *Conn v. Coburn*, 7 N. H. 368, 26 Am. Dec. 746; *Haines' Adm. v. Tarrant*, 2 Hill (S. C.), 400. See also *Ayers v. Burns*, 87 Ind. 245, 248, 249, 44 Am. Rep. 759; *Dial v. Wood*, 9 Baxt. 296.

⁹⁰ *Randall v. Sweet*, 1 Denio, 460.

⁹¹ See cases *supra*, and *Clarke v. Leslie*, 5 Esp. 28; *Re Clabbon*, [1904] 2 Ch. 465.

to be made between a case where the creditor bought the necessities for the infant and a case where he allowed the infant to do so with money lent for the purpose. The same result follows if the infant's liability for necessities be regarded as contractual. Contracts for necessities on this assumption differ from other contracts only in this that they cannot be avoided, and the reason for not allowing them to be avoided is because it is essential for the infant's welfare that he have power to bind himself, since otherwise, if without money, he might be deprived of the necessities of life. This reason applies to the case of money lent and used for necessities as fully as to anything else. Frequently an infant can get no credit for necessities, but can borrow money from a friend wherewith to buy them. It is a harsh rule which compels the lender, who resides perhaps at a distance, to supervise the expenditure on penalty of forfeiting his claim, even though the infant keeps his word and buys only necessities. The reasoning suggested in some of the old cases that the contract must be either valid or invalid when made and that as the infant might misapply the money the contract could not be good goes on the assumption, which cannot now be maintained, that the contracts of an infant if not for necessities are void, for there is no reason why a contract voidable when made—that is before the money is spent for necessities—should not cease to be voidable later, when the money is so expended, or that a *quasi*-contractual liability should not then arise.⁹² In a recent Tennessee case⁹³ it was held that a claim for payment for a telegram sent by an infant in destitute circumstances to his parents for money was a claim for necessities. This can hardly be supported unless it is admitted that money sent to relieve his destitution would be a necessary.

§ 25. **Previous supply.**—What are necessities is determined not simply by the nature of thing, but by the need of that thing

⁹² The further reason suggested by Redfield, J., in *Bradley v. Pratt*, 23 Vt. 378, 386, and adopted in the note to *Craig v. Van Bebber*, 18 Am. St. Rep. 658, that the difficulty is want of privity between the lender and the one who supplies the necessities, is in reality no reason but merely a

statement of the rule in other terms, for why should such privity be necessary. There is no rule and no analogy in the law that makes it requisite for the enforcement of a right against the infant.

⁹³ *Western Union Tel. Co. v. Greer*, 115 Tenn. 368, 89 S. W. 327.

at that time by the particular infant in question. Accordingly if an infant is already supplied either by his guardian or by previous purchases with sufficient food, clothing, or other necessities, no further purchase on credit of articles of the same kind can bind him.⁹⁴ Similarly if an infant when in need purchases more of the required goods than are essential, recovery can be had by the seller for only so much as were actually needed.⁹⁵ "It is immaterial whether the plaintiffs did or did not know of the existing supply, just as it is immaterial whether they did or did not know that the defendant was a minor."⁹⁶ It has been decided in England⁹⁷ that an infant in receipt of an income sufficient to pay for all necessities may, nevertheless, bind himself by a purchase on credit, but the contrary has been held in this country.⁹⁸ It would seem on principle that though if the infant had previously wasted the money he could buy on credit, otherwise he ought not to be bound, for his power to bind himself should be limited to cases where his protection requires it.⁹⁹ If it appears that an infant has been sufficiently supplied with money to provide himself with necessities the burden should be upon the creditor of producing evidence that the money had been previously misapplied.¹ So if the infant is living with his parents or guardian, the burden is upon the creditor to prove that the infant was not supplied by them.² It has been settled that an infant is not bound by his executory promise to buy necessities,³ but it has not been

⁹⁴ *Burghart v. Angerstein*, 6 C. & P. 690; *Foster v. Redgrave*, L. R. 4 Ex. 35, note; *Barnes v. Toye*, 13 Q. B. D. 410; *Johnstone v. Marks*, 19 Q. B. D. 509; *Conboy v. Howe*, 59 Conn. 112, 22 Atl. 35; *McKanna v. Merry*, 61 Ill. 177, 180; *Trainer v. Trumbull*, 141 Mass. 527, 6 N. E. 761; *Decell v. Lewenthal*, 57 Miss. 331, 34 Am. Rep. 449; *Perrin v. Wilson*, 10 Mo. 451; *Nichol v. Steger*, 6 Lea, 393.

⁹⁵ *Nicholson v. Wilborn*, 13 Ga. 467; *Johnson v. Lines*, 6 Watts & S. 80, 40 Am. Dec. 542.

⁹⁶ *Barnes v. Toye*, 13 Q. B. D. 410, 414; *Kline v. L'Amoureux*, 2 Paige, 419, 22 Am. Dec. 652; *Nichol v. Steger*, 6 Lea, 393.

⁹⁷ *Burghart v. Hall*, 4 M. & W. 727.

⁹⁸ *Brent v. Williams*, 79 Miss. 355, 30 So. 713; *Rivers v. Gregg*, 5 Rich. Eq. 274.

⁹⁹ *Rivers v. Gregg*, 5 Rich. Eq. 274.

¹ *Rivers v. Gregg*, 5 Rich. Eq. 274. See also *Nicholson v. Wilborn*, 13 Ga. 467.

² *Bainbridge v. Pickering*, 2 W. Bl. 1325; *Hoyt v. Casey*, 114 Mass. 397, 19 Am. Rep. 371; *Perrin v. Wilson*, 10 Mo. 451; *Freeman v. Bridger*, 4 Jones L. 1, 67 Am. Dec. 258; *Connolly v. Hull*, 3 McCord, 6, 15 Am. Dec. 612.

³ See *supra*, § 19.

decided whether in case of a sale where title has passed to the infant but the goods have not been delivered, the infant may repudiate the bargain. It seems reasonable that he should, if for instance he finds that he no longer needs the goods. Though the elements of contractual liability exist, the unjust enrichment which forms the basis of *quasi*-contractual liability does not. If this be so the time that the infant becomes bound, if at all, is when the goods are so delivered. For this reason in the Sales Act the moment of delivery is the time considered in determining whether an infant has a previous supply.

§ 26. **False representations of age.**—It is everywhere agreed that the fact that the infant was trading as an adult or otherwise appeared to be of age, and that the other party contracted with him on the belief that he was an adult, does not affect the validity of the transaction or the infant's privilege either at law⁴ or in equity.⁵ If the infant is guilty of actual misrepresentation, the authorities are not so uniform but the view generally accepted is that so far as the validity of contracts and conveyances is concerned the rights at law of the parties are not affected by the misrepresentation.⁶ In equitable proceedings, however, the infant is generally held to be estopped to avoid such a transaction if he

⁴ *Miller v. Blankley*, 33 L. T. (N. S.) 527; *MacGreal v. Taylor*, 167 U. S. 688, 695, 42 L. ed. 326; *Oliver v. McClellan*, 21 Ala. 675; *Buchanan v. Hubbard*, 96 Ind. 1; *Folds v. Al-lardt*, 35 Minn. 488, 499, 29 N. W. 201; *Houston v. Cooper*, 3 N. J. L. 866; *Van Winkle v. Ketcham*, 3 Caines, 323; *Curtin v. Patton*, 11 S. & R. 305, 309; *Carpenter v. Pridgen*, 40 Tex. 32, 35.

⁵ *Stikeman v. Dawson*, 1 De G. & S. 90; *Alvey v. Reed*, 115 Ind. 148 (Code), 17 N. E. 265, 7 Am. St. Rep. 418; *Baker v. Stone*, 136 Mass. 405; *Brantley v. Wolf*, 60 Miss. 420; *Rivers v. Gregg*, 5 Rich. Eq. 274, 279.

⁶ *Price v. Hewett*, 8 Ex. 146; *Bartlett v. Wells*, 1 B. & S. 836; *DeRoo v.*

Foster, 12 C. B. (N. S.) 272; *Sims v. Everhardt*, 102 U. S. 300, 312, 26 L. ed. 87; *Tobin v. Spann*, 85 Ark. 556, 109 S. W. 534; *Merriam v. Cunningham*, 11 Cush. 40; *Conrad v. Lane*, 26 Minn. 389, 4 N. W. 695, 37 Am. Rep. 412; *Alt v. Graff*, 65 Minn. 191, 68 N. W. 9; *United States Corp. v. Ulrickson*, 84 Minn. 14, 20, 86 N. W. 613, 87 Am. St. Rep. 326; *Burley v. Russell*, 10 N. H. 184, 34 Am. Dec. 146; *Conroe v. Birdsall*, 1 Johns. Cas. 127, 1 Am. Dec. 105; *Brown v. McCune*, 5 Sandf. 224. But see *contra*, *Damron v. Commonwealth*, 110 Ky. 268, 96 Am. St. Rep. 453; *Commander v. Brazil*, 88 Miss. 668, 41 So. 497. See also *Harper v. Utsey* (Tex. Civ. App.), 97 S. W. 508.

cannot restore the consideration.⁷ Such misrepresentation has, moreover, other effects. Though the infant may not lose his privileges under the bargain, at law or perhaps even in equity, the adult acquires also the right to disaffirm the contract. A transaction induced by fraud is voidable by the defrauded person, and it is immaterial for this purpose whether the fraudulent person is an infant or an adult.⁸ Whether the infant is liable in tort for deceit in misrepresenting his age is not so clear. There is considerable authority that he is not.⁹ The sounder view, however, is that the infant is liable.¹⁰ It is conceded in all the cases that an infant is as a rule liable for his torts and there is no valid reason why he should not be liable for false and fraudulent

⁷ *Ex parte* Unity Association, 3 De G. & J. 63 (citing earlier authorities by which the court felt bound but of which it expressed its dislike); *Cornwall v. Hawkins*, 41 L. J. Ch. 435 (compare *Bartlett v. Wells*, 1 B. & S. 836; *De Roo v. Foster*, 12 C. B. (N. S.) 272); *Ferguson v. Bobo*, 54 Miss. 121. See also *Davidson v. Young*, 38 Ill. 145. See further, § 18. *Contra*, however, is *Sims v. Everhardt*, 102 U. S. 300, 26 L. ed. 87. The force of this decision is somewhat weakened by the fact that the court was evidently ignorant of the distinction made by the English decisions between legal and equitable proceedings so far as this question of estoppel is concerned. *Sims v. Everhardt* is cited as controlling in *Sanger v. Hibbard*, 104 Fed. Rep. 455, 43 C. C. A. 635. See also *Geer v. Hovy*, 1 Root, 179; *Schmitheimer v. Eiseman*, 7 Bush, 298.

⁸ *Lemprière v. Lange*, 12 Ch. D. 675; *Badger v. Phinney*, 15 Mass. 359. So where the infant obtains goods with fraudulent intent not to pay for them. *Wallace v. Morss*, 5 Hill, 391; *Kilgore v. Jordan*, 17 Tex. 341, 351.

⁹ "The earlier authorities are clear to this point that no such action can

be maintained. *Johnson v. Pie*, 1 Lev. 169, and 1 Keb. 905; *Grove v. Nevill*, 1 Keb. 778; *Green v. Greenbank*, 2 Marsh. 485." *Merriam v. Cunningham*, 11 Cush. 40. To the same effect are *Liverpool Assoc. v. Fairhurst*, 9 Ex. 422; *Slayton v. Barry*, 175 Mass. 513, 56 N. E. 574, 49 L. R. A. 560, 78 Am. St. Rep. 510; *Brooks v. Sawyer*, 191 Mass. 151; *Brown v. McCune*, 5 Sandf. 224, 229; *Nash v. Jewett*, 61 Vt. 501, 18 Atl. 47, 4 L. R. A. 561, 15 Am. St. Rep. 931. See also *Price v. Hewett*, 8 Ex. 146; *Bartlett v. Wells*, 1 B. & S. 836; *Brown v. Dunham*, 1 Root, 272; *Geer v. Hovy*, 1 Root, 179; *Conrad v. Lane*, 26 Minn. 389, 4 N. W. 695, 37 Am. Rep. 412; *United States Corp. v. Ulrickson*, 84 Minn. 14, 20, 86 N. W. 613, 87 Am. St. Rep. 326; *Ferguson v. Bobo*, 54 Miss. 121, 131; *Keen v. Hartman*, 48 Pa. St. 497, 88 Am. Dec. 472.

¹⁰ *Davidson v. Young*, 38 Ill. 145; *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53; *Yeager v. Knight*, 60 Miss. 730; *Fitts v. Hall*, 9 N. H. 441 (the leading case); *Eckstein v. Frank*, 1 Daly, 334; *Kilgore v. Jordan*, 17 Tex. 341; *Carpenter v. Pridgen*, 40 Tex. 32.

representations as fully as for other torts, nor if he is in general liable for his deceits is there any reason to distinguish the case where the injurious consequence of the deceit is entering into an unenforceable contract from cases where the injurious consequences are of a different nature. The reasoning generally given in cases which protect the infant, "that infants are liable for their torts, yet the form of action does not determine their liability, and they cannot be made liable when the cause of action arises from a contract, although the form is *ex delicto*,"¹¹ does not meet the difficulty. The infant is not held liable on his contract either in form or substance if he is held liable for deceit.

§ 27. **Other false representations.**—Even more difficult questions have arisen in regard to other false statements of infants—especially warranties of quality or title. The action upon a warranty is older than the action of assumpsit, deceit being regarded as the gist of the action. In modern times a warranty has been regarded as contractual in its nature, but the right to bring an action sounding in tort upon it having been early established has persisted. Undoubtedly many, perhaps most, warranties are representations of fact as well as promises, but in other cases the warrantor's liability is wholly based on a promise, and so far as there is any representation to be implied from the warranty, it is one of opinion. Even where a warranty contains a false representation of fact, the seller may be unaware that his representation is false, and in such a case an essential element of the ordinary right of action for deceit is lacking. If an action of tort is allowed under such circumstances against an adult, the gist of the action is nevertheless contractual or *quasi*-contractual, and if the action is against an infant, his privilege should protect him from liability. If, however, an infant makes representations of fact, known to him to be false, and these representations are relied on, the fact that the infant has also warranted the truth of his statements should not protect him. This reasoning agrees with that in a South Carolina decision,¹² and finds some support from other cases, not directly in point, for instance, the decisions cited in the preceding section holding an infant liable for misrepresenting his

¹¹ *Nash v. Jewett*, 61 Vt. 501, 503, 18 Atl. 47, 4 L. R. A. 561, 61 Am. St. Rep. 931.

¹² *Word v. Vance*, 1 Nott & McC. 197, 9 Am. Dec. 683. The court in view of the finding of the jury that

age, and other decisions in which it was held that an infant who obtains property with intent not to pay for it is liable in tort.¹³ The broad statement sometimes made¹⁴ that an infant is not liable for a tort which grows out of contractual relations is also discredited by another class of cases which hold that if property is bailed to an infant for one purpose and in violation of his contract he uses it for another he is guilty of conversion.¹⁵ Nevertheless, there are decisions holding without qualification that an infant warrantor is not liable in any form of action or under any circumstances.¹⁶ The distinction is not observed in these cases between holding the infant to make good the warranty and holding him liable for the damage caused by inducing the plaintiff to enter into the transaction. The former ought not to be allowed even though the action is in tort; the latter ought to be.

§ 28. **Insane persons; early law.**—The rule laid down by Lord Coke as to a lunatic was that he could not be permitted to show the invalidity of his acts because to do so would be to stultify himself.¹⁷ This reasoning would probably prevail nowhere at the present time, and may, therefore, be disregarded. There are,

the infant knew of the falsity of his representations held the plea of infancy ineffectual, saying: "This is an action, as well in form as in substance, *ex delicto*, and when such is the cause of action, even where the form is *ex contractu*, the defense of infancy will not avail. *Bristow v. Eastman*, 1 Esp. 172." In *Bristow v. Eastman*, the action of money had and received was allowed against an infant to recover money embezzled by him. To the same effect are *Shaw v. Coffin*, 58 Me. 254, 4 Am. Rep. 290; *Ellwell v. Martin*, 32 Vt. 217.

¹³ *Mathews v. Cowan*, 59 Ill. 341; *Ashlock v. Vivell*, 29 Ill. App. 388; *Wallace v. Morss*, 5 Hill, 391. See also *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Walker v. Davis*, 1 Gray, 506; *Gaunt v. Taylor*, 15 N. Y. Suppl. 589; *Harseim v. Cohen* (Tex. Civ. App.), 25 S. W. 977.

¹⁴ See *e. g.*, *Cooley on Torts*, *106; 2 Kent's Com. *241.

¹⁵ *Burnard v. Haggis*, 14 C. B. (N. S.) 45; *Walley v. Holt*, 35 L. T. 631; *Homer v. Thwing*, 3 Pick. 492; *Eaton v. Hill*, 50 N. H. 235, 9 Am. Rep. 189; *Stack v. Cavanaugh*, 67 N. H. 149, 30 Atl. 350; *Campbell v. Stakes*, 2 Wend. 137, 19 Am. Dec. 561; *Fish v. Ferris*, 5 Duer, 49; *Moore v. Eastman*, 1 Hun, 578; *Free-man v. Boland*, 14 R. I. 39, 51 Am. Rep. 340; *Green v. Sperry*, 16 Vt. 390, 42 Am. Dec. 519; *Towne v. Wiley*, 23 Vt. 355, 56 Am. Dec. 85; *Ray v. Tubbs*, 50 Vt. 688, 28 Am. Rep. 519. *Contra*, *Jennings v. Rundall*, 8 T. R. 335; *Schenk v. Strong*, 1 Southard (N. J.), 87; *Penrose v. Curren*, 3 Rawle, 351, 24 Am. Dec. 356; *Wilt v. Welsh*, 6 Watts, 9.

¹⁶ *Grove v. Nevill*, 1 Keb. 778; *Green v. Greenbank*, 2 Marsh. 485; *Prescott v. Norris*, 32 N. H. 101; *Doran v. Smith*, 49 Vt. 353.

¹⁷ *Beverley's Case*, 4 Co. Rep. 123b.

however, still several theories in regard to the nature of a lunatic's contract or deed. Most of the cases relate to deeds, but there seems to be no distinction in principle between the case of a deed or conveyance of real estate and a contract or sale of personal property. Decisions, therefore, in regard to deeds, may be taken as establishing a rule of decision for other cases in the absence of authority to the contrary. These several theories may now be considered.

§ 29. **Lunatics' transactions void.**—It seems a natural consequence of lunacy that a transaction which requires mutual assent cannot be effectually made by a lunatic; as was said in a decision of the Supreme Court of the United States: "The fundamental idea of a contract is that it requires the assent of two minds; but a lunatic or a person *non compos mentis* has nothing which the law recognizes as a mind."¹⁸ Accordingly it was held in early English cases that a lunatic could not execute a deed,¹⁹ nor a bond,²⁰ nor indorse a bill of exchange.²¹ And so it was held that a family settlement made by a lunatic ought to be set aside, although it was reasonable and for the convenience of the family.²² In accordance with this view it is held in many cases, especially those of not very recent times, that a lunatic's contract²³ or deed²⁴

¹⁸ *Dexter v. Hall*, 15 Wall. 9, 21 L. ed. 73.

¹⁹ *Yates v. Boen*, 2 Strange, 1104.

²⁰ *Faulder v. Silk*, 3 Campb. 126.

²¹ *Alcock v. Alcock*, 3 M. & Gr. 268.

²² *Clerk v. Clerk*, 2 Vern. 323.

²³ *Edwards v. Davenport*, 4 McCrary, 34; *Henry v. Fine*, 23 Ark. 417; *Caulkins v. Fry*, 35 Conn. 170; *Reinskopf v. Rogge*, 37 Ind. 207; *Atwell v. Jenkins*, 163 Mass. 362, 40 N. E. 178, 28 L. R. A. 694, 47 Am. St. Rep. 463; *Burke v. Allen*, 29 N. H. 106, 61 Am. Dec. 642; *Berkley v. Cannon*, 4 Rich. L. 136; *Hunter v. Tolbard*, 47 W. Va. 258, 34 S. E. 737; *Bursinger v. Bank of Watertown*, 67 Wis. 75, 30 N. W. 290, 58 Am. Rep. 848. See also *Chicago, etc., Ry. v. Lewis*, 109 Ill. 120.

²⁴ *German Savings Soc. v. Lashmutt*,

67 Fed. Rep. 399; *Thompson v. New England Co.*, 110 Ala. 400, 18 So. 315, 55 Am. St. Rep. 29; *Dougherty v. Powe*, 127 Ala. 577, 30 So. 524; *Wilkins v. Wilkinson*, 129 Ala. 279, 30 So. 578; *Van Deusen v. Sweet*, 51 N. Y. 378; *Sander v. Savage*, 75 N. Y. App. Div. 333 (but see *Blinn v. Schwarz*, 177 N. Y. 252, 69 N. E. 542); *Farley v. Parker*, 6 Or. 105, 25 Am. Rep. 504; *Estate of Desilver*, 5 Rawle, 111; *Rogers v. Walker*, 6 Pa. St. 371, 47 Am. Dec. 470. And see *Dexter v. Hall*, 15 Wall. 9, 21 L. ed. 73; *Jacks v. Estee*, 139 Cal. 507, 73 Pac. 247; *Edwards v. Davenport*, 4 McCrary, 34; *Waller v. Julius*, 68 Kan. 314, 74 Pac. 157; *Valpey v. Rea*, 130 Mass. 384; *Brigham v. Fayerweather*, 144 Mass. 48, 10 N. E. 735.

is absolutely void. It should be noticed, however, that the word "void" is used with very different meanings by judges and law writers;²⁵ and it may be doubted whether most of the courts which have said that the acts of a lunatic are void would follow that doctrine to its logical conclusion. Thus: If the contracts of a lunatic are void they cannot be ratified; third persons may effectually deny the title of an insane person's grantee; and a sane party to a bargain with a lunatic may repudiate it although the lunatic has performed on his side, or is ready to perform. That all these consequences would be admitted by courts which speak of the contracts of a lunatic as void is at least not clear.

§ 30. **Lunatics' transactions voidable.**—According to the view more commonly expressed, a lunatic's transactions are voidable. An analogy with infant's contracts, confessedly not perfect, inasmuch as an infant may be, in fact, mentally competent, whereas a lunatic generally, at least, is incompetent in fact to understand the force of his bargain, has been followed both as to contracts²⁶ and deeds.²⁷

²⁵ See *Blinn v. Schwarz*, 177 N. Y. 252, 259, 69 N. E. 542; *State v. Richmond*, 26 N. H. 232, 239; Markby, *Elements on Law* (3d ed.), §§ 274, 651.

²⁶ *Wright v. Waller*, 127 Ala. 557, 29 So. 57, 54 L. R. A. 440; *Coburn v. Raymond*, 76 Conn. 484, 100 Am. St. Rep. 1000; *Orr v. Equitable Mortgage Co.*, 107 Ga. 499, 33 S. E. 708; *Wooley v. Gaines*, 114 Ga. 122, 39 S. E. 892, 88 Am. St. Rep. 22; *Joest v. Williams*, 42 Ind. 565, 13 Am. St. Rep. 377; *Musselman v. Cravens*, 47 Ind. 1; *Louisville, etc., Ry. Co. v. Herr*, 135 Ind. 591, 35 N. E. 556; *Mansfield v. Watson*, 2 Iowa, 111; *Allen v. Berryhill*, 27 Iowa, 534, 1 Am. Rep. 309; *Van Patten v. Beals*, 46 Iowa, 62; *Seaver v. Phelps*, 11 Pick. 304, 22 Am. Dec. 372; *Carpenter v. Rodgers*, 61 Mich. 384, 28 N. W. 156, 1 Am. St. Rep. 595; *De Vries v. Crofoot*, 148 Mich. 183, 111 N. W. 775; *Broadwater v. Darne*, 10

Mo. 277; *Ingraham v. Baldwin*, 9 N. Y. 45; *Bush v. Breinig*, 113 Pa. St. 310, 6 Atl. 86, 57 Am. Rep. 469.

²⁷ *Luhrs v. Hancock*, 181 U. S. 567, 574, 21 S. Ct. 726, 44 L. ed. 1005; *Wooley v. Gaines*, 114 Ga. 122, 39 S. E. 892, 88 Am. St. Rep. 22; *Scanlan v. Cobb*, 85 Ill. 296; *Nichol v. Thomas*, 53 Ind. 42; *Freed v. Brown*, 55 Ind. 310; *Schuff v. Ramsom*, 79 Ind. 458; *Boyer v. Berriman*, 123 Ind. 451, 24 N. E. 249; *Harrison v. Otley*, 101 Iowa, 652, 70 N. W. 724; *Gribben v. Maxwell*, 34 Kans. 8, 7 Pac. 584; *Smith's Committee v. Forsythe*, 28 Ky. L. Rep. 1034, 90 S. W. 1075; *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705; *Allis v. Billings*, 6 Metc. 415, 39 Am. Dec. 744; *Riley v. Carter*, 76 Md. 581, 25 Atl. 667, 19 L. R. A. 489; *Arnold v. Richmond Iron Works*, 1 Gray, 434; *Gibson v. Soper*, 6 Gray, 279, 66 Am. Dec. 414; *Howe v. Howe*, 99 Mass. 88, 98; *Rogers v. Blackwell*, 49 Mich. 192, 13

§ 31. **Voidable against bona fide purchaser.**— Though a lunatic's contracts are regarded as voidable only, they may at common law, if voidable at all, be avoided against a purchaser who paid value for the property which was the subject of the lunatic's bargain and which the purchaser bought in ignorance of the original owner's insanity from the person to whom the lunatic sold it.²⁸ This rule has, however, been changed by the Sales Act,²⁹ which makes no exception to the rule that a *bona fide* purchaser for value from one who has a voidable title acquires a good title.

§ 32. **Ratification and disaffirmance.**— It is a consequence of the voidable character of a lunatic's contracts that they may be ratified and the authorities almost uniformly support the validity of such ratification.³⁰ Any conduct on the part of the lunatic who has regained his reason which clearly indicates assent to his previous acts, will ratify those acts.³¹ Such conduct will amount to ratification in spite of ignorance of the right to avoid the trans-

N. W. 512 (*semble*); *Moran v. Moran*, 106 Mich. 8, 63 N. W. 989, 58 Am. St. Rep. 462; *Thorpe v. Hanscom*, 64 Minn. 201, 66 N. W. 1; *Miller v. Barber*, 73 N. J. L. 38, 62 Atl. 276; *Blinn v. Schwarz*, 177 N. Y. 252, 69 N. E. 542, 101 Am. St. Rep. 806; *Riggan v. Green*, 80 N. C. 236, 30 Am. Rep. 77; *Elston v. Jasper*, 45 Tex. 409. See also *Hardy v. Dyas*, 203 Ill. 211, 67 N. E. 852; *Sheehan v. Allen*, 67 Kans. 712, 74 Pac. 245.

²⁸ *Hull v. Louth*, 109 Ind. 315, 10 N. E. 270, 58 Am. Rep. 405; *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705; *Rogers v. Blackwell*, 49 Mich. 192, 13 N. W. 512; *McKenzie v. Donnell*, 151 Mo. 431, 52 S. W. 214; *Dewey v. Allgire*, 37 Neb. 6, 55 N. W. 276, 40 Am. St. Rep. 468; *Gingrich v. Rogers*, 69 Neb. 527, 96 N. W. 156. But see *Ashcraft v. De Armond*, 44 Iowa, 229; *Odom v. Riddick*, 104 N. C. 515, 10 S. E. 609, 7 L. R. A. 118, 17 Am. St. Rep. 686, where it was held that a *bona fide* purchaser of land who had paid full value for it could not be deprived thereof unless the consideration paid was re-

stored. It should be observed that wherever it is held that a lunatic cannot avoid a contract made by him with one who is ignorant of his lunacy and who pays him full value as consideration, unless the original status is restored, it necessarily follows that property if recoverable from a *bona fide* purchaser can be recovered only upon the same conditions.

²⁹ Sec. 24. See *infra*, § 348.

³⁰ *Matthews v. Baxter*, L. R. 8 Ex. 132; *Baldwyn v. Smith*, [1900] 1 Ch. 588; *Etna L. I. Co. v. Sellers*, 154 Ind. 370, 56 N. E. 97, 77 Am. St. Rep. 481; *Arnold v. Richmond Works*, 1 Gray, 434; *Wolcott v. Conn. L. I. Co.*, 137 Mich. 309; *Gingrich v. Rogers*, 69 Neb. 527, 96 N. W. 156; *Blinn v. Schwarz*, 177 N. Y. 252, 69 N. E. 542, 101 Am. St. Rep. 806. And see cases in the following notes. But see *Oakley v. Shelley*, 129 Ala. 467, 470, 29 So. 385.

³¹ *Barry v. St. Joseph's Hospital* (Cal.), 48 Pac. Rep. 68; *Stroder v. Southern Granite Co.*, 99 Ga. 595, 27 S. E. 174; *Beasley v. Beasley*, 180 Ill. 163, 54 N. E. 187; *Louisville*,

action and of the effect of the subsequent conduct as a relinquishment of that right.³² Whether a mere failure to disaffirm a bargain made during insanity will suffice for ratification has not been as much discussed as the corresponding question in regard to infants. It seems, however, that if the lunatic on recovering his reason was aware of the bargain which he had made while insane, delay without more would preclude him from disaffirming the transaction.³³ The lunatic's representatives may ratify after his death a contract made by him.³⁴ Similarly they may disaffirm the bargain.³⁵ In England ratification by a guardian has been upheld.³⁶ And in this country the converse proposition, that the guardian of a lunatic may disaffirm his contracts, is upheld.³⁷ It has been held in Nebraska, however, that the acts of a lunatic cannot be ratified by his guardian or even by the court having jurisdiction over the lunatic.³⁸ The party with whom the lunatic dealt cannot avoid the contract because of the lunacy.³⁹ And so far as third persons are concerned

etc., *Ry. Co. v. Herr*, 135 Ind. 591, 35 N. E. 556; *Whitcomb v. Hardy*, 73 Minn. 285, 76 N. W. 29; *Allis v. Billings*, 6 Metc. 415, 39 Am. Dec. 744; *Arnold v. Richmond Works*, 1 Gray, 434; *Gibson v. Western, etc.*, R. R. Co., 164 Pa. St. 142, 30 Atl. 308, 44 Am. St. Rep. 586.

³² *Arnold v. Richmond Works*, 1 Gray, 434. But see *Alabama, etc., Ry. v. Jones*, 73 Miss. 110, 19 So. 105, 55 Am. St. Rep. 488.

³³ *Cockrill v. Cockrill*, 92 Fed. Rep. 811, 34 C. C. A. 254; *Barry v. St. Joseph's Hospital (Cal.)*, 48 Pac. 68; *Strodder v. Southern Granite Co.*, 99 Ga. 595, 27 S. E. 174; *Bunn v. Postell*, 107 Ga. 490, 33 S. E. 707; *Spicer v. Holbrook*, 29 Ky. L. Rep. 865, 96 S. W. 571; *Morris v. Gt. Northern Ry. Co.*, 67 Minn. 74, 69 N. W. 628. See also *Wright v. Fisher*, 65 Mich. 275, 284, 32 N. W. 605, 8 Am. St. Rep. 886.

³⁴ *Bunn v. Postell*, 107 Ga. 490, 33 S. E. 707; *Bullard v. Moor*, 158 Mass. 418, 33 N. E. 928.

³⁵ *Langley v. Langley*, 45 Ark. 392.

397; *Orr v. Equitable Mortgage Co.*, 107 Ga. 499, 33 S. E. 708; *Downham v. Holloway*, 158 Ind. 626, 64 N. E. 82, 92 Am. St. Rep. 330.

³⁶ *Baldwyn v. Smith*, [1900] 1 Ch. 588.

³⁷ *Eldredge v. Palmer*, 185 Ill. 618, 57 N. E. 770, 76 Am. St. Rep. 59; *Hull v. Louth*, 109 Ind. 315, 10 N. E. 270, 58 Am. St. Rep. 405; *Louisville, etc., Ry. Co. v. Herr*, 135 Ind. 591, 35 N. E. 556; *Alexander v. Haskins*, 68 Iowa, 73, 25 N. W. 935; *Reason v. Jones*, 119 Mich. 672, 78 N. W. 899.

³⁸ *Gingrich v. Rogers*, 69 Neb. 527, 96 N. W. 156. See also *Rannells v. Gerner*, 80 Mo. 474.

³⁹ *Harmon v. Harmon*, 51 Fed. Rep. 113; *Allen v. Berryhill*, 27 Iowa, 534; *Breckenridge v. Ormsby*, 1 J. J. Marsh. 236, 239, 19 Am. Dec. 71; *Atwell v. Jenkins*, 163 Mass. 362, 40 N. E. 178, 28 L. R. A. 694, 47 Am. St. Rep. 463. Compare *Ashley v. Holman*, 15 S. C. 97, where the court seemed to regard any liability of the other party to be *quasi-contractual*.

the contract before it has been avoided is valid.⁴⁰ Therefore, a creditor of an insane person cannot attack a transfer of property made by his debtor for the sole reason that the grantor was a lunatic at the time of the transfer.⁴¹ If a contract has been ratified it is obvious that it cannot thereafter be avoided.⁴² It has been held that a lunatic's contracts cannot be effectively avoided by him while insane,⁴³ but the decisions on this question in regard to infants should be compared.⁴⁴

§ 33. **Lunatic's contracts valid in some cases.**—In comparatively recent times courts have made a still farther departure from the view that a lunatic's contract is void because of his inability to give intelligent assent. In the leading case of *Molton v. Camroux*,⁴⁵ the rule was stated "The modern cases show that when that state of mind was unknown to the other contracting party, and no advantage was taken of the lunatic, the defense cannot prevail, especially where the contract is not merely executory but executed in the whole or in part and the parties cannot be restored altogether to their original positions."⁴⁶ The rule thus stated had, at the time, the support of decisions in equity,⁴⁷ but went beyond what had been previously decided by courts of law. The rule is, however, in line with the view now generally prevailing in regard to mutual assent as a requirement for the formation of contracts. According to the modern view actual mental assent is not material in the formation of contracts, the important thing being what each party is warranted in believing from the actions and words of the man he is dealing with. Accordingly if one

⁴⁰ *Atwell v. Jenkins*, 163 Mass. 362, 40 N. E. 178, 28 L. R. A. 694, 47 Am. St. Rep. 463. See, however, *Waller v. Julius*, 68 Kans. 314, 74 Pac. 157, where it was held that one in possession of land might set up the invalidity of a deed made by an insane owner, in view of the facts that no consideration was paid by the grantee and he knew of the insanity.

⁴¹ *Brumbaugh v. Richcreek*, 127 Ind. 240, 26 N. E. 664, 22 Am. St. Rep. 649. Compare *Riley v. Carter*, 76 Md. 581, 25 Atl. 667, 19 L. R. A. 489, 35 Am. St. Rep. 443, where it was held that creditors might attack a

general assignment made by their debtor for the benefit of his creditors on the ground that he was insane.

⁴² *Bunn v. Postell*, 107 Ga. 490, 33 S. E. 707.

⁴³ *Louisville, etc., Ry. Co. v. Herr*, 135 Ind. 591, 35 N. E. 556.

⁴⁴ See *supra*, § 16.

⁴⁵ 2 Ex. 487; 4 Ex. 17. This was an action brought after a lunatic's death to recover back premiums paid by him for an annuity. Recovery was not allowed.

⁴⁶ 4 Ex. 17, 19.

⁴⁷ *Niell v. Morley*, 9 Ves. 478.

dealing with a lunatic may reasonably suppose he is sane and makes a bargain with him on that assumption, there is no theoretical difficulty in the lack of mutual assent. It is, however, for reasons of justice, necessary that the lunatic should be privileged to avoid the contract if it is oppressive. As this is a personal privilege it may well be limited to cases where there would be hardship otherwise. It is so limited by the rule of *Molton v. Camroux*, for if a lunatic has received fair consideration, of which he has had the benefit, and which he cannot restore, there is no hardship in treating the transaction as valid. Accordingly the rule has not only been followed in England,⁴⁸ but has been much extended. In *Molton v. Camroux* the court confined its remarks strictly to the case of executed contracts, but in the case of *Imperial Loan Co. v. Stone*⁴⁹ all the judges state without limitation that unless the mental incapacity was known to the other party insanity is no defense to an action on a contract; and Lord Esher says expressly "whether it is executory or executed." But one of the three judges suggests that it is essential that the contract shall be fair, and none of the three suggest that if the consideration was restored the lunatic might rescind the contract. Indeed in the actual case the lunatic was a surety, who may be presumed to have received no benefit from the consideration. Whether all the implications of this decision can be taken as settled law in England may be questioned in view of late judicial expressions in other cases.⁵⁰ In this country, the weight of authority certainly supports the rule quoted above from *Molton v. Camroux*.⁵¹ This

⁴⁸ *Matthews v. Baxter*, L. R. 8 Ex. 132; *Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 599.

⁴⁹ [1892] 1 Q. B. 599.

⁵⁰ "There cannot be a contract by a lunatic," per Cotton, L. J., *Re Rhodes*, 44 Ch. D. 94, 105 [1890]. "A man, while of unsound mind, entered into a contract to purchase an estate. The contract was accordingly voidable," per Byrne, J. *Baldwyn v. Smith*, [1900] 1 Ch. 538, 590.

⁵¹ *Brodrrib v. Brodrrib*, 56 Cal. 563; *More v. Calkins*, 85 Cal. 177, 24 Pac. 729; *Strodger v. Southern Granite Co.*, 99 Ga. 595, 27 S. E. 174; *Boll-*

now v. Roach, 210 Ill. 364, 71 N. E. 454; *Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142; *Copenrath v. Kienby*, 83 Ind. 18; *Northwestern, etc., Ins. Co. v. Blankenship*, 94 Ind. 535, 544, 48 Am. Rep. 185; *Behrens v. McKenzie*, 23 Iowa, 333, 92 Am. Dec. 428; *Abbott v. Creal*, 56 Iowa, 175, 9 N. W. 115; *Bokemper v. Hazen*, 96 Iowa, 221, 64 N. W. 773; *Swartwood v. Chance*, 131 Iowa, 714, 109 N. W. 297; *Gribben v. Maxwell*, 34 Kans. 8, 7 Pac. 584; *Smith's Committee v. Forsythe*, 28 Ky. L. Rep. 1034, 90 S. W. 1075; *Flach v. Gottschalk Co.*, 88 Md. 368, 41 Atl. 908, 42 L. R. A.

principle applies to the case of a deed made by a lunatic.⁵² So negotiable paper executed by a lunatic is binding in the hands of an innocent holder for value, if the lunatic received a proper consideration therefor.⁵³ It seems generally assumed in these cases that if any consideration received by the lunatic can be and is restored, the bargain may be rescinded.⁵⁴ It follows, therefore, that contracts still wholly executory are not enforceable against a lunatic.⁵⁵ And probably most courts in this country would agree with the Supreme Court of Georgia in holding that the mere fact "that the other party to the contract was ignorant that the person with whom he was dealing was in fact insane, and that the existence of such insanity could not have been discovered by an ordinarily reasonable and prudent person, does not make such

745, 71 Am. St. Rep. 418; *Shoulters v. Allen*, 51 Mich. 529, 16 N. W. 888; *Schaps v. Lehner*, 54 Minn. 208, 55 N. W. 911; *Morris v. Great Northern Ry. Co.*, 67 Minn. 74, 69 N. W. 628; *Matthiessen, etc. v. McMahon's Adm.*, 38 N. J. L. 536; *Miller v. Barber*, 73 N. J. L. 38, 62 Atl. 276; *Young v. Stevens*, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541; *Hosler v. Beard*, 54 Ohio St. 398, 43 N. E. 1040, 35 L. R. A. 161, 56 Am. St. Rep. 720; *Beals v. See*, 10 Pa. St. 56, 49 Am. Dec. 573; *Kneedler's Appeal*, 92 Pa. St. 428; *Cooney v. Lincoln*, 21 R. I. 246, 42 Atl. 867, 79 Am. St. Rep. 799; *Sims v. McLure*, 8 Rich. Eq. 286, 70 Am. Dec. 196.

⁵² *Ronan v. Bluhm*, 173 Ill. 277, 50 N. E. 694; *Eldredge v. Palmer*, 185 Ill. 618, 57 N. E. 770, 76 Am. St. Rep. 59; *Thrash v. Starbuck*, 145 Ind. 673, 44 N. E. 543; *Ashcraft v. De Armond*, 44 Iowa, 229; *Harrison v. Otley*, 101 Iowa, 652, 70 N. W. 724; *Myers v. Knabe*, 51 Kans. 720, 33 Pac. 602; *Rusk v. Fenton*, 14 Bush, 490, 29 Am. Rep. 413; *Smith's Committee v. Forsythe*, 28 Ky. L. Rep. 1034, 90 S. W. 1075; *McKenzie v. Donnell*, 151 Mo. 431, 52 S. W. 214; *Yauger v. Skinner*, 14 N. J. Eq. 389;

Riggan v. Green, 86 N. C. 236, 30 Am. Rep. 77. *Contra*, *Nichol v. Thomas*, 53 Ind. 42; *Hovey v. Hobson*, 53 Me. 451, 55 Me. 256, 275, 89 Am. Dec. 705; *Bates v. Hyman* (Miss.), 28 So. 567; *Dewey v. Allgire*, 37 Neb. 6, 55 N. W. 276, 40 Am. St. Rep. 468; *Wager v. Wagoner*, 53 Neb. 511, 73 N. W. 937; *Smith v. Ryan*, 191 N. Y. 452, 84 N. E. 402; *Gillgallon v. Bishop*, 46 N. Y. App. Div. 350; *Crawford v. Scovell*, 94 Pa. St. 48, 39 Am. Rep. 766.

⁵³ *Lancaster Bank v. Moore*, 78 Pa. St. 407, 21 Am. Rep. 24; *Snyder v. Laubach* (S. C. Pa.), 7 W. N. C. 464, 9 C. L. J. 496. *Contra*, *Hosler v. Beard*, 54 Ohio St. 398, 43 N. E. 1040, 35 L. R. A. 161, 56 Am. St. Rep. 720, but is not binding if he did not; *McClain v. Davis*, 77 Ind. 419; *Moore v. Hershey*, 90 Pa. St. 196; *Wirebach v. Bank*, 97 Pa. St. 543, 39 Am. Rep. 821.

⁵⁴ So held in *Wooley v. Gaines*, 114 Ga. 122, 39 S. E. 892, 88 Am. St. Rep. 22.

⁵⁵ *Baldwyn v. Smith*, [1900] 1 Ch. 588; *Corbit v. Smith*, 7 Iowa, 60, 71 Am. Dec. 431; *Young v. Stevens*, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592.

a contract valid and binding.”⁵⁶ The fact that the consideration has been spent and that the lunatic without fault is unable to restore it does not seem to be material if he cannot do so, for whatever cause, the contract is binding.⁵⁷ The requirement of restoration of the consideration as a condition of rescission is not universal. Of course jurisdictions which hold the contract of a lunatic is void cannot enforce such a condition, and accordingly some of the older decisions hold that restoration of the consideration is unnecessary.⁵⁸ Even though the consideration for a lunatic’s promise does not inure to his benefit as has been seen, the transaction has none the less been held binding in England⁵⁹ and the English decision finds support in this country,⁶⁰ but the contrary has been held in Indiana, even though the contract was a fair one.⁶¹ Where the insanity was known to the person dealing with the lunatic, an offer to restore the consideration is not required as a condition precedent to rescission,⁶² and the same result has been reached where the bargain was an unfair one.⁶³

⁵⁶ *Orr v. Equitable Mortgage Co.*, 107 Ga. 499, 33 S. E. 708. See also *Jacks v. Estee*, 139 Cal. 507, 73 Pac. 247; *Woolley v. Gaines*, 114 Ga. 122, 39 S. E. 892, 88 Am. St. Rep. 22; *Hull v. Louth*, 109 Ind. 315, 10 N. E. 270, 58 Am. Rep. 405.

⁵⁷ *Scanlan v. Cobb*, 85 Ill. 296; *Burnham v. Kidwell*, 113 Ill. 425; *Young v. Stevens*, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; *Matthiessen v. McMahon’s Adm.*, 38 N. J. L. 536; *Yauger v. Skinner*, 14 N. J. Eq. 389; *Mutual L. I. Co. v. Hunt*, 79 N. Y. 541; *Riggan v. Green*, 80 N. C. 236, 30 Am. Rep. 77; *Lancaster Bank v. Moore*, 78 Pa. St. 407, 21 Am. Rep. 24; *Sims v. McLure*, 8 Rich. Eq. (S. C.) 286, 70 Am. Dec. 196. See, however, *Strodger v. Southern Granite Co.*, 99 Ga. 595, 27 S. E. 174; *Hale v. Kobbert*, 109 Iowa, 128, 130, 80 N. W. 308.

⁶³ *Hale v. Kobbert*, 109 Iowa, 128, 80 N. W. 308; *Clark v. Lopez*, 75 Miss. 932, 23 So. 648, 957; *Halley v.*

⁵⁸ *Breckenridge v. Ormsby*, 1 J. J. Marsh. 236, 245, 19 Am. Dec. 71; *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705; *Gibson v. Soper*, 6 Gray, 279, 66 Am. Dec. 414; *Flanders v. Davis*, 19 N. H. 139.

⁵⁹ *Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 599.

⁶⁰ *Abbott v. Creal*, 56 Iowa, 175, 9 N. W. 115; *Blount v. Spratt*, 113 Mo. 48, 20 S. W. 967; *Bank v. Sneed*, 97 Tenn. 120, 36 S. W. 716, 56 Am. St. Rep. 788.

⁶¹ *Northwestern, etc., Ins. Co. v. Blankenship*, 94 Ind. 535, 48 Am. Rep. 185; *Physio-Medical College v. Wilkinson*, 108 Ind. 314, 9 N. E. 167.

⁶² *Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 599; *Allore v. Jewell*, 94 U. S. 506, 24 L. ed. 260; *Harding v. Wheaton*, 2 Mason (U. S.), 378; *Henry v. Fine*, 23 Ark. 417; *Ronan v. Bluhn*, 173 Ill. 277, 50 N. E. 694;

Troester, 72 Mo. 73; *Sims v. McLure*, 8 Rich. Eq. (S. C.) 286, 70 Am. Dec. 196.

§ 34. **Necessaries.**—For the same reason as in the case of infants, lunatics are liable for necessities furnished them.⁶⁴ As pointed out,⁶⁵ under the heading of infancy, this liability should be regarded as *quasi-contractual* rather than contractual.⁶⁶ Hence it is not necessary for the existence of the liability that any express contract be made, as is shown by the fact, that even though a lunatic is under guardianship and, consequently, totally incapable of contracting, he can, nevertheless, bind himself for necessities if not furnished with them by his guardian.⁶⁷ As in the case of infants also a lunatic's liability is measured not by the promises he may have made but by the value of the necessities furnished him.⁶⁸ As to what constitutes necessities, the same principles that have been discussed previously in case of infants are applicable. In the case of a lunatic medical services, including nursing and other protection usual for insane persons, may be

Hardy v. Dyas, 203 Ill. 211, 67 N. E. 852; Thrash v. Starbuck, 145 Ind. 673, 44 N. E. 543; Sheehan v. Allen, 67 Kans. 712, 74 Pac. 245; Waller v. Julius, 68 Kans. 314, 74 Pac. 157, 35 L. R. A. 161; Rhoades v. Fuller, 139 Mo. 179, 40 S. W. 760; Creekmore v. Baxter, 121 N. C. 31, 27 S. E. 994; Hosler v. Beard, 54 Ohio St. 398, 43 N. E. 1040, 56 Am. St. Rep. 720; Crawford v. Scovell, 94 Pa. St. 48, 39 Am. Rep. 766; Lincoln v. Buckmaster, 32 Vt. 652.

⁶⁴ Baxter v. Portsmouth, 5 B. & C. 170; *Ex parte* Northington, 37 Ala. 496, 79 Am. Dec. 67; Borum v. Bell, 132 Ala. 85, 31 So. 454; Henry v. Fine, 23 Ark. 417; Ratliff v. Baltzer's Adm (Idaho), 89 Pac. 71, Sawyer v. Lufkin, 56 Me. 308; Kendall v. May, 10 Allen, 59; Gross v. Jones, 89 Miss. 44, 42 So. 802; Reando v. Misplay, 90 Mo. 251, 2 S. W. 405, 59 Am. Rep. 13; Seeva v. True, 53 N. H. 627; Van Horn v. Hann, 39 N. J. L. 207; Waldron v. Davis, 70 N. J. L. 788, 58 Atl. 293, 66 L. R. A. 591; Richardson v.

Strong, 13 Ired. L. 106, 55 Am. Dec. 430; Surles v. Pipkin, 69 N. C. 513; Kneeder's App., 92 Pa. St. 428; Blaisdell v. Holmes, 48 Vt. 492.

⁶⁵ See *supra*, § 21.

⁶⁶ *Re* Rhodes, 44 Ch. D. 94; Henry v. Fine, 23 Ark. 417, 418; Seeva v. True, 53 N. H. 627. In *Re* Rhodes, at p. 107, Lindley, L. J., deprecated "The unfortunate terminology of our law, owing to which the expression 'implied contract' has been used to denote not only a genuine contract established by inference, but also an obligation which does not arise from any real contract, but which can be enforced as if it had a contractual origin. Obligations of this class are called by civilians *obligationes quasi ex contractu*."

⁶⁷ Creagh v. Tunstall, 98 Ala. 249, 12 So. 713; Sawyer v. Lufkin, 56 Me. 308; Darby v. Cabanné, 1 Mo. App. 126; Stannard v. Burns, 63 Vt. 244, 22 Atl. 460; Maughan v. Burns, 64 Vt. 316, 23 Atl. 583.

⁶⁸ Surles v. Pipkin, 69 N. C. 513.

necessary.⁶⁹ Necessaries furnished to the wife of the lunatic are also a necessary expense for which he may be held liable.⁷⁰

§ 35. **What constitutes insanity.**—In the early decisions little distinction is made between different kinds of lunatics or different kinds of insanity. It was indeed recognized from early times that a lunatic might enjoy lucid intervals and contracts made during such intervals have been regarded as good.⁷¹ This rule, of course, still prevails.⁷² In modern times it has, however, been recognized that a person may be insane for some purposes and yet be perfectly able to reason upon other matters. The question, however, should and, according to the great weight of modern authority, does depend upon whether the alleged lunatic had sufficient reason to enable him to understand the nature and effect of the act in dispute.⁷³ It is not necessary, however, that a person should have average mental capacity in order to make a valid bargain. Mere weakness of mind or a condition approaching imbecility is not sufficient to constitute what the law regards as insanity.⁷⁴ Such condition, however, is highly important, for frequently advantage is taken by designing persons of those in this way partially dis-

⁶⁹ *Richardson v. Strong*, 13 Ired. L. 106, 55 Am. Dec. 430.

⁷⁰ *Drew v. Nunn*, 4 Q. B. D. 661; *Pearl v. McDowell*, 3 J. J. Marsh. 659, 20 Am. Dec. 199; *Shaw v. Thompson*, 16 Pick. 198, 26 Am. Dec. 655; *Stuckey v. Mathes*, 24 Hun. 461.

⁷² *Beverley's Case*, 4 Co. Rep. 123b; *Hall v. Warren*, 9 Ves. 605.

⁷² *Critchfield v. Easterday*, 26 App. D. C. 89; *Lilly v. Waggoner*, 27 Ill. 395; *Jones' Admr. v. Perkins*, 5 B. Mon. (Ky.) 222; *Richardson v. Smart*, 152 Mo. 623, 54 S. W. 542, 75 Am. St. Rep. 488; *Gingrich v. Rogers*, 69 Neb. 527, 96 N. W. 156; *Wright v. Market Bank* (Tenn. Ch. App.), 60 S. W. 623; *McPeck v. Graham*, 56 W. Va. 200, 49 S. E. 125.

⁷³ *Baldwyn v. Smith*, [1900] 1 Ch. 588; *Parker v. Marco*, 76 Fed. Rep. 510; *Pike v. Pike*, 104 Ala. 642, 16 So. 689; *More v. Calkins*, 85 Cal. 177, 24 Pac. 729; *Searle v. Galbraith*, 73

Ill. 269; *Raymond v. Wathen*, 142 Ind. 367, 41 N. E. 815; *Elwood v. O'Brien*, 105 Iowa, 239, 74 N. W. 740; *Swartwood v. Chance*, 131 Iowa, 714, 109 N. W. 297; *Meigs v. Dexter*, 172 Mass. 217, 52 N. E. 75; *Chadwell v. Reed*, 198 Mo. 359, 95 S. W. 227; *Dewey v. Allgire*, 37 Neb. 610, 40 Am. St. Rep. 468; *Dennett v. Dennett*, 44 N. H. 531, 84 Am. Dec. 97; *Sbarbero v. Miller* (N. J. Eq.), 65 Atl. 472; *Aldrich v. Bailey*, 132 N. Y. 85, 30 N. E. 264; *Sprinkle v. Wellborn*, 140 N. C. 163, 111 Am. St. Rep. 827; *Buckey v. Buckey*, 38 W. Va. 168, 18 S. E. 383.

⁷⁴ *Soberanes v. Soberanes*, 106 Cal. 1, 39 Pac. 39, 527; *Harrison v. Otley*, 101 Iowa, 652, 70 N. W. 724; *Entwistle v. Meikle*, 180 Ill. 9, 21, 54 N. E. 217; *Mulloy v. Ingalls*, 4 Neb. 115; *Ducker v. Whitson*, 112 N. C. 44, 16 S. E. 854.

qualified to protect themselves, and evidence of weakness of mind, together with other circumstances, may be important in establishing that a bargain is voidable for fraud or undue influence, although it fails to establish insanity. If insanity is established the burden is upon one who claims that a transaction took place during a lucid interval to show sufficient capacity at the time in question,⁷⁵ but this rule has been denied if the insanity is only occasional and intermittent.⁷⁶

§ 36. **During guardianship lunatics' bargains are void.**—In the discussion thus far it has been assumed that the lunatic was not under guardianship. When a guardian is appointed he thereupon becomes vested with the control of the property of his ward, and he alone is capable of transferring it.⁷⁷ It may also be assumed that all contracts of a lunatic made during guardianship would be held void. The guardian represents the lunatic for the purpose of all business transactions. So far is this doctrine carried that even though the lunatic has a lucid interval or regains his reason while the guardianship still exists a transaction with him is void.⁷⁸ The contrary has, however, been held where the lunatic had regained his reason and the guardianship had been allowed to fall into disuse although not legally terminated.⁷⁹ Stress is laid in many of the cases upon whether the lunatic has been so found by inquisition. If so found there are statements in the books that his transactions are void. The truth seems to be, however, that the finding merely establishes the fact of insanity, and the legal effect of the transaction is the same as it would be in any case of proved insanity. It is the appointment of a

⁷⁵ *Rogers v. Rogers* (Del.), 66 Atl. 374; *Richardson v. Smart*, 152 Mo. 623, 54 S. W. 542, 75 Am. St. Rep. 488; *Gingrich v. Rogers*, 69 Neb. 527, 96 N. W. 156; *Fishburne v. Ferguson*, 84 Va. 87, 4 S. E. 575.

⁷⁶ *McPeck v. Graham*, 56 W. Va. 200, 49 S. E. 125.

⁷⁷ *Re Walker*, [1905] 1 Ch. 160; *Cockrill v. Cockrill*, 92 Fed. Rep. 811, 34 C. C. A. 254; *McKenzie v. Donnell*, 151 Mo. 431, 52 S. W. 214; *Hughes*

v. Jones, 116 N. Y. 67, 22 N. E. 446, 5 L. R. A. 632, 15 Am. St. Rep. 386; *Sander v. Savage*, 75 N. Y. App. Div. 333.

⁷⁸ *Re Walker*, [1905] 1 Ch. 160; *Gingrich v. Rogers*, 69 Neb. 527, 96 N. W. 156; *Carter v. Beckwith*, 128 N. Y. 312, 28 N. E. 582; *Sander v. Savage*, 75 N. Y. App. Div. 333.

⁷⁹ *Thorpe v. Hanscom*, 64 Minn. 201, 66 N. W. 1; *Blaisdell v. Holmes*, 48 Vt. 492.

guardian which works the change in the legal power of a lunatic to act for himself.⁸⁰

§ 37. **Drunkenness — When it incapacitates.**—It is not every degree of intoxication that renders a person incapable in a legal sense. In order to make out incapacity it is necessary to prove that a man was so far intoxicated as to be incapable in fact of understanding the nature of the transaction in which he engaged.⁸¹

§ 38. **Drunkards' bargains voidable.**—If intoxication is so extreme as to produce legal incapacity, the effect is generally held to be the same as that of insanity; consequently, a contract or sale made under such circumstances is voidable.⁸² In some jurisdictions where insanity is said to make a lunatic's transactions void, extreme intoxication is also said to make bargains void and

⁸⁰ *Wolcott v. Conn. Life Ins. Co.*, 137 Mich. 309. In *Hughes v. Jones*, 116 N. Y. 67, 22 N. E. 446, 5 L. R. A. 632, 15 Am. St. Rep. 386, the rule is stated that before office found though within the period during which the lunatic is declared by the finding to have been insane, the evidence of incapacity is only presumptive and may be overthrown by satisfactory evidence of sanity, but "the presumption whether conclusive or *prima facie* extends to all the world, and includes all persons whether they have notice of the inquisition or not." By statute in New York after inquisition and confirmation a lunatic's contracts are void. 2 Rev. St. (6th ed.), p. 1094; *O'Reilly v. Sweeney*, 54 N. Y. Misc. Rep. 408, 105 N. Y. Suppl. 1033.

⁸¹ *Hawkins v. Bone*, 4 F. & F. 311; *Conley v. Nailor*, 118 U. S. 127, 6 S. Ct. 1001, 30 L. ed. 112; *Taylor v. Purcell*, 60 Ark. 506, 31 S. W. 567; *Cook v. Bagnell Timber Co.*, 78 Ark. 47, 94 S. W. 695; *Caulkins v. Fry*, 35 Conn. 170; *Bates v. Ball*, 72 Ill. 108; *Shackelton v. Sebree*, 86 Ill. 616; *Watson v. Doyle*, 130 Ill. 415, 22 N. E. 613; *Ryan v. Schutt*, 135 Ill.

App. 554; *Kuhlman v. Wieben*, 129 Iowa, 188, 105 N. W. 445; *Wright v. Fisher*, 65 Mich. 275, 32 N. W. 605, 8 Am. St. Rep. 886; *Johns v. Fritchey*, 39 Md. 258; *Rogers v. Warren*, 75 Mo. App. 271; *Spoonheim v. Spoonheim*, 14 N. Dak. 380, 104 N. W. 845; *French v. French*, 8 Ohio, 214, 31 Am. Dec. 441; *Bush v. Breinig*, 113 Pa. St. 310, 6 Atl. 86, 57 Am. Rep. 469; *Reynolds v. Dechaums*, 24 Tex. 174, 76 Am. Dec. 101; *Houston, etc., R. R. Co. v. Tierney*, 72 Tex. 312, 12 S. W. 586; *Loftus v. Maloney*, 89 Va. 576, 16 S. E. 749; *Bursinger v. Bank*, 67 Wis. 75, 30 N. W. 290, 58 Am. Rep. 848. The rule was applied with considerable strictness in *Caulkins v. Fry*, 35 Conn. 170, and *Johns v. Fritchey*, 39 Md. 258. In the former case the court held that if the drunkard could remember the following morning what he had done, he was not so far intoxicated as to be legally incapacitated.

⁸² *Gore v. Gibson*, 13 M. & W. 623; *Matthews v. Baxter*, L. R. 8 Ex. 132; *Phelan v. Gardner*, 43 Cal. 306; *Caulkins v. Fry*, 35 Conn. 170; *Cummings v. Henry*, 10 Ind. 109; *Mansfield v. Watson*, 2 Iowa, 111; *Johns*

for the same reason, namely — lack of mutual assent.⁸³ But in Alabama the court makes a distinction between intoxication and insanity, holding that the former cannot render a bargain void.⁸⁴ Although going beyond the statements of most courts, the doctrine enunciated in New Jersey is sustained, it is submitted, by sound reason: "Drunkenness may be insanity, but it is voluntary. It is no excuse from the consequences of crime; why should it be against those of acts affecting property? Sound policy requires that it should not, unless brought about by the other party, or unless it was so total as to be palpable evidence of fraud in the person entering into a contract with one so intoxicated."⁸⁵ If an intoxicated person is able to appear to give intelligent assent he should not be allowed to set up his own misconduct to defeat one who has been deceived in dealing with him. Doubtless the reason why such a rule is not more generally expressed in the books is because cases in fact can rarely arise where one dealing with an intoxicated person is unaware of the fact. Insane persons frequently appear to be sane, but persons so far intoxicated as to have lost their intelligence must almost invariably give indication of their condition to any one dealing with them. If, however, we suppose the case of an offer signed in extreme intoxication and sent to some one at a distance, it is submitted that if

v. Fritchey, 39 Md. 258; *Foss v. Hildreth*, 10 Allen, 76; *Carpenter v. Rodgers*, 61 Mich. 384, 28 N. W. 156, 1 Am. St. Rep. 595; *Newell v. Fisher*, 11 Sm. & M. 431, 49 Am. Dec. 66; *Broadwater v. Darne*, 10 Mo. 277; *Van Wyck v. Brasher*, 81 N. Y. 260; *Baird v. Howard*, 51 Ohio St. 57, 36 N. E. 732, 22 L. R. A. 846, 46 Am. St. Rep. 550; *Bush v. Breinig*, 113 Pa. St. 310, 6 Atl. 86.

⁸³ *Taylor v. Purcell*, 60 Ark. 606, 31 S. W. 567; *Shackelton v. Seabee*, 86 Ill. 616; *Berkley v. Cannon*, 4 Rich. L. 136; *Hunter v. Tolbard*, 47 W. Va. 258, 34 S. E. 737.

⁸⁴ *Oakley v. Shelley*, 129 Ala. 467, 29 So. 385. The court said at p. 470: "Unlike general and permanent in-

sanity and idiocy, drunkenness does not create such legal incapacity as will alone render a contract wholly void. Though it may furnish the party suffering from it ground for rescission, yet being voidable only, the contract may be affirmed and made binding by him after he becomes sober." As expressed in a recent Illinois decision the drunkenness must have been such as to drown reason, memory, and judgment, and to impair the mental faculties to such an extent as to render the party *non compos mentis* for the time being. *Martin v. Harsh*, 231 Ill. 384, 83 N. E. 164, 13 L. R. A. (N. S.) 1000.

⁸⁵ *Burroughs v. Richman*, 1 Green (N. J. L.), 233, 238, 23 Am. Dec. 717.

accepted and certainly if acted on, the intoxicated person should be bound.⁸⁶

§ 39. **Effects of drunkards' bargains.**—If a bargain is voidable on the ground of intoxication, the same consequences follow as in the case of a bargain voidable for insanity. The transaction may, therefore, be ratified.⁸⁷ What constitutes ratification gives rise to the same question as in the case of insanity, and, therefore, a failure to disaffirm the transaction within a reasonable time after becoming sober will, unless the drunkard remains ignorant of what he did when intoxicated, amount to a ratification.⁸⁸ If goods are bought when drunk and kept when sober, the buyer must pay the price. The same reasons that require return of consideration as a condition precedent to the avoidance of a lunatic's bargain apply with even greater force to the case of an intoxicated person,⁸⁹ and if the consideration is not restored the drunkard may be sued for it.⁹⁰ Even though the drunkard should have spent or wasted the consideration while intoxicated, the rule should not be relaxed unless the person dealing with the drunkard knowingly took fraudulent advantage of his condition.⁹¹

§ 40. **Bona fide purchasers.**—As the lack of intelligence of an intoxicated person is his own fault, his privilege of avoiding a bargain made while intoxicated should not enable him to regain prop-

⁸⁶ See *Youn v. Lamont*, 56 Minn. 216, 57 N. W. 478.

⁸⁷ *Matthews v. Baxter*, L. R. 8 Ex. 132; *Johnson v. Harmon*, 94 U. S. 371, 24 L. ed. 271; *Oakley v. Shelley*, 129 Ala. 467, 29 So. 385; *Strickland v. Parlin & Orendorf Co.*, 118 Ga. 213, 44 S. E. 997; *Hawley v. Howell*, 60 Iowa, 79, 14 N. W. 199; *Carpenter v. Rodgers*, 61 Mich. 384, 28 N. W. 156, 1 Am. St. Rep. 595; *Easton's Adm. v. Perry*, 29 Mo. 96; *Smith v. Williamson*, 8 Utah, 219, 30 Pac. 753. But see *Newell v. Fisher*, 11 Sm. & M. 431, 49 Am. Dec. 66; *Berkley v. Cannon*, 4 Rich. L. 136.

⁸⁸ *Wright v. Waller*, 127 Ala. 557, 29 So. 57, 54 L. R. A. 440; *Mansfield v. Watson*, 2 Iowa, 111; *Youn v. Lamont*, 56 Minn. 216, 57 N. W.

478; *Spoonheim v. Spoonheim*, 14 N. Dak. 380, 104 N. W. 845; *Bush v. Breinig*, 113 Pa. St. 310, 316, 6 Atl. 96, 57 Am. Rep. 469; *Fowler v. Meadow Brook Co.*, 208 Pa. St. 473, 57 Atl. 959; *Williams v. Inabnet*, 1 Bailey, 343; *Smith v. Williamson*, 8 Utah, 219, 30 Pac. 753. *Contra*, *Reinskopf v. Rogge*, 37 Ind. 207.

⁸⁹ *Joest v. Williams*, 42 Ind. 565, 13 Am. Rep. 377; *Fowler v. Meadow Brook Co.*, 208 Pa. St. 473. Compare *Thackrah v. Haas*, 119 U. S. 499, 7 Sup. Ct. 311, 30 L. ed. 486.

⁹⁰ *Haneklau v. Felchlin*, 57 Mo. App. 602.

⁹¹ Compare *Thackrah v. Haas*, 119 U. S. 499, 7 Sup. Ct. 311, 30 L. ed. 486.

erty transferred by him and subsequently transferred to one who paid value for it in good faith without notice of the circumstances under which it had been acquired from the original owner. This question has arisen several times in the case of negotiable paper and it has been said that the better opinion supports the right of the drunkard to set up his condition as a defense even against a *bona fide* purchaser for value.⁹² The modern decisions, however, with good reason, take the opposite view.⁹³ The case of ordinary chattel property does not differ in principle from that of negotiable paper. In the case of ordinary chattel property, as in the case of negotiable paper, if a title voidable for a cause personal to the original grantee is transferred to one who pays value without notice of the voidable character of the title, an indefeasible title is created. It has already been argued and reasons have already been given for confining a drunkard's right of avoiding his contracts to such as were made with persons who knew of his condition.⁹⁴ The same reasons should protect a *bona fide* purchaser. Under the Sales Act it is clear that there can be no right to avoid a voidable title after the property has been acquired by a *bona fide* purchaser for value without notice.⁹⁵

§ 41. **Necessaries.**—For the same reason and to the same extent as in the case of lunatics, intoxicated persons are liable on principles of *quasi-contract* for necessities which have been furnished to them.⁹⁶

§ 42. **Fraud upon intoxicated persons.**—Bargains made with intoxicated persons are peculiarly likely to have been induced by fraud. No different legal principle covers such cases from that applicable to all cases of fraud, but in view of the obvious impro-

⁹² Daniel on Negotiable Instruments, 214, quoting from *Gore v. Gibson*, 13 M. & W. 623. "It is just the same as if the defendant had written his name on the bill in his sleep in the state of somnambulism."

⁹³ *Page v. Krekey*, 137 N. Y. 307, 33 N. E. 311, 21 L. R. A. 409, 33 Am. St. Rep. 731; *State Bank v. McCoy*, 69 Pa. St. 204, 8 Am. Rep. 246; *McSparran v. Neeley*, 91 Pa. St. 17; *Smith v. Williamson*, 8

Utah, 219, 30 Pac. 753. See also *Miller v. Finley*, 26 Mich. 249, 12 Am. Rep. 306.

⁹⁴ *Supra*, § 38.

⁹⁵ Sales Act, Sec. 24. See *infra*, § 348.

⁹⁶ *Gore v. Gibson*, 13 M. & W. 623; *McCrillis v. Bartlett*, 8 N. H. 569; *Van Horn v. Hann*, 39 N. J. L. 207; *Brockway v. Jewell*, 52 Ohio St. 187, 39 N. E. 470.

priety of entering into a bargain with an intoxicated person, such a transaction should be closely scrutinized. It is, of course, not essential in order to make out a case of fraudulent advantage to show that the intoxication was sufficient altogether to overthrow the reasoning powers if it was sufficient to diminish the intelligence, and the party dealing with the intoxicated person knowingly made use of the situation in order to induce the bargain. If such a case has been made out the transaction may be set aside in any proceeding against the fraudulent party.⁹⁷ Especially if the intoxication was brought about by the other party is there ground for suspecting the good faith of the transaction and reason for setting it aside.⁹⁸

§ 43. **Married women.**—The incapacity of married women at common law may be considered in connection with their rights and liabilities under contracts, and as affecting attempted transfers of personal chattels to or by a married woman.

§ 44. **Rights and liabilities under contracts.**—A married woman could not make herself liable on a contract.⁹⁹ If she were liable upon a contract at the time of her marriage the liability upon this contract passed to her husband. Upon such ante-nuptial liabilities, however, the husband could not be sued alone,¹ and if the wife died before judgment had been recovered against both, the husband's liability was discharged,² except so far as he might have assets in his hands as her administrator. If the husband died before judgment had been recovered, the widow was again liable as if she had never been married.³ The capacity of a married woman to acquire rights under a contract, though limited, was not

⁹⁷ *Say v. Barwick*, 1 Ves. & B. 195; *Cooke v. Clayworth*, 18 Ves. 12; *Holland's Adm. v. Barnes*, 53 Ala. 83, 25 Am. Rep. 595; *Murray v. Carlin*, 67 Ill. 286; *Henry v. Ritenour*, 31 Ind. 136; *Warnock v. Campbell*, 25 N. J. Eq. 485; *Baird v. Howard*, 51 Ohio St. 57, 36 N. E. 732, 22 L. R. A. 846, 46 Am. St. Rep. 550; *Birdsong v. Birdsong*, 2 Head, 289; *Jones v. McGruder*, 87 Va. 360, 12 S. E. 792.

⁹⁸ *Johnson v. Medlicott*, 3 P. Wms.

130 note; *Wilcox v. Jackson*, 51 Iowa, 208, 1 N. W. 513; *Newell v. Fisher*, 11 Sm. & M. 431, 49 Am. Dec. 66; *O'Connor v. Rempt*, 29 N. J. Eq. 156; *Dunn v. Amos*, 14 Wis. 106.

⁹⁹ Com. Dig. Baron & Feme (Q.); *James v. Fowks*, 12 Mod. 101.

¹ *Garrard v. Guibilei*, 13 C. B. (N. S.) 832.

² Com. Dig., Baron & Feme (C. 2).

³ *Woodman v. Chapman*, 1 Campb. 189.

absolutely excluded. Obligations for which she rendered personal services were recognized as giving her a contractual right.⁴ It is true that the husband might reduce this right to possession and thereby acquire the fruits of it himself, but unless he did so the right survived to the wife or, if she died during her husband's life, passed to her representatives.⁵ A contractual right which a woman had before marriage was dealt with in the same way. It might be reduced to possession by the husband, but in the meantime was regarded as wife's chose in action and upon her husband's death, or her own, was dealt with accordingly.⁶

§ 45. **Effects of attempted transfers.**—As the chattels a woman had upon her marriage immediately passed to her husband, she was obviously incapacitated from transferring such property even aside from her inability to make a valid bargain, because she had no title.⁷ If property was transferred to her while she was married, it vested immediately in the husband in the same way as property owned by her at the time of her marriage, and it was immaterial whether the property was acquired by the wife's personal services, by gift, or otherwise.⁸

§ 46. **Modifications in equity.**—The almost absolute denial of property rights to a married woman under the common-law system was modified in equity by the doctrine of separate estate. Originally this was given effect by conveying to trustees property of which a married woman was made the beneficiary.⁹ Though it remained customary to convey the property to trustees, it became permissible to make the conveyance directly to the married woman for her separate use. A court of equity would then compel her husband to hold the legal estate, which he took by virtue of the common-law rules, in trust for his wife for her separate use. As to property held to the separate use of a married woman, courts

⁴ See cases in the following note.

⁵ *Brashford v. Buckingham*, Cro. Jac. 77; *Dalton v. Midland, etc., Ry. Co.*, 13 C. B. 474, 478.

⁶ Com. Dig., Baron & Feme (E. 3), (Z.).

⁷ "If the wife sell or dispose of the money or goods of the husband without his assent the sale is void,

and the husband may have trover." Com. Dig., Baron & Feme (Q.); *Manby v. Scott*, 1 Sid. 109, 122.

⁸ Com. Dig., Baron & Feme (E. 3); *Buckley v. Collier*, 1 Salk. 114.

⁹ Hayne, *Outlines of Equity*, Lecture VII; *Fettiplace v. Gorges*, 1 Ves. Jr. 46.

of equity gave her a limited power of contracting and charging it. In order that a contract should bind the separate estate, it was necessary that it should have been made with reference to the separate estate or that either from express language or otherwise the courts should find a purpose to charge the separate estate.¹⁰ In order to protect married women from improvident dispositions of their separate property, it became usual in settlements of property on married women to add a clause restraining them from "anticipation." The effect of this clause was to deprive the woman of power to alienate or charge the property.¹¹ The restraint might be confined to the principal or it might extend also to the income.¹²

§ 47. **Modern statutes.**—In England the Married Woman's Property Act of 1882 greatly extended the rights of married women. In this country there are statutes in nearly if not quite all the States extending or changing the rules of the common law. Except in so far as those rules are changed by statute, they still exist,¹³ but the statutes in most States are so far reaching that little is left of the old rules. The legislation in the different States, however, varies widely. Some States broadly provide that married women have the same rights and powers as if sole, others limit the right of a married woman to make certain kinds of contracts, such as contracts of suretyship or contracts with her husband.¹⁴ It may now be assumed in most jurisdictions that a married woman has the power to make ordinary purchases and sales of personal property.

§ 48. **Agency of wife for husband.**—Even at common law in early times it was recognized that the wife might be the agent of the husband and, as such, bind him by contracts and purchases. She herself incurred no liability even as a warrantor of her authority,¹⁵ but under modern statutes, giving a married woman

¹⁰ *Murray v. Barlee*, 3 Myl. & K. 209.

¹¹ *Re Currey*, 32 Ch. D. 361.

¹² *Cooper v. Macdonald*, 7 Ch. D. 288.

¹³ *Bank v. Partee*, 99 U. S. 325, 25 L. ed. 390; *Parker v. Lambert*, 31

Ala. 89; *Flesh v. Lindsay*, 115 Mo. 1, 37 Am. St. Rep. 374.

¹⁴ The American statutes are collected in 1 *Parsons on Contracts* (9th ed.), *371.

¹⁵ *Smout v. Ilbery*, 10 M. & W. 1.

power to contract, this would doubtless be otherwise. Whether a married woman is in any case agent for her husband, except in regard to contracts for necessities, is a question of fact to be determined by the same rules which govern the law of agency in general. So far as express authority is concerned, there is no occasion for discussion. As to implied authority, however, the relation of husband and wife necessarily differentiates the situation from that of ordinary cases of implied authority in the law of agency; though the differences are of fact rather than of legal principle. Where a husband and wife are living together and the wife is in the habit of buying goods and pledging her husband's credit for them and he has been in the habit of paying the price of such goods, it may fairly be inferred that he authorizes the continued purchase of goods of that character.¹⁶ This implication may, however, be avoided if it appears that the husband warned the seller not to give credit, or if the husband and wife separate.¹⁷ As to necessities for the wife or family, an obligation is imposed by law upon the husband similar to that which the law imposes upon infants and insane persons in regard to necessities furnished to them. There is some confusion in the early cases between this obligation of the husband to pay for necessities purchased on his credit by his wife, and his obligation to pay for goods which he had either impliedly or apparently authorized her to buy. The distinction is important because while an implied or apparent authority may be revoked by express prohibition, an obligation imposed by law, sometimes called

¹⁶ *Wallis v. Biddick*, 22 W. R. 76; *Ryan v. Sams*, 12 Q. B. 460; *Debenham v. Mellon*, 6 A. C. 24; *Dolan v. Brooks*, 168 Mass. 350, 353, 47 N. E. 408; *Bergh v. Warner*, 47 Minn. 250, 50 N. W. 77, 28 Am. St. Rep. 362; *Feiner v. Boynton*, 73 N. J. L. 136, 62 Atl. 420; *Gilman v. Andrus*, 28 Vt. 241, 67 Am. Dec. 713.

¹⁷ *Etherington v. Parrot*, 1 Salk. 118. See also *Jolly v. Rees*, 15 C. B. (N. S.) 628; *Debenham v. Mellon*, 6 A. C. 24; *McKee v. Cunningham*, 2 Cal. App. 684, 84 Pac. 260; *Hibler*

v. Thomas, 99 Ill. App. 355; *Olson Co. v. Youngquist*, 76 Minn. 26, 78 N. W. 870; *Hass v. Brady*, 49 N. Y. Misc. Rep. 235, 96 N. Y. Suppl. 449; *Segelbaum v. Ensminger*, 117 Pa. St. 248, 10 Atl. 759, 2 Am. St. Rep. 662. And as to goods of a character not needed for herself or for ordinary family use no inference of authority can be made, as where goods were bought by the wife to establish her sons in business. *Richburg v. Sherwood* (Tex. Civ. App.), 105 S. W. 524.

an "agency by necessity," cannot be. This agency by necessity is limited to cases where the husband is not fulfilling the obligation imposed upon him by law to furnish support to his wife according to his station in life, owing to his fault and not that of his wife, but within this limit the husband is bound even though the necessities are furnished against his will.¹⁸ If the parties are living apart the plaintiff in order to recover, on the theory of agency by necessity, must show that the separation is due to the husband's fault.¹⁹ If the wife is sufficiently provided for by her husband she has no agency by necessity to bind him even for articles of a sort which would ordinarily be classified as necessities.²⁰ Whether a wife has power to pledge her husband's credit in this way, if she has a property of her own from which she could derive an adequate support, is a point which has been somewhat questioned. Two early English cases²¹ denied her that right. In the latter of these cases Lord Ellenborough instructing the jury said: "The only credit given to the husband is an implied one, which arises from his situation and the inadequacy of the funds of the wife * * * If so [she was adequately provided for] the circumstance repels all idea of implied credit." This seems still to represent the law of England,²² and has some support in this country.²³ But in a recent New Hamp-

¹⁸ *Nissen v. Bendixsen*, 69 Cal. 521, 11 Pac. 29; *Rea v. Durkee*, 25 Ill. 503; *Raynes v. Bennett*, 114 Mass. 424; *Tebbets v. Hapgood*, 34 N. H. 420; *Ott v. Hentall*, 70 N. H. 231, 47 Atl. 80, 51 L. R. A. 226; *Clothier v. Sigle* (N. J. L.), 63 Atl. 865.

¹⁹ *Brinckerhoff v. Briggs*, 92 Ill. App. 537; *Sturbridge v. Franklin*, 160 Mass. 149, 35 N. E. 669; *Clothier v. Sigle* (N. J. L.), 63 Atl. 865; *Sturtevant v. Starin*, 19 Wis. 268. Compare *Baker v. Oughton*, 130 Iowa, 35, 106 N. W. 272.

²⁰ *Reid v. Teakle*, 13 C. B. 627; *Hoey v. Hechtman*, 2 Cal. App. 120, 83 Pac. 85 (statutory); *Bergh v.*

Warner, 47 Minn. 250, 252, 50 N. W. 77, 28 Am. St. Rep. 362; *Oatman v. Watrous*, 105 N. Y. Suppl. 174. Compare *Wenz v. McCann*, 107 N. Y. App. Div. 557, 95 N. Y. Suppl. 462.

²¹ *War v. Huntly*, 1 Salk. 118; *Liddlow v. Wilmot*, 2 Stark. 86.

²² *Dixon v. Hurrell*, 8 C. & P. 717.

²³ *Litson v. Brown*, 26 Ind. 489; *Hunt v. Hayes*, 64 Vt. 89, 23 Atl. 920, 15 L. R. A. 661, 33 Am. St. Rep. 917. In both these cases it should be noticed that the wife's means were derived from her husband. In the Vermont case as an allowance expressly for her support, and apparently sufficient for that purpose.

shire case,²⁴ the court in a careful opinion held that the wife's right was not limited by her possession of means sufficient to supply her reasonable wants. On principle, this decision seems sound. Certainly, if the husband is bound to support his wife when she is living with him in spite of the fact that she has means of her own, she ought to be allowed to pledge his credit if he fails to perform that obligation. The early English decisions went on the mistaken idea of an agency implied in fact instead of a right given by law. Certainly, the fact that the wife has separate property, if it is inadequate for her support, will not prevent her from pledging her husband's credit.²⁵ The wife herself at common law could not be made liable even for necessities.²⁶ Now by statute in a few States, her separate estate is bound though she did not buy the necessities.²⁷ If credit is in fact given to the wife, she alone will be liable even though the circumstances were such that she might have pledged her husband's credit.²⁸ The word "necessaries," in connection with married women, seems to have a wider meaning than when used in regard to infants. In a Massachusetts case,²⁹ the court said: "As a general rule the term 'necessaries,' applied to a wife, is not confined to articles of food or clothing required to sustain life, or to preserve decency, but includes such articles of utility as are suitable to maintain her according to the estate and degree of her husband." Accord-

²⁴ *Ott v. Hentall*, 70 N. H. 231, 47 Atl. 80. See also *Eiler v. Crull*, 99 Ind. 375; *Arnold v. Brandt*, 16 Ind. App. 169, 44 N. E. 936; *Scott v. Carothers*, 17 Ind. App. 673, 47 N. E. 389; *Thorpe v. Shapleigh*, 67 Me. 235; *Dolan v. Brooks*, 168 Mass. 350, 353, 47 N. E. 408; *Prescott v. Webster*, 175 Mass. 316, 56 N. E. 577.

²⁵ *Arnold v. Brandt*, 16 Ind. App. 169, 44 N. E. 936; *Prescott v. Webster*, 175 Mass. 316, 56 N. E. 577.

²⁶ *Marshall v. Rutton*, 8 T. R. 545.

²⁷ *Starr v. Curtis*, Annot. St. Ill. (1896), c. 68, § 15; Iowa Code (1897), § 3165; Mo. Rev. St. (1899), § 4340; Hill's Annot. Laws Or. (1892), § 2874.

²⁸ *Bentley v. Griffin*, 5 Taunt. 356; *Metcalf v. Shaw*, 3 Campb. 22; *Shelton v. Pendleton*, 18 Conn. 417; *Taylor v. Shelton*, 30 Conn. 122; *Halle v. Einstein*, 34 Fla. 589, 16 So. 554; *Connerat v. Goldsmith*, 6 Ga. 14; *Dolan v. Brooks*, 168 Mass. 350, 47 N. E. 408; *Swett v. Penrice*, 24 Miss. 416; *Tuttle v. Hoag*, 46 Mo. 38, 2 Am. Rep. 481; *Hill v. Goodrich*, 46 N. H. 41; *Stammers v. Macomb*, 2 Wend. 454; *Simmons v. McElwain*, 26 Barb. 420; *Catron v. Warren*, 1 Coldw. 358; *Carter v. Howard*, 39 Vt. 106; *Zent v. Sullivan* (Wash.), 91 Pac. 1088.

²⁹ *Raynes v. Bennett*, 114 Mass. 424, 429.

ingly the court refused to say, as matter of law, that a gold chain and locket and a gold watch and chain were not necessities, and evidence that the husband wore diamonds and kept a fast horse was held to be admissible.³⁰ The question whether money lent to the wife on the credit of her husband for the purchase of necessities and which is, in fact, expended by her for necessities can be recovered from the husband by the lender should be governed by the same principles previously discussed under the heading of infancy and insanity,³¹ but there is an additional circumstances in the case of husband and wife to which attention is not always directed. If the money is loaned on the credit of the wife there seems no possible ground for holding the husband liable. The English authorities have held broadly that the husband is not liable,³² and these cases have been followed to some extent in this country.³³ In equity the husband, on the other hand, has been held liable.³⁴ In the decisions both at law and in equity it does not seem generally to have been regarded as material whether the credit was in fact given by the lender to the husband. This seems, however, a vital point and the importance of it is brought out in a recent Massachusetts decision.³⁵

³⁰ See further, *Phillipson v. Hayter*, L. R. 6 C. P. 38; *Shelton v. Hoadley*, 15 Conn. 535; *Clark v. Cox*, 32 Mich. 204; *Sauter v. Scrutchedfield*, 28 Mo. App. 150. Under an Illinois statute a waist of Honiton lace, costing \$200, was held a "family expense" for which a wife could pledge her husband's credit. *Ross v. Johnson*, 125 Ill. App. 65. A set of "Stoddard's Lectures" was held not necessities in *Shuman v. Steinel*, 129 Wis. 422, 109 N. W. 74, 116 Am. St. Rep. 961.

³¹ See §§ 24, 34.

³² *Knox v. Bushell*, 3 C. B. (N. S.) 334; *Paule v. Goding*, 2 F. & F. 585.

³³ *Zeigler v. David*, 23 Ala. 127; *Gilbert's Ex. v. Plant*, 18 Ind. 308; *Anderson v. Cullen*, 16 Daly, 15; *Schwartz v. Bisland*, 4 N. Y. Misc. Rep. 534; *Marshall v. Perkins*, 20 R. I. 34, 37 Atl. 301, 78 Am. St.

Rep. 841; *Gill v. Read*, 5 R. L. 343, 73 Am. Dec. 73.

³⁴ *Harris v. Lee*, 1 P. Wms. 482; *Matter of Wood's Est.*, 1 De G. J. & S. 465; *Jenner v. Morris*, 3 De G. F. & J. 45; *Deare v. Soutten*, L. R. 9 Eq. 151; *Kenyon v. Farris*, 47 Conn. 510, 36 Am. Rep. 86; *Reed v. Crissey*, 63 Mo. App. 184; *Walker v. Simpson*, 7 Watts & S. (Pa.) 83, 42 Am. Dec. 216. See, however, *Leuppie v. Osborn's Ex.*, 52 N. J. Eq. 637, 29 Atl. 433, where the court refused to apply the rule to a case where the husband's default was the result of misfortune.

³⁵ *Skinner v. Tirrell*, 159 Mass. 474, 34 N. E. 692, 21 L. R. A. 673, 38 Am. St. Rep. 447. It is perhaps a fair implication from the decision that the court would not have allowed recovery even though the

§ 49. **Corporations.**—Corporations derive their power from the government which creates them, and if they act beyond the limits of power given them by that government, their acts are at least unwarranted by law and, according to many authorities, absolutely void. It is beyond the scope of this work to enter upon a full discussion of the law of *ultra vires*, but the effect upon contracts to sell and sales made by a corporation without charter power to enter into such a transaction may be briefly stated. If the contract in question is wholly executory on both sides it will not be enforced.³⁶ It is unnecessary to decide in such cases whether the invalidity is due to lack of power or simply to violation of authority. In the case of contracts which have been executed wholly or partly on either side the distinction becomes important. All jurisdictions agree in allowing some relief to the party which has parted with consideration, but the grounds and the measure of recovery differ. The view which has the support of perhaps a majority of the most authoritative courts is that the contract is absolutely void because the corporation was wholly lacking in capacity to make such a bargain and, consequently, that recovery must be had on principles of *quasi-contract*, for the benefit that has been rendered to or by the corporation rather than for what was actually promised.³⁷ A number of American courts, however, refuse to adopt this view and probably with greater justice hold that the contract is not void, that the corporation in fact made it and that it is merely a question of public policy, using the words in a broad sense, whether the con-

money had been borrowed on the credit of the husband, but the decision was primarily rested on the ground that the wife borrowed the money on her own credit.

³⁶ *Ashbury Ry. Carriage Co. v. Riche*, L. R. 7 H. L. 653; *Atty.-Gen. v. Gt. Eastern Ry. Co.*, 5 A. C. 473; *Camden, etc., R. R. Co. v. May's Landing, etc., R. R. Co.*, 48 N. J. L. 530, 7 Atl. 523; *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135, 25 N. E. 264, 19 Am. St. Rep. 482. See many

decisions collected in 29 Am. & Eng. Encyc. 49.

³⁷ *Central Transportation Co. v. Pullman's Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. ed. 55; *Pullman's Co. v. Central Transportation Co.*, 171 U. S. 138, 18 S. Ct. 808, 43 L. ed. 108; *Davis v. Old Colony R. R. Co.*, 131 Mass. 258, 41 Am. St. Rep. 221; *Tennessee Ice Co. v. Raine*, 107 Tenn. 151, 64 S. W. 29. See many decisions collected in 29 Am. & Eng. Encyc. 54.

tract should be enforced. These courts hold that if the contract has been partly executed on either side, the other party will not be allowed to set up the defense of *ultra vires* in order to defeat liability on a promise made in return.³⁸

³⁸ Heims Brewing Co. v. Flannery, E. 496, 92 Am. St. Rep. 761. See 137 Ill. 309, 27 N. E. 286; Rehberg many decisions collected in 29 Am. v. Tontine Surety Co., 131 Mich. 135, & Eng. Encyc. 57. See also *infra*, 91 N. W. 132; Vought v. Eastern § 663. Bldg. Assoc., 172 N. Y. 508, 65 N.

CHAPTER III.

FORMALITIES OF THE CONTRACT.

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§ 50. Contracts to sell, or sales, may be written or oral — Provisions of the Sales Act.—

Sec. 3. FORM OF CONTRACT OR SALE.—Subject to the provisions of this act and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly

by word of mouth, or may be inferred from the conduct of the parties.¹

This section states an obvious rule of the common law. Aside from Statutes of Frauds the only importance of a writing in a contract to sell or a sale is that it furnishes evidence which can not be varied by parol. Even though parties expressly contract that subsequent agreements shall not be valid unless in writing, a subsequent oral agreement is not thereby invalidated, for the later agreement indicates a rescission of the earlier.^{1a}

§ 51. **Statutes of Frauds in England and America.**—The seventeenth section of the English Statute of Frauds² is as follows: “And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June [A. D. 1677] no contract for the sale of any goods, wares, and merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.” In the United States a corresponding provision has been passed in all the States but Alabama, Arizona, Delaware, Illinois, Kansas, Kentucky, Louisiana, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, and West Virginia. The language of the American statutes is not uniform and often not quite the same in meaning as that of the English statute. Reference will be made hereafter to these changes in wording.

¹This follows section 3 of the English act except for the omission of a proviso contained in that act: “Provided that nothing in this section shall affect the law relating to corporations.” This proviso was inserted in the English act out of deference to the old law that corporations could contract only under seal. This is not law in England today to its former extent, and it

certainly is not law in this country, so far as contracts to sell and sales of goods are concerned. It was thought unnecessary to insert the proviso for this reason.

^{1a}Nichols & Shepard Co. v. Maxson, 76 Kan. 607, 92 Pac. 545. See also National Bank v. Dutcher, 123 Ia. 413, 104 N. W. 497, 1 L. R. A. (N. S.) 142.

²29 Car. II, c. 3, § 17.

§ 52. **Statute of Frauds in Sales Act.**—The effect of the English statute has been preserved in the English Sale of Goods Act, section 4, though the wording has been changed and elaborated. In the Sales Act, except in one or two particulars which will be hereafter referred to, the wording of the later English statute has been followed.

Sec. 4. STATUTE OF FRAUDS.—(1.) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars³ or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

(2.) The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

(3.) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods.

§ 53. "A contract to sell or a sale."—The question was early made under the English Statute whether it applied to executory contracts to sell goods as well as to sales, and there were decisions to the effect that executory contracts were not included,⁴ but the contrary view was afterward taken and the correctness of it confirmed by a statute known as Lord Tenterden's Act.⁵ This

³ Amended to \$100 in Connecticut and to \$2,500 in Ohio.

506; *Clayton v. Andrews*, 4 Burr. 1201.

⁴ *Towers v. Osborne*, 1 Strange,

⁵ 9 George IV, c. 14, § 7.

statute is in terms merely declaratory, and such it has always been considered, so that though Lord Tenterden's Act has never been enacted in this country there has never been any doubt that executory contracts are within the terms of Statutes of Frauds.⁶ It is probable, however, that the early English decisions in regard to this matter have been partly responsible for the confusion of the law in this country in regard to contracts for work and labor as distinguished from contracts to sell. The words of the Sales Act make it clear that executory contracts are covered. A contract to bequeath personal property has been held within the statute.⁷

§ 54. **Contracts of work and labor—The English rule.**—Contracts for work and labor have never been within the terms of Statutes of Frauds. It is, therefore, necessary to mark the line which divides such contracts from contracts to sell. The early English decisions⁸ suggested different rules which have been influential upon the decisions in this country but which have been superseded in England by the decision of *Lee v. Griffin*,⁹ in which it was decided that a contract for the manufacture of a set of false teeth to the order of the defendant's testatrix was a contract for the sale of goods. The rule in that case was thus stated by Blackburn, J.: "If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labor; but if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered. The case of an attorney employed to prepare a deed is an illustration of this latter proposition. It cannot be said that the paper and ink he uses in the preparation of the deed are goods sold and delivered. The case of a printer printing a book would most probably fall within the same category * * *. I do not think that the test to apply to these cases is whether the value of the work exceeds that of the materials used in its execution; for, if a sculptor were employed to execute a

⁶ See cases cited *infra*, § 55; also *Barr v. Satcher*, 72 S. C. 35.

⁷ *Wallace v. Long*, 105 Ind. 522, 5 N. E. 666, 55 Am. Rep. 222.

⁸ *Rondeau v. Wyatt*, 2 H. Bl. 63; *Garbutt v. Watson*, 5 B. & Ald. 613;

Clay v. Yates, 1 H. & N. 73.

⁹ 1 B. & S. 272.

work of art, greatly as his skill and labor, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would, in my opinion, nevertheless be a contract for the sale of a chattel." This rule has been carried to the extent of holding that a contract to paint a portrait is a contract for the sale of goods.¹⁰ Canada follows the English decisions.^{10a}

§ 55. **American rules.**—Although the rule finally reached in England is absolutely logical and is the only rule that has ever been suggested for which so much can be said, it has not been widely followed in this country. The only decisions approving it to its full extent seem to be Missouri cases.¹¹ The rule most commonly adopted is what is known as the Massachusetts rule, which was first laid down by Chief Justice Shaw, in *Mixer v. Howarth*.¹² This was an action to recover the price of a buggy made to the defendant's order and the court held the plaintiff entitled to recover. Chief Justice Shaw stated the principles governing the case as follows: "When the contract is a contract of sale, either of an article then existing, or of articles which the vendor usually has for sale in the course of his business, the statute applies to the contract, as well where it is to be executed at a future time, as where it is to be executed immediately. * * * But where it is an agreement with a workman to put materials together and construct an article for the employer, whether at an agreed price or not, though in common parlance it may be called a purchase and sale of the article, to be completed *in futuro*, it is not a sale until an actual or constructive delivery and acceptance; and the remedy for not accepting is on the agreement." This rule has been followed both in Massa-

¹⁰ *Isaacs v. Hardy*, 1 Cab. & E. 287.

^{10a} *Canada Bank Note Co. v. Toronto Ry. Co.*, 22 Ont. App. 462; *Wolfenden v. Wilson*, 33 U. C. Q. B. 442.

¹¹ *Pratt v. Miller*, 109 Mo. 78, 18 S. W. 965, 32 Am. St. Rep. 656; *Burrell v. Highleyman*, 33 Mo. App. 183; *Pike Co. v. Richardson Co.*, 42 Mo. App. 272; *Helmert v. Nagel*, 112

Mo. App. 202; *Schmidt v. Rozier*, 121 Mo. App. 306, 98 S. W. 791. The facts of these cases do not present an extreme application of the English rule. That last cited was a contract of a tailor to make a customer a coat and waistcoat according to a special pattern.

¹² 21 Pick. 205, 32 Am. Dec. 256.

chusetts¹³ and elsewhere, either exactly or substantially.¹⁴ In New York still another rule is in force. The distinction is drawn between goods to be manufactured, which are treated as not within this statute, and goods already in existence which are treated as within the statute, even though something remains to be done before they are in deliverable condition.¹⁵ This rule also has had a wide following in this country.¹⁶ In the Sales

¹³ *Goddard v. Binney*, 115 Mass. 450, 15 Am. Rep. 112. But if the seller is to procure the goods from a third person who manufactures them, the contract is within the statute. *Smalley v. Hamblin*, 170 Mass. 380, 49 N. E. 626.

¹⁴ *Flynn v. Dougherty*, 91 Cal. 669, 27 Pac. 1080, 14 L. R. A. 230; *Atwater v. Hough*, 29 Conn. 508, 79 Am. Dec. 229; *Cason v. Cheely*, 6 Ga. 564; *Yoe v. Newcomb*, 33 Ind. App. 615, 71 N. E. 256; *Edwards v. Grand Trunk R. Co.*, 48 Me. 379; *Crockett v. Scribner*, 64 Me. 447; *Turner v. Mason*, 65 Mich. 662, 32 N. W. 846; *Russell v. Wisconsin Ry. Co.*, 39 Minn. 145, 39 N. W. 302; *Brown & Hayward Co. v. Wunder*, 64 Minn. 450, 67 N. W. 357; *Schloss v. Josephs*, 98 Minn. 442, 108 N. W. 474; *Pitkin v. Noyes*, 48 N. H. 294, 97 Am. Dec. 615, 2 Am. Rep. 218; *Prescott v. Locke*, 51 N. H. 94, 12 Am. Rep. 55; *Pawelski v. Hargreaves*, 47 N. J. L. 334, 54 Am. Rep. 162; *Mechanical Boiler Co. v. Kellner*, 62 N. J. L. 544, 43 Atl. 599; *Roubicek v. Haddad*, 67 N. J. L. 522, 51 Atl. 938; *Orman v. Hager*, 3 N. Mex. 331, 9 Pac. 363; *Puget Sound Depot v. Rigby*, 13 Wash. 264, 43 Pac. 39; *Meinke v. Falk*, 55 Wis. 427, 13 N. W. 545, 42 Am. Rep. 722; *Hanson v. Roter*, 64 Wis. 622, 25 N. W. 530; *Gross v. Heckert*, 120 Wis. 314; *Williams-Hayward Co. v. Brooks*, 9 Wyo. 424, 64 Pac. 342. See also *Sawyer v. Ware*, 36 Ala. 675; *Scales v.*

Wiley, 68 Vt. 39, 33 Atl. 771; *Wisconsin Fibre Co. v. Jeffris Lumber Co.*, Wis. , 111 N. W. 237.

¹⁵ *Parsons v. Loucks*, 48 N. Y. 17, 8 Am. Rep. 517; *Cooke v. Millard*, 65 N. Y. 352, 22 Am. Rep. 619; *Hinds v. Kellogg*, 13 N. Y. Suppl. 922; affirmed, 133 N. Y. 536, 30 N. E. 1148; *Deal v. Maxwell*, 51 N. Y. 652; *Warren Co. v. Holbrook*, 118 N. Y. 586, 23 N. E. 908, 16 Am. St. Rep. 788; *Joy v. Schloss*, 15 Abb. N. C. 373; *Talmadge v. Lane*, 17 N. Y. Misc. Rep. 731, 41 N. Y. Suppl. 413; *Gerli v. Metzger*, 99 N. Y. St. Rep. 858. See also *Roubicek v. Haddad*, 67 N. J. L. 522, 51 Atl. 938.

¹⁶ *Bennett v. Nye*, 4 Greene (Iowa), 410 (compare *Mighell v. Dougherty*, 86 Iowa, 480, 53 N. W. 402, 17 L. R. A. 755, 41 Am. St. Rep. 511; *Lewis v. Evans*, 108 Iowa, 296, 79 N. W. 81; *Dierson v. Petersmeyer*, 109 Iowa, 233, 80 N. W. 389); *Eichelberger v. McCauley*, 5 H. & J. 213, 9 Am. Dec. 514; *Bagby v. Walker*, 78 Md. 239, 27 Atl. 1033; *Deal v. Maxwell*, 51 N. Y. 652; *Higgins v. Murray*, 4 Hun, 565, 73 N. Y. 252; *Rutty v. Consolidated Fruit Jar Co.*, 13 N. Y. Suppl. 331; *Winship v. Buzzard*, 9 Rich. 103; *Suber v. Pullin*, 1 S. C. 273; *Mattison v. Westcott*, 13 Vt. 258; *Ellison v. Brigham*, 38 Vt. 64; *Forsyth v. Mann*, 68 Vt. 116, 34 Atl. 481, 32 L. R. A. 788. See also *Hientz v. Burkhard*, 29 Or. 55, 43 Pac. 866, 54 Am. St. Rep. 777.

Act it was thought best to follow the Massachusetts rule as representing, on the whole, the weight of American authority, although the English rule is more exact from a scientific standpoint; as a practical rule it seems to have no advantage.¹⁷

§ 56. **Exchanges.**—It is said by Chalmers in his annotation of the Sale of Goods Act that an exchange is not within the meaning of sale in the Statute or Frauds. He cites no authority for this, however, and in this country it is well settled that a contract of exchange or barter is within the statute.¹⁸ As the mischief is the same whether the bargain is one for a money price or an exchange or barter, it is desirable that the rule should be the same. Under the definition of sale in section 1, and that of price in section 9 (2) of the Sales Act, there can be no question that an agreement to transfer title to goods, or an actual transfer of title, in consideration of any personal property transferred or promised to be transferred, is within the terms of section 4 of the Act.¹⁹

§ 57. **Mortgages.**—It is not clear at common law whether a mortgage of goods is to be regarded as within the statute. In jurisdictions where it is held that a mortgage does not transfer

¹⁷ By express provision of a few statutes some definition is made. In California (Civ. Code, § 1740), agreements to manufacture goods from materials furnished by the manufacturer or another are excluded. See *Flynn v. Dougherty*, 91 Cal. 669, 27 Pac. 1080, 14 L. R. A. 230. So in Iowa (Code 1897, § 4626), contracts requiring the expenditure of labor, skill, or money for producing or procuring the goods are excepted. See *Dierson v. Petersmeyer*, 109 Iowa, 233, 80 N. W. 389; *Lewis v. Evans*, 108 Iowa, 296, 79 N. W. 81.

¹⁸ *Raymond v. Colton*, 104 Fed. Rep. 219, 43 C. C. A. 501; *Franklin v. Matoa Gold Min. Co.*, 158 Fed. Rep. 941, C. C. A. ; *Kuhns v. Gates*, 92 Ind. 66; *Wallace v. Long*, 105 Ind. 522, 526, 5 N. E. 666, 55 Am. Rep. 222; *Dowling v. McKenney*, 124 Mass.

478; *Gorman v. Brossard*, 120 Mich. 611, 79 N. W. 903; *Rutan v. Hinchman*, 30 N. J. L. 255; *Misner v. Strong*, 181 N. Y. 163, 168, 73 N. E. 965. In *Spinney v. Hill*, 81 Minn. 316, 84 N. W. 116, however, it was held, citing no authority, that an agreement to transfer stock in part payment for services was not a sale of the stock within the meaning of the Statute of Frauds. But see the case of *White v. Drew*, 56 How. Pr. 53, where a contract to give stock for valuable information was regarded as within the statute, though the bargain was enforced because the statute was held to have been satisfied. Also *Wallace v. Long*, 105 Ind. 522, 526, 5 N. E. 666, 55 Am. Rep. 222.

¹⁹ See *infra*, § 98.

title but merely creates a lien, it seems obvious that the statute must be held inapplicable. Even in jurisdictions where a mortgage is held to transfer a title defeasible upon the condition subsequent of payment by the mortgagor, authority points in the same direction.²⁰ In view of the definitions in section 75 of the Sales Act, it is clear that mortgages are not within the words "contract to sell" or "sale" in section 4.

§ 58. **Partnership agreements.**—A contract by which parties agree to acquire and sell, or simply to sell, property for their joint benefit is not a contract to sell, or a sale, within the terms of the statute.²¹ Similarly an agreement between partners to dissolve the partnership and divide the assets is not within the statute, even though one partner, who has advanced the money with which the assets had been purchased, is by the agreement to have a lien on the property until the other partner pays his share of the debt.²² With such cases should be contrasted a case where the agreement is that one party shall buy goods and, subsequently, resell a share of them to the other. Such a contract is within the statute.²³ Where choses in action are expressly included in the terms of the statute the sale of a partner's interest in a business would seem also to require a writing.²⁴ But otherwise such a sale is not within the statute.²⁵

²⁰ *Gleason v. Drew*, 9 Greenl. 79; *Alexander v. Ghiselin*, 5 Gill, 138; *Bogigian v. Hassanoff*, 186 Mass. 380, 382, 71 N. E. 789. See also *Hel-frech, etc., Co. v. Honaker*, 25 Ky. L. Rep. 717, 76 S. W. 342. In *Cerny v. Paxton & Gallagher Co.*, Neb., 110 N. W. 882, a debtor gave a chattel mortgage to his creditor on the faith of a promise by the latter that, if the property when sold at auction did not bring above a certain price, he would bid it in and allow the debtor to sell it at private sale and keep any balance above the debt. This agreement was held not within the statute.

²¹ *Colt v. Clapp*, 127 Mass. 476; *Bullard v. Smith*, 139 Mass. 492, 2 N. E. 86; *Bogigian v. Hassanoff*, 186

Mass. 380, 71 N. E. 789; *Buckner v. Ries*, 34 Mo. 357; *McNealy v. Bartlett*, 123 Mo. App. 58, 99 S. W. 767; *Coleman v. Eyre*, 45 N. Y. 38; *Sanger v. French*, 157 N. Y. 213, 234, 51 N. E. 979; *Treat v. Hiles*, 68 Wis. 344, 32 N. W. 517, 60 Am. Rep. 858. But see *Mace v. Heath*, 30 Neb. 620, 46 N. W. 918. A fortiori, a contract of agency under which the agent is to purchase goods for the principal is not within the statute. *Wiger v. Carr*, Wis., 111 N. W. 657, 11 L. R. A. (N. S.) 650.

²² *Mason v. Spiller*, 186 Mass. 346, 71 N. E. 779.

²³ *Brown v. Slauson*, 23 Wis. 244.

²⁴ See *infra*, § 67.

²⁵ *Vincent v. Vieths*, 60 Mo. App. 9.

§ 59. **Agreements of compromise.**—A contract by which one person agrees merely to surrender a claim upon goods is not within the statute, for the title in the other person vests in him, not by virtue of a transfer from the adverse claimant, but by virtue of his own original title.²⁶ So where parties having competing executions agree that the property shall be sold under one of them and the proceeds divided, they are not agreeing to transfer title to the property or to their claims but merely to divide the money received from the sale.²⁷

§ 60. **"Of any goods."**—The words of the original English statute were "goods, wares, and merchandise," but the term "goods," as defined in the Sales Act, is as wide in its meaning as the several words used in the older statute. The most troublesome question in any attempt to define the meaning of goods relates to the dividing line between real and personal property. Although the Statutes of Frauds in England and in this country require a bargain in regard to real estate to be in writing, it is frequently important to distinguish whether a transaction is within the section of the statute relating to lands or in that relating to goods, for there is no limitation of value in the section relating to lands, and that section also offers only one method of making the transaction enforceable, namely, a writing, whereas the section relating to goods offers several alternatives.

§ 61. **Crops and fructus industriales.**—It would seem, on principle, that as long as crops are growing or even standing matured in the earth, they are affixed to the realty; and that an agreement for an immediate transfer of title to them while thus growing or standing is an agreement for the sale of an interest in land. Doubtless the earth may be used as a storehouse for articles of any kind, but to apply this reasoning, as has been done to the case of trees in a nursery,²⁸ is pushing it beyond the point where it is justified by the facts. In truth, the nurseryman has attached his trees to the soil and the fact that he means to detach them later does not diminish the bond

²⁶ *Clark v. Duffey*, 24 Ind. 271; *Holden v. Gilfeather*, 78 Vt. 405, 63 Atl. 144.

²⁷ *Mygatt v. Tarbell*, 78 Wis. 351,

47 N. W. 618. See also *Goldbeck v. Kensington Bank*, 147 Pa. St. 267, 23 Atl. 565.

²⁸ *Miller v. Baker*, 1 Met. 27.

existing in the meantime. On the other hand it is clear, on principle, that a contract to sell a particular crop after it has been gathered is a contract for the sale of goods, even though at the time the contract was made the crop was still growing (unless under a local American rule it was a contract for work and labor), for the contract is not to sell the standing crop but to sell the harvested crop. There can be no doubt that the law supports this proposition²⁹ but it does not support the criticisms as to trees in a nursery. The tendency of the decisions has been to treat crops as personal property in some cases where strict reasoning might lead to a contrary conclusion. The vegetable products of the earth have been classified as *fructus naturales* and *fructus industriales*. In the former class are included everything which grows spontaneously, or without annual cultivation, such as trees or grass. In the second class are included crops which are the subject of yearly planting and cultivation. By a rule arbitrary, but not inconvenient, *fructus industriales* are treated in every case as goods, whether matured or not at the time when by the terms of the bargain they were to be sold.³⁰ The definition of goods in the Sales Act clearly involves the adoption of this rule. Some difficult questions have arisen in regard to the line dividing *fructus naturales* and *fructus industriales*. Thus, in the case of fruit, though the crop is picked annually, it is not the result of annual planting and not always of regular cultivation, but because of the annual character of the crop, together with the labor required to produce it, it has been held that a crop of peaches or other orchard

²⁹ Evans v. Roberts, 5 B. & C. 829; Watts v. Friend, 10 B. & C. 446; Bowman v. Conn, 8 Ind. 58; Wain-scott v. Kellogg, 84 Mo. App. 621; Pitkin v. Noyes, 48 N. H. 294, 97 Am. Dec. 615, 2 Am. Rep. 218. If the contract is to raise and sell a crop, under the New York rule it is a contract for work and labor. Talmadge v. Lane, 17 N. Y. Misc. Rep. 731, 41 N. Y. Suppl. 413.

³⁰ Marshall v. Green, 1 C. P. D. 35; Marshall v. Ferguson, 23 Cal. 65; Davis v. McFarlane, 37 Cal. 634, 99 Am. Dec. 340; Bull v. Griswold, 19 Ill. 631; Sherry v. Picken, 10

Ind. 375; Moreland v. Myall, 14 Bush, 474; Bryant v. Crosby, 40 Me. 9; Purner v. Piercy, 40 Md. 212, 17 Am. Rep. 591; Whitmarsh v. Walker, 1 Met. 313; Smock v. Smock, 37 Mo. App. 56; Holt v. Holt, 57 Mo. App. 272; Swafford v. Spratt, 93 Mo. App. 631, 67 S. W. 701; Wimp v. Early, 104 Mo. App. 85; Newcomb v. Ramer, 2 Johns. 421, note; Webster v. Zielly, 52 Barb. 482; Walton v. Jordan, 65 N. C. 170; Carson v. Browder, 2 Lea, 701; Kerr v. Hill, 27 W. Va. 576. Compare Powell v. Rich, 41 Ill. 466; Powers v. Clarkson, 17 Kan. 218.

fruit is to be classed as *fructus industriales*.³¹ The same has been held in regard to hops.³²

§ 62. **Trees and fructus naturales.**—In England the court has gone to great length in supporting the validity of an oral contract to sell standing trees. In *Marshall v. Green*,³³ there was a parol sale of thirty-two trees “to be got away as soon as possible.” After six of the trees had been cut down the seller countermanded the sale, but the buyer continued to cut and the action was brought by the seller because of this. The court held that “where the thing sold is to derive no benefit from the land, and it is to be taken away immediately, the contract is not for an interest in land.” Since part of the trees had been taken away the section of the statute relating to goods was satisfied and the bargain was held to be enforceable. The same doctrine prevails in several States in this country,³⁴ but “the courts of most of the American States that have considered the question hold expressly that a sale of growing or standing timber is a contract concerning an interest in land.”³⁵

§ 63. **Water and ice.**—Water when separated from a stream or

³¹ *Purner v. Piercy*, 40 Md. 212, 17 Am. Rep. 591; *Vulicevich v. Skinner*, 77 Cal. 239, 19 Pac. 424; *Smock v. Smock*, 37 Mo. App. 56.

³² *Rodwell v. Phillips*, 9 M. & W. 501; *Frank v. Harrington*, 36 Barb. 415.

³³ 1 C. P. D. 35.

³⁴ *Bostwick v. Leach*, 3 Day, 476; *Cain v. McGuire*, 13 B. Mon. 340; *Byassee v. Reese*, 4 Metc. (Ky.) 372, 83 Am. Dec. 481; *Prater v. Campbell*, 110 Ky. 23, 60 S. W. 918; *Cutler v. Pope*, 13 Me. 377; *Erskine v. Plummer*, 7 Me. 447, 22 Am. Dec. 216; *Smith v. Bryan*, 5 Md. 141, 59 Am. Dec. 104; *Nettleton v. Sykes*, 8 Met. (Mass.) 34; *Claffin v. Carpenter*, 4 Met. (Mass.) 580, 38 Am. Dec. 381. See also *Sterling v. Baldwin*, 42 Vt. 306.

³⁵ *Hirth v. Graham*, 50 Ohio St. 57, 33 N. E. 90, 19 L. R. A. 721, 40 Am. St. Rep. 641. To the same effect are *Heflin v. Bingham*, 56 Ala.

566, 28 Am. Rep. 776; *Coody v. Gress Lumber Co.*, 82 Ga. 793, 10 S. E. 218; *Hostetter v. Auman*, 119 Ind. 7, 20 N. E. 506; *Cool v. Lumber Co.*, 87 Ind. 531; *Terrell v. Frazier*, 79 Ind. 473; *Owens v. Lewis*, 46 Ind. 488, 15 Am. Rep. 295; *Armstrong v. Lawson*, 73 Ind. 498; *Jackson v. Evans*, 44 Mich. 510, 7 N. W. 79; *Kileen v. Kennedy*, 90 Minn. 414, 97 N. W. 126; *Harrell v. Miller*, 35 Miss. 700, 72 Am. Dec. 154; *Walton v. Lowry*, 74 Miss. 484, 21 So. 243; *Lyle v. Shinnebarger*, 17 Mo. App. 66; *Howe v. Batchelder*, 49 N. H. 204; *Putney v. Day*, 6 N. H. 430, 25 Am. Dec. 470; *Westbrook v. Eager*, 16 N. J. L. 81; *Green v. Armstrong*, 1 Denio, 550; *Bishop v. Bishop*, 11 N. Y. 123, 62 Am. Dec. 68; *Mizell v. Burnett*, 4 Jones (N. C.), 249, 69 Am. Dec. 744; *Drake v. Howell*, 133 N. C. 162, 45 S. E. 539; *Clark v. Guest*, 54 Ohio St. 298, 43 N. E. 862; *Bowers v. Bowers*, 95 Pa. St. 477;

lake becomes personalty. In the case of *Jersey City v. Harrison*,³⁶ where one town had contracted to supply water to another at a specified price per million gallons, the court held the contract to be "a contract for the sale of goods, wares, and merchandise, as fully as if the water was to be delivered in bottles."³⁷ Ice which has been cut is personal property, and a contract to sell and deliver after cutting would be a contract to sell goods. It has even been broadly held that a sale of ice, whether the subject of the sale is ice in the water or not, is a sale of goods, owing to the ephemeral character of ice and because it can only be used and sold as personalty.³⁸

§ 64. **Minerals, manure.**—Minerals also, though part of the realty, may be severed and, when severed, become goods. A contract to sell severed iron ore would be a contract to sell goods even though the ore which the parties expected, or even contracted, should be the subject of the sale, was not yet mined; but any attempt to give the buyer a right in the ore before it was mined would be an attempt to transfer an interest in land.³⁹ As to manure, the Massachusetts court said:⁴⁰ "It is till then (the time when mixed with the soil) an incident of the real estate of such peculiar character that while it remains only constructively annexed, it will be personal property if the parties interested agree so to treat it."⁴¹

§ 65. **Fixtures.**—The legal interest which a tenant has in articles affixed to the realty, but which he has a right to remove, is a right to sever the fixtures and revert himself with the title to them as personalty. Consequently what purports to be a sale of fixtures by a tenant to his landlord is in reality a surrender by the tenant of his right to sever. The title is already in the landlord

Miller v. Zufall, 113 Pa. St. 317, 6 Atl. 350; *Knox v. Haralson*, 2 Tenn. Ch. 232; *Buck v. Pickwell*, 27 Vt. 157; *Fluharty v. Mills*, 49 W. Va. 446, 38 S. E. 521; *Daniels v. Bailey*, 43 Wis. 566; *Lillie v. Dunbar*, 62 Wis. 198, 22 N. W. 467; *Seymour v. Cushway*, 100 Wis. 580, 76 N. W. 769, 69 Am. St. Rep. 957.

³⁶ 71 N. J. L. 69, 72 N. J. L. 185, 58 Atl. 100.

³⁷ 71 N. J. L. 69, 70.

³⁸ *Higgins v. Kusterer*, 41 Mich. 318, 2 N. W. 13, 32 Am. Rep. 160. Compare *State v. Pottmeyer*, 33 Ind. 402.

³⁹ See *McConathy v. Lanham*, 25 Ky. L. Rep. 971, 76 S. W. 535.

⁴⁰ *Strong v. Doyle*, 110 Mass. 92, 93.

⁴¹ The court, therefore, held title to the manure in question did not pass to the purchaser of a farm, it having been agreed that it should not.

by virtue of his ownership of the real estate of which the fixtures form part. The bargain is, therefore, neither within the fourth section nor the seventeenth section of the English statute.⁴² A case where a tenant attempts to sell his fixtures to a third person should be sharply distinguished. Such a transaction involves an agreement on the part of the tenant to transfer the title to them, and, therefore, it is a contract to sell goods. Even if it is contemplated that the buyer shall make the severance, he can only become owner of the property severed by virtue of the agreement that the tenant has made to transfer title. This distinction has not been sufficiently observed by the cases.⁴³ What are fixtures may depend to some extent upon the agreement of the parties.⁴⁴ For the same reason that a sale of fixtures by a tenant to his landlord is not a sale of goods, so a contract by which one person agrees to make improvements on land of another who agrees to pay subsequently for the improvements is not within the statute, whether the agreement is made before or after the improvements have been made.⁴⁵

⁴² *Hallen v. Runder*, 1 C. M. & R. 266; *Lee v. Gaskell*, 1 Q. B. D. 700; *South Baltimore Co. v. Muhlbach*, 69 Md. 395, 16 Atl. 117, 1 L. R. A. 507.

⁴³ *Lee v. Gaskell*, 1 Q. B. D. 700; *Moody v. Aiken*, 50 Tex. 65. These were both cases where a sale was made to a third person and, in both, the statute was held inoperative. In *Lee v. Gaskell*, Cockburn, C. J., said: "Fixtures, although they could be removable during the tenancy, as long as they remained unsevered, are part of the freehold and you cannot dispose of them to the landlord or any one else as goods and chattels because they are not severed from the freehold so as to become goods and chattels." To this it should be answered that it is settled that the statute applies to contracts for the sale of goods not in existence as such, or in existence at all at the time of the bargain. The decision of the cases of *Lee v. Gaskell* and of *Moody v. Aiken*, was,

nevertheless, correct. In each case the action was not between the parties to the bargain, but between the purchaser from the tenant and the landlord. The landlord had no right to set up the lack of memorandum under the seventeenth section. If the seller and buyer are content to make an oral sale or contract to sell, no one else can say that it is invalid. See *infra*, § 71. Browne on the Statute of Frauds, § 234, fails to observe the importance of distinguishing between a sale of fixtures to the landlord and one to a third person. See also *Strong v. Doyle*, 110 Mass. 92, 93.

⁴⁴ *Durkee v. Powell*, 75 N. Y. App. Div. 176. See also *Strong v. Doyle*, 110 Mass. 92.

⁴⁵ *Frear v. Hardenbergh*, 5 Johns. 272, 4 Am. Dec. 356; *Benedict v. Beebee*, 11 Johns. 145; *Lower v. Winters*, 7 Cow. 263. See also *Underfeed Stoker Co. v. Detroit Co.*, 135 Mich. 431, 97 N. W. 959.

§ 66. **Buildings.**—Agreements are not infrequently made for the sale of buildings or of the materials in standing buildings. If the contract is to sell and deliver a house, even though the house is at the time of the bargain affixed to the realty, it is a contract for the sale of goods, for the parties contract to buy and sell a house separated from the realty and moved from its foundations.⁴⁶ On the other hand if the parties attempt to make a present transfer of a building or materials fixed in a building, it is evident that they are attempting to make a sale of realty, even though it is also agreed that the subject-matter of the sale shall be severed within a short time.⁴⁷

§ 67. **Choses in action.**—Under the English statute it is settled that choses in action are not included within the terms “goods, wares, and merchandise.” Even though the chose in action in question is evidenced by a tangible document, as a certificate of stock, the rule is still applicable.⁴⁸ In this country, even under statutes similar to the English original, shares of stock are held to be included.⁴⁹ Likewise a bond and mortgage are within the

⁴⁶ *Scoggin v. Slater*, 22 Ala. 687; *Harris v. Powers*, 57 Ala. 139; *Long v. White*, 42 Ohio St. 59. See also *Rogers v. Cox*, 96 Ind. 157, 49 Am. Rep. 152; *Whetmore v. Rhett*, 12 Rich. L. 565; *Brown v. Roland*, 11 Tex. Civ. App. 648, 33 S. W. 273. Compare *Fenlason v. Rackliff*, 50 Me. 362; *Powell v. McAshan*, 28 Mo. 70.

⁴⁷ *Lavery v. Pursell*, 39 Ch. D. 508. In this case the defendant sold building materials in a standing building. By the terms of the sale the materials were to be taken down and removed within two months. Chitty, J., held the contract to be one for the sale of an interest in land and refused to follow the doctrine applied to trees in *Marshall v. Green*, 1 C. P. D. 35, that the prospect of immediate severance took the case out of the fourth section. To the same effect as *Lavery v. Pursell* is *Meyers v. Schemp*, 67 Ill. 469. See, how-

ever, *Keyser v. School District*, 35 N. H. 477.

⁴⁸ See as to shares of stock, *Humble v. Mitchell*, 11 A. & E. 205; *Bradley v. Holsworth*, 3 M. & W. 422; *Knight v. Barber*, 16 M. & W. 66; *Heseltine v. Siggers*, 1 Ex. 856; *Tempest v. Kilner*, 3 C. B. 249; *Bowlby v. Bell*, 3 C. B. 284; *Duncuft v. Albrecht*, 12 Sim. 189. As to choses in action generally, *Colonial Bank v. Whinney*, 30 Ch. D. 261, 283; *Benjamin on Sales* (5th Eng. ed.), 174. Compare *Evans v. Davies*, [1893] 2 Ch. 216.

⁴⁹ *Mayer v. Child*, 47 Cal. 142, 144; *North v. Forest*, 15 Conn. 400; *Banta v. Chicago*, 172 Ill. 204, 218, 50 N. E. 233, 40 L. R. A. 611; *Pray v. Mitchell*, 60 Me. 430; *Colvin v. Williams*, 3 H. & J. 38, 5 Am. Dec. 417; *Tisdale v. Harris*, 20 Pick. 9; *Boardman v. Cutter*, 128 Mass. 388; *Fine v. Hornsby*, 2 Mo. App. 61; *Bern-*

statute in this country,⁵⁰ and bills and notes.⁵¹ On the other hand it has been held that an oral agreement for the sale of an interest in an invention, before letters-patent had been obtained, might be enforced.⁵² In a Massachusetts case which so held,⁵³ the court said: "The words of the statute have never yet been extended by any court beyond securities which are subjects of common sale and barter and which have a visible and tangible form." These words are quoted with approval in other cases.⁵⁴ They are, however, not strictly accurate, for even a sale of a simple contract debt has been held by some courts to be within the statute.⁵⁵ The sale of a partner's interest in a firm is not within the statute.⁵⁶ In some States choses in action have been included by the express words of the statute,⁵⁷ or the wide term "personal

hardt v. Walls, 29 Mo. App. 206. *Webb v. Baltimore, etc., R. R.*, 77 Md. 92, 26 Atl. 113, 32 Am. St. Rep. 396, follows the English decisions, and discredits a *dictum* to the contrary in *Colvin v. Williams, supra*. See also *Rogers v. Burr*, 105 Ga. 432, 31 S. E. 438, 70 Am. St. Rep. 50. Compare *Meehan v. Sharp*, 151 Mass. 564, 24 N. E. 507; *Green v. Brookins*, 23 Mich. 48, 9 Am. Rep. 74. Where a company was in process of reorganization and its stock, as yet unissued, was represented by reorganization receipts, it was said to be doubtful whether an agreement to sell the stock was within the statute in *Berwin v. Bolles*, 183 Mass. 340, 342, 67 N. E. 323. See also *Green v. Brookins*, 23 Mich. 48, 9 Am. Rep. 74.

⁵⁰ *Greenwood v. Law*, 55 N. J. L. 168, 26 Atl. 134, 19 L. R. A. 688.

⁵¹ *Hudson v. Weir*, 29 Ala. 294; *Gooch v. Holmes*, 41 Me. 523; *Pray v. Mitchell*, 60 Me. 430, 435; *Baldwin v. Williams*, 3 Met. 365; *Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459. But see *contra*, *Vawter v. Griffin*, 40 Ind. 593; *Howe v. Jones*, 57 Iowa, 130, 8 N. W. 451,

10 N. W. 299; *Whittemore v. Gibbs*, 24 N. H. 484.

⁵² *Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459; *Jones v. Reynolds*, 120 N. Y. 213, 24 N. E. 279. See also *Cook v. Sterling Electric Co.*, 118 Fed. Rep. 45. An assignment of a patent must be in writing. U. S. Rev. St., § 4898.

⁵³ *Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459.

⁵⁴ *Meehan v. Sharp*, 151 Mass. 564, 24 N. E. 907; *Vincent v. Vieths*, 60 Mo. App. 9. See also *Banta v. Chicago*, 172 Ill. 204, 218, 50 N. E. 233 40 L. R. A. 611; *Howe v. Jones*, 57 Iowa, 130, 8 N. W. 451.

⁵⁵ *Walker v. Supple*, 54 Ga. 178; *French v. Schoonmaker*, 69 N. J. L. 6, 54 Atl. 225.

⁵⁶ *Victor v. Vieths*, 60 Mo. App. 9.

⁵⁷ See *Colton v. Raymond*, 114 Fed. Rep. 863, 52 C. C. A. 382; *Artcher v. Zeh*, 5 Hill, 200; *Peabody v. Speyers*, 56 N. Y. 230; *Tompkins v. Sheehan*, 158 N. Y. 617, 53 N. E. 502; *Greenberg v. Davidson*, 39 N. Y. Misc. Rep. 796, 81 N. Y. Suppl. 345; *Nichols v. Clark*, 40 N. Y. Misc. Rep. 107; *Spear v. Bach*, 82 Wis. 192, 52 N. W. 97.

property" is used.⁵⁸ Where the statute is in this form there seems no ground for confining the statute to choses in action having "a visible and palpable form." But where the words of the statute are confined to goods, wares, and merchandise, this construction seems sound. As there is perhaps quite as much reason why the transfer of intangible property should be supported by written evidence as the transfer of visible property the Sales Act expressly includes choses in action.

§ 68. **Undivided interest in goods.**—The sale of an undivided share of goods is within the statute.⁵⁹

§ 69. **"Of the value of."**—The English statute contained the words "for the price," and the word "price" has generally been copied in the statutes in this country. Lord Tenterden's Act,⁶⁰ however, made use of the word "value," and it was subsequently held that the effect of this was to extend to all contracts for the sale of goods to the value of £10 and upwards the earlier statute. That is, "to substitute the word 'value' for the word 'price.'"⁶¹ Though the word "price" is used in almost all the American statutes, and the word "value" in none, the narrow construction which the English court suggests that it would have given to the Statute of Frauds, had it not been for Lord Tenterden's Act, has never been adopted in this country. Thus, contracts of barter are held to be within the terms of the statute.⁶² The importance of determining whether value is equivalent to price also arises where the contract is to sell an article for a fair price or to sell several articles for a lump price,⁶³ or a contract to sell a quantity of goods as yet undetermined at a price to be determined by the number, weight, or measure of the goods.⁶⁴ That such bargains may be within the statute is clear from the au-

⁵⁸ See Mechem on Sales, § 287.

⁵⁹ *Dehority v. Paxson*, 97 Ind. 253; *Gerndt v. Conradt*, 117 Wis. 15, 93 N. W. 804.

⁶⁰ 9 George IV, c. 14.

⁶¹ *Harman v. Reeve*, 25 L. J. C. P. 257.

⁶² *Raymond v. Colton*, 104 Fed. Rep. 219, 43 C. C. A. 501; *Kuhns v. Gates*, 92 Ind. 66; *Dowling v. McKenney*, 124 Mass. 478; *Gorman v. Brossard*,

120 Mich. 611, 79 N. W. 903; *Rutan v. Hinchman*, 30 N. J. L. 255; *Misner v. Strong*, 181 N. Y. 163, 168, 73 N. E. 965; *supra*, § 56. But see *Spinney v. Hill*, 81 Minn. 316, 84 N. W. 116.

⁶³ *Harman v. Reeve*, 25 L. J. C. P. 257.

⁶⁴ *Watts v. Friend*, 10 B. & C. 446; *Bowman v. Corn*, 8 Ind. 58; *Jersey City v. Harrison*, 72 N. J. L. 185.

thorities cited, but a subsidiary question is, as yet, not so clearly settled. Is the value of goods, when it must be fixed in order to determine whether the bargain is within the statute, to be regarded as the amount the parties, or a reasonable person in the position of the parties, would have expected it to be, or is the value to be considered what it actually turns out to be, or is the construction which has been adopted in connection with contracts not to be performed within a year to be adopted, namely, that if the value may not exceed the statutory amount, even though it probably will and, in fact, ultimately does, the contract is not within the statute. Probably the true view is that the matter depends on the ultimate value of the goods actually sold.⁶⁵ This rule, however, leads to the curious result that not only may it be uncertain at the time the contract is made whether it is within the statute, but if the contract is utterly broken by the seller at the outset, it may happen that it never can be determined with certainty what the amount or value of the goods would have been if the contract had been carried out, and, therefore, whether the contract is within the statute.

§ 70. **"Five hundred dollars or upwards."** The amount fixed by the English statute is £10 or upwards, and this amount has generally been translated in this country into \$50. In Arkansas, Maine, Missouri, and New Jersey, it is fixed at \$30; in New Hampshire, \$33; in Vermont, \$40; in California, Idaho, Montana, and Utah, \$200; and in Florida there is no limit. It should be noticed that at the time when the amount was originally fixed in the English statute, £10 meant a great deal more money than it does to-day. It was deemed wise in the Sales Act to name \$500, amended to \$2,500 in Ohio, and to \$100 in Connecticut. It has been seriously questioned whether the seventeenth section of the Statute of Frauds enacts a desirable rule,⁶⁶ and as to small transactions where the custom of

⁶⁵ *Watts v. Friend*, 10 B. & C. 446.

⁶⁶ See for instance an article by Justice Fitzjames Stephen * * * 1 L. Q. Rev. 1. Compare Lord Kenyon, *Chaplin v. Rogers*, 1 East,

102. It "is one of the wisest laws in our statute book;" Wright, J., *Shindler v. Houston*, 1 N. Y. 261, "this meritorious law."

reasonable business men does not prescribe a writing, it may well be that more fraud is caused than avoided by the section in question. As to transactions so considerable in amount as \$500, however, it seems probable that prudent business men would not generally leave the matter on the basis of a mere oral agreement. In determining whether the value in a given case exceeds the specified amount, the question properly is, "What is the total value of all the goods bargained for in one sale or contract to sell?" The mere fact that several articles are bought and that a separate price is agreed on for each article does not necessarily prove that several contracts existed.^{66a} This doctrine, though doubtless correct, has been carried to great lengths in the cases. In general, courts have been rather disposed to take doubtful cases out of the statute, rather than to force them within its terms, but here it is otherwise. In the leading case of *Baldey v. Parker*,⁶⁷ not only were there several articles upon which a separate price was agreed, but the articles seem to have been bought separately, one after another. The fact that a bill for the total amount was afterward ordered to be sent does not seem to alter the fact that separate sales were made, not one sale of a number of articles. The doctrine has even been carried so far as to hold where there were several successive sales by auction to one person, although each article was separately bid for and knocked down, acceptance of one article took all out of the statute.⁶⁸ If goods are to be delivered in instalments, even though each instalment is of less value than that specified in the statute, the con-

^{66a} *Baldey v. Parker*, 2 B. & C. 37; *Elliott v. Thomas*, 3 M. & W. 170; *Scott v. Eastern Counties Ry. Co.*, 12 M. & W. 33; *Bigg v. Whisking*, 14 C. B. 195; *Garfield v. Paris*, 96 U. S. 557, 24 L. ed. 821; *Weeks v. Crie*, 94 Me. 458, 48 Atl. 107, 80 Am. St. Rep. 410; *Brown v. Snider*, 126 Mich. 198, 85 N. W. 570; *Jenness v. Wendell*, 51 N. H. 63, 12 Am. Rep. 48; *Allard v. Greasert*, 61 N. Y. 1; *Tompkins v. Sheehan*, 158 N. Y. 617, 53 N. E. 502.

⁶⁷ B. & C. 37. See also *Weeks v. Crie*, 94 Me. 458, 48 Atl. 107, 80 Am. St. Rep. 410.

⁶⁸ *Jenness v. Wendell*, 51 N. H. 63, 12 Am. Rep. 48; *Coffman v. Hampton*, 2 W. & S. 377, 37 Am. Dec. 511; *Tompkins v. Haas*, 2 Barr, 74. In the New Hampshire case the purchases were not even all made on the same day. But see the contrary and sounder decisions, *Emerson v. Heelis*, 2 Taunt. 38; *Couston v. Chapman*, L. R. 2 H. L. Sc. 250, 252.

tract is within the statute if it is in fact a single contract, and if the total value of all the instalments exceeds the prescribed amount.⁶⁹ Where, however, goods belonging to several persons are sold, even though one bargain only is intended, there must be several sales in order to transfer title to the goods to a purchaser and the property of each seller must be considered separately.⁷⁰

§ 71. "**Shall not be enforceable by action.**"—The corresponding words of the original English statute are, "shall not be allowed to be good," but the draughtsman of the English Sales of Goods Act changed the words to those at the heading of this section, and these words have been in turn adopted in the Sales Act. The meaning of the later expression is supposed to be the same as that which the courts had given the earlier expression. In considering what is the nature of a contract to sell, or a sale, which is valid at common law but as to which there has been no compliance with the statute, and how far such a transaction has any validity, it is desirable to bear in mind the words of the statute that may be in question; for in this country varying language has been used in the different statutes and the meaning does not seem necessarily identical. Maryland alone, of the States, seems to have adopted the English statute as such, as part of her jurisprudence,⁷¹ but the statutes of other States contain words which are either the same, or must be regarded as equivalent. The words, "shall be good," are contained in the statutes of Connecticut,⁷² Florida,⁷³ Massachusetts,⁷⁴ Mississippi,⁷⁵ South Carolina,⁷⁶ Washington.⁷⁷ Several States enact that only such a bargain as fulfills the terms of the statute "is valid" or that otherwise it "is invalid." Such States are California,⁷⁸ Idaho,⁷⁹

⁶⁹ *Marsh v. Hyde*, 3 Gray, 331; *Standard Wall Paper Co. v. Towns*, 72 N. H. 324, 56 Atl. 744.

⁷⁰ *Tompkins v. Sheehan*, 158 N. Y. 617, 53 N. E. 502.

⁷¹ See *Colvin v. Williams*, 3 H. & J. 38, 5 Am. Dec. 417; *Newman v. Morris*, 4 H. & McH. 421; *Rentch v. Long*, 27 Md. 188; *Sentman v. Gamble*, 69 Md. 293, 13 Atl. 58, 14 Atl. 673; *Webb v. Baltimore, etc., R. R. Co.*, 77

Md. 92, 26 Atl. 113, 39 Am. St. Rep. 396; *Corbett v. Wolford*, 84 Md. 426, 35 Atl. 1088.

⁷² Gen. St. (1902), § 1090.

⁷³ Rev. St. (1892), § 1996.

⁷⁴ Rev. Laws (1902), c. 74, § 5.

⁷⁵ Code, § 4229.

⁷⁶ Code (1902), § 2653.

⁷⁷ *Ballinger's Codes* (1897), § 4577.

⁷⁸ Civil Code (1903), § 1739.

⁷⁹ Civil Code (1901), § 2739.

Indiana,⁸⁰ Maine,⁸¹ Michigan,⁸² Montana,⁸³ New Hampshire,⁸⁴ North Dakota,⁸⁵ South Dakota,⁸⁶ Vermont.⁸⁷ In Arkansas the words are, "shall be binding on the parties."⁸⁸ In Georgia the words are, "binding on the promisor."⁸⁹ In Iowa the statute reads, "no evidence is competent unless it be in writing." If there has been neither part delivery nor part payment, these various expressions may be assumed to be identical in legal effect with the expressions used in the English statute, but the same assumption cannot safely be made in regard to the words "shall be void," or "are void," which are contained in the statutes of a number of the States, namely: Colorado,⁹⁰ Minnesota,⁹¹ Nebraska,⁹² Nevada,⁹³ New Jersey,⁹⁴ New York,⁹⁵ Oregon,⁹⁶ Utah,⁹⁷ Wisconsin,⁹⁸ Wyoming.⁹⁹ Under the English statute it has been held that only the enforceability, not the validity, of a bargain depends upon the satisfaction of the statute. It is even said that the only effect of the statute is to require certain evidence in order to prove the bargain. This view has been given currency by the learned author of the leading treatise on the Statute of Frauds,¹ and has been expressed in the statute of Iowa referred to above. It has also received the sanction of high judicial authority.² Nevertheless it seems that the effect of the statute is more far-reaching than a rule of evidence. In the first place a memorandum made after the beginning of the action will not satisfy

⁸⁰ Burns Annot. St. (1901), § 6635.

⁸¹ Rev. St. (1903), c. 113, § 4.

⁸² Comp. Laws (1897), § 9516.

⁸³ Civil Code, § 2340.

⁸⁴ Pub. St., c. 215, § 3.

⁸⁵ Rev. St. (1895), § 3958.

⁸⁶ Annot. St. (1901), § 4804.

⁸⁷ Stat. (1894), § 1225.

⁸⁸ Dig. of St. (1894), § 3470.

⁸⁹ Code (1895), § 2693.

⁹⁰ Mills' St. (1891), § 2025.

⁹¹ Rev. Laws (1905), § 3484.

⁹² Comp. St. (1899), § 3183.

⁹³ Gen. St. (1885), § 2631.

⁹⁴ Gen. St. (1895), p. 1603, § 6.

⁹⁵ Birdseye's Rev. St. (1901), p. 2634.

⁹⁶ Hill's Annot. Laws (1892), § 785.

⁹⁷ Rev. St. (1898), § 2469.

⁹⁸ Sanborn & Berryman St. (1898), § 2308.

⁹⁹ Rev. St. (1899), § 2954.

¹ Browne on the Statute of Frauds.

² Lord Blackburn in *Maddison v. Alderson*, 8 App. Cas. 467, at p. 488: "I think it is now finally settled that the true construction of the Statute of Frauds, both the 4th and 17th sections, is not to render the contracts under them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract." Similar expressions are used by the court in *Townsend v. Hargraves*, 118 Mass. 325; *Crane v. Powell*, 139 N. Y. 379, 34 N. E. 911.

the statute.³ Again, it is generally held that the statute must be affirmatively pleaded.⁴ If only a rule of evidence were involved this would be unnecessary. To be sure the requirement of a special plea is by no means universal; for in England at common law, and still in many jurisdictions, the defendant may take advantage of the statute under the general issue.⁵ The words of the English statute also seem to express, if naturally construed, more than a rule of evidence. For this reason it seems better to call the rule of the statute one of remedial procedure, somewhat analogous to the rule of the Statute of Limitations, rather than a mere rule of evidence.⁶ The validity of an unenforceable contract, or sale, may be important in several kinds of cases. As between the parties themselves the effect of a trans-

³ *Bill v. Bament*, 9 M. & W. 36; *Lucas v. Dixon*, 22 Q. B. D. 357; *Bird v. Munroe*, 66 Me. 337, 347, 22 Am. Rep. 571. See also *Purdon Co. v. Western Union Tel. Co.*, 153 Fed. Rep. 327. A contrary decision, under the section of the statute relating to land, is *Remington v. Linthicum*, 14 Pet. 84, 10 L. E. 364. See also *Cash v. Clark*, 61 Mo. App. 636; and *infra*, § 117.

⁴ *Carter v. Fischer*, 127 Ala. 52, 28 So. 376; *Wolfskill v. Douglas* (Cal.), 59 Pac. 987. But see *Feeney v. Howard*, 79 Cal. 525, 532, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162; *Taliaferro v. Smiley*, 112 Ga. 62, 37 S. E. 106; *Koenig v. Dohm*, 209 Ill. 468, 476, 70 N. E. 1061; *De Montague v. Bacharach*, 187 Mass. 128, 132, 72 N. E. 938; *Fee v. Sharkey*, 59 N. J. Eq. 284, 44 Atl. 673; *Crane v. Powell*, 139 N. Y. 379, 34 N. E. 911; *Agan v. Barry*, 66 N. Y. App. Div. 101; *Hemmings v. Doss*, 125 N. C. 400, 34 S. E. 511; *Gladwell v. Hume*, 18 Ohio C. C. 845 (but see *Birchell v. Neaster*, 36 Ohio St. 331); *Smith v. Ruohs* (Tenn. Ch. App.), 54 S. W. 161; *Citty v. Manufacturing Co.*, 93 Tenn. 276, 24 S. W. 121, 42 Am. St. Rep. 919; *Hart v. Garcia* (Tex. Civ. App.), 63 S. W. 921;

Abba v. Smyth, 21 Utah, 109, 59 Pac. 756.

⁵ *Buttermere v. Hayes*, 5 M. & W. 456; *Eastwood v. Kenyon*, 11 A. & E. 438; *Dunphy v. Ryan*, 116 U. S. 491, 6 S. Ct. 486, 29 L. ed. 703; *McDonald v. Yungbluth*, 46 Fed. Rep. 836; *Buhl v. Stephens*, 84 Fed. Rep. 922; *Feeney v. Howard*, 79 Cal. 525, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162; *Salomon v. McRae*, 9 Colo. App. 23; *Thompson v. Frakes*, 112 Iowa, 585, 84 N. W. 703; *Morgan v. Wickliffe*, 22 Ky. L. Rep. 1648, 61 S. W. 13; *Hamilton v. Thirston*, 93 Md. 213, 48 Atl. 709; *Morgart v. Smouse*, 103 Md. 463, 63 Atl. 1070, 115 Am. St. Rep. 367; *Bean v. Lamprey*, 82 Minn. 320, 84 N. W. 1016; *Neuvirth v. Engler*, 83 Mo. App. 420; *Young v. Ledford*, 99 Mo. App. 565, 568, 74 S. W. 443; *Hillhouse v. Jennings*, 60 S. C. 373, 38 S. E. 599; *Williams-Hayward Co. v. Brooks*, 9 Wyo. 424, 64 Pac. 342.

⁶ This view is elaborated in an able article in 9 Am. L. Rev. 434. The article is not signed but was, in fact, written by William C. Loring, now a justice of the Supreme Judicial Court of Massachusetts. The theory is substantially stated also by Willes, J., in *Gibson v. Holland*, L. R. 1 C. P.

action sufficient at common law to pass the title to property but where the statute has not been satisfied, was thus expressed in a recent English case.⁷ "The contract being good, all the legal consequences of a contract follow; so that, if the contract is for sale of specified goods, the property in the goods passes to the buyer. It may be asked, What happens if the buyer, after making the purchase, refuses to fulfill any of the statutory conditions which alone will make the contract enforceable against him? The property in the goods has passed to him, and it may be that he has received the goods themselves, yet he cannot be sued for the price. My answer is that the seller may call on the buyer to pay for the goods, and, if he fails to comply, the seller may treat the contract as rescinded. The effect of such rescission would be to revest the property in the seller and to entitle him to resume the possession." It is clear, however, that the seller must have a right to repudiate if the sale is not enforceable against him, and if he can do this, he must also be able to resell them and give the second purchaser a good title. This was so held in a recent Missouri case.⁸

1, in language quoted and approved by Peters, J., in *Bird v. Munroe*, 66 Me. 337, 347, 22 Am. Rep. 571: "The courts have considered the intention of the Legislature to be of a mixed character; to prevent persons from having actions brought against them so long as no written evidence was existing when the action was instituted."

⁷ *Taylor v. Great Eastern Ry. Co.*, [1901] 1 K. B. 774, 779.

⁸ *Shelton v. Thompson*, 96 Mo. App. 327, 70 S. W. 256. The court said: "If the acts of the parties constituted a sale at law, the transaction was not void but only voidable at the election of the party to be charged. *Aultman v. Booth*, 95 Mo. 383, 8 S. W. 742; *Maybee v. Moore*, 90 Mo. 340, 2 S. W. 471. And it may also be said that as the Statute of Frauds affects only the remedy of the party sought to be charged, its benefits cannot be claimed by one who is not a party to

the contract and is not sought to be charged thereby. *St. Louis Railway v. Clark*, 121 Mo. 169, 25 S. W. 192, 906. But we hold that the defendants are not within the above rule, for the reason that their vendor, Bain, voided the contract in the first instance by refusing to let plaintiffs have the hogs in dispute. It would be illogical to hold that after a vendor had repudiated an oral contract like the one in question, he could not thereafter sell the goods and give good title. That is to say, that thereafter he must keep the goods because a purchaser could not be found, for the reason that they could be taken from him by the original vendee, which would destroy their character as articles of merchandise. But it is plain, that when the vendor voids a sale under said statute and retains the goods, his title is as if no such sale had ever been made, and he can resell and give

§ 72. Third persons cannot take advantage of the statute.—If the views that have been stated in the previous section are sound, as is believed, it follows that a contract or sale within the statute is valid except that it cannot be enforced against either party unless the statute has been satisfied as to him. A third party should not be able to assert the invalidity of such transactions. In general the authorities support this view. Therefore, in an action for preventing performance of a contract between a third person and the plaintiff, the defense cannot set up that the contract was oral.⁹ Again, if insurance is made by a buyer upon property which he has bought by oral sale, and the statute has not been in any way satisfied, the insurance company cannot set up that the insurer had no insurable interest in the property.¹⁰ It should also be true that the buyer, in the case of such a sale, should be able to recover against any one who has injured the property. Much of the authority seems, however, without good reason, to be contrary. The buyer has not been allowed to sue a carrier for goods injured in transit when title had passed at common law,

as good a title as his own to the purchaser, who can, at a suit by the first vendee for the same goods, plead the action of the vendor, as a bar to such suit."

⁹ *Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588. The court said: "If this be true, it is no concern of the appellees. Parties to contracts and their privies can alone take advantage of the fact that a contract is invalid under the Statute of Frauds. Many forms of expression by this and other courts illustrate the doctrine that a third person cannot make the Statute of Frauds available to overthrow a transaction between other persons; that the defense of this statute is purely a personal one, and cannot be made by strangers. *Burrow v. Railroad Co.*, 107 Ind. 432, 8 N. E. 167; *Bodkin v. Merit*, 102 Ind. 293, 1 N. E. 625; *Cool v. Peters Box, etc., Co.*, 87

Ind. 531; *Dixon v. Duke*, 85 Ind. 434; *Wright v. Jones*, 105 Ind. 17, 4 N. E. 281; *Savage v. Lee*, 101 Ind. 515, 8 Am. & Eng. Enc. Law, 659, and cases cited. It concerns the remedy alone, and the modern law is well settled that, in the absence of a statutory provision to the contrary, the effect of the statute is not to render the agreement void, but simply to prevent its direct enforcement by the parties, and to refuse damages for its breach. 8 Am. & Eng. Enc. Law, 658, 659, and cases cited."

¹⁰ *Amsinck v. American Ins. Co.*, 129 Mass. 185; *Wainer v. Milford Mutual F. I. Co.*, 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598. Compare *Stockdale v. Dunlop*, 6 M. & W. 224, per Parke, B.; *Felthouse v. Bindley*, 11 C. B. (N. S.) 869, per Willes, J.; *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6.

but the statute had not been satisfied.¹¹ It has been held in Florida that a buyer could not maintain an action against a third person for detaining property which the buyer had bought, the statute not having been satisfied.¹² Other decisions, however, are opposed to this in principle.¹³ Further, though in Minnesota

¹¹ *Morgan v. Sykes*, stated in 3 Q. B. 486; *O'Neill v. New York, etc., R. R. Co.*, 60 N. Y. 138. It should be noticed, however, that the New York statute says that such a transaction shall be "void."

¹² *Summerall v. Thoms*, 3 Fla. 298.

¹³ *Garcia v. United States*, 37 Ct. Cl. 243; *Norton v. Simonds*, 124 Mass. 19. In this case the plaintiff was a purchaser from one who had acquired title by a sale in which the statute was not satisfied. The plaintiff was, nevertheless, allowed replevin against a third person. In *Townsend v. Hargraves*, 118 Mass. 325, 333, Colt, J., said: "In carrying out its purpose, the statute only affects the modes of proof as to all contracts within it. If a memorandum or proof of any of the alternative requirements peculiar to the seventeenth section be furnished; if acceptance and actual receipt of part be shown; then the oral contract, as proved by the other evidence, is established with all the consequences which the common law attaches to it. If it be a completed contract according to common-law rules, then, as between the parties at least, the property vests in the purchaser, and a right to the price in the seller, as soon as it is made, subject only to the seller's lien and right of stoppage *in transitu*. Many points decided in the modern cases support by the strongest implication the construction here given. Thus, if one party has signed the memorandum, the contract can be enforced against him, though not against the other—showing that the promise of the other

is not wholly void, because it affords a good and valid consideration to support the promise which by reason of the memorandum may be enforced. *Reuss v. Picksley*, L. R. 1 Ex. 342. The memorandum is sufficient if it be only a letter written by the party to his own agent; or an entry or record in his own books; or even if it contain an express repudiation of the contract. And this because it is evidence of, but does not go to make the contract. *Gibson v. Holland*, L. R. 1 C. P. 1; *Buxton v. Rust*, L. R. 7 Ex. 1, 279; *Allen v. Bennet*, 3 Taunt. 169; *Tufts v. Plymouth Mining Co.*, 14 Allen, 407; *Argus Co. v. Albany*, 55 N. Y. 495. A creditor, receiving payment from his debtor, without any direction as to its application, may apply it to a debt upon which no action can be maintained under the statute. *Haynes v. Nice*, 100 Mass. 327, 1 Am. Rep. 109. The contract is treated as a subsisting valid contract when it comes in question between other parties for purposes other than a recovery upon it. Hence the statute cannot be used to charge a trustee, who may set up against his debt to the principal defendant a verbal promise within the statute to pay the defendant's debt to another for a greater amount. *Cahill v. Bigelow*, 18 Pick. 369. And a guarantor may recover of his principal a debt paid upon an unwritten guaranty. *Beal v. Brown*, 13 Allen, 114. On the ground that the statute affects the remedy and not the validity of the contract, it has been held that an oral contract, good by the law of the place

and New York it has been held that a buyer under such a sale cannot maintain an action against an officer who attaches the goods as the property of the seller,¹⁴ in opposition to these cases are decisions in Maine and New Jersey, allowing the action against the officer.¹⁵ Under a Federal statute allowing compensation to loyal owners of property captured or destroyed during the Civil War, the Supreme Court of the United States had to consider the question whether the buyer of cotton, under a sale in which the statute had not been satisfied, could be regarded as owner, and the court held that he could not.¹⁶ The court cites no authorities in support of this statement, however; and a later decision by the same court, involving almost precisely the same question, expressed a contrary view without citing the earlier case.¹⁷ Support for the view

where made, will not be enforced in the courts of a country where the statute prevails. *Leroux v. Brown*, 12 C. B. 801. The defendant may always waive its protection, and the court will not interpose the defense. *Middlesex Co. v. Osgood*, 4 Gray, 447. And, except that the statute provides that no action shall be brought, there would be no good reason to hold that a memorandum signed, or an act of acceptance proved, at any time before the trial, would not be sufficient. *Bill v. Bament*, 9 M. & W. 36; *Tisdale v. Harris*, 20 Pick. 9. In a recent case in the Queen's Bench, a memorandum in writing made by the defendant, after the goods had been delivered to a carrier and been totally lost at sea while in his hands, was held sufficient to take the case out of the statute, and no notice is taken of the fact that the goods were not in existence when the memorandum was furnished. *Leather Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 140."

¹⁴ *Waite v. McKelvy*, 71 Minn. 167, 73 N. W. 727; *Ely v. Ormsby*, 12 Barb. 570. See also *Winner v. Williams*, 62 Mich. 363, 28 N. W. 904.

Here also it should be noticed that both the Minnesota and the New York statute use the word "void."

¹⁵ *Cowan v. Adams*, 1 Fairf. 374, 25 Am. Dec. 242; *Sherron v. Humphreys*, 2 Green (N. J. L.), 217.

¹⁶ *Mahan v. United States*, 16 Wall. 143, 21 L. ed. 307. Miller, J., delivering the opinion of the court, said (p. 147): "To hold that an agreement which that statute declares shall not be allowed to be good and valid was sufficient to transfer the title of the property to the claimant would be to overrule the uniform construction of this or a similar clause in all Statutes of Frauds by all the courts which have construed them."

¹⁷ *Briggs v. United States*, 143 U. S. 346, 12 S. Ct. 391, 36 L. ed. 180. The court there said: "There was no creditor or purchaser who could question the transfer of title to the vendee. The government stood in no such relation and could raise no such objection. It had no pre-existing demand or equity against the property. All the rights of the government resulted from capture."

that the contract is valid except as concerning enforceability between the parties will also be found in the cases under the section of the statute relating to land. These cannot be examined here but should be referred to.¹⁸ How far the use of the word "void" in the statute should be held to require a difference in construction is a question upon which authority is lacking. Such statutes were probably not intended to vary the meaning of the English statute which forms the original basis of all of them, and it may be that the word "void" should be given the meaning of "voidable," at the election of the other party.¹⁹

§ 73. **Satisfaction of the statute.**—The statute specifies three ways in which contracts or sales within its terms may be made binding: (1) Acceptance of the whole or part of the goods (or choses in action) sold, and actual receipt of the same; (2) payment of earnest money or a portion of the price; (3) The giving of a memorandum signed by the party to be charged. There has been elaborate judicial construction of each of these requirements, all of which are found with hardly an exception in the American statutes.²⁰ These statutory requirements are obviously additional to what the common law requires; although the same circumstances may sometimes indicate the formation of a bargain at common law and a satisfaction of the statute by the statutory requirements. In order to recover, therefore, a plaintiff must show a good bargain, whether contract or sale, at common law, and

¹⁸ See Browne on the Statute of Frauds, c. VIII, 29 Am. & Eng. Encyc. 807.

¹⁹ In *Crane v. Powell*, 139 N. Y. 379, 384, 34 N. E. 911, the court said, speaking of the statute: "It simply requires that certain agreements must be proved by writing. It introduced a new rule of evidence in certain cases without condemning as illegal any contract that was legal before." The court here does not seem to distinguish the construction to be given the New York statute from that given the English statute.

²⁰ In Indiana the statute uses simply the word "receive" without reference to acceptance. Burns'

Annot. St. (1901) § 6635. In Iowa the corresponding requirement is that part of the goods be "delivered." Code (1897), § 4625. As to the construction of this language, see *Bullock v. Tschergi*, 13 Fed. Rep. 345; *Legget & Meyer Co. v. Collier*, 89 Iowa, 144, 56 N. W. 417; *Diersen v. Petersmeyer*, 109 Iowa, 233, 80 N. W. 389. The first of these cases held delivery to a carrier for the buyer satisfied the statute. The latter decision in the same State held the contrary. Many American statutes make no reference to earnest, but any sum of money paid to bind a bargain of sale would in fact always be a part payment of the price.

satisfaction of the statute in one of the three specified ways. Until this has been done, the defendant may withdraw without liability.²¹ The requirement of a memorandum is obviously suitable either for a contract to sell or a sale. The other two modes of satisfaction seem more naturally to apply to sales than to executory contracts. It is clear, however, that earnest money, or a portion of the price, may be paid by the buyer before the time when it is agreed that the property shall pass; and if this is done the executory contract must become binding. Even acceptance and actual receipt of the goods may take place before title has passed, though the case is so unusual as to make it appear strange. The seller may, however, deliver to the buyer the goods to which the contract relates and the buyer may accept them though it is agreed that the property shall not pass until some time later. The ordinary case of a conditional sale is an instance of the sort. Such a bargain, though oral, is enforceable if the buyer accepts and receives the goods, though he does not get complete title as yet.²² Also the seller may deliver part of the goods and transfer the property in these, while the contract as to the rest of the goods still remains executory.²³ Satisfaction of the statute by acceptance and actual receipt of part of the goods²⁴ or by part payment makes the entire bargain of the parties enforceable, even though the bargain contains as a part of it another agreement to sell besides that which has been partly performed. Thus if the seller of goods agree as part of the original bargain to take them back if desired, this agreement of repurchase becomes enforceable by the acceptance and receipt or payment by the buyer.²⁵

²¹ *Smith v. Hudson*, 6 B. & S. 431; *Dierson v. Petersmeyer*, 109 Iowa, 233, 80 N. W. 389; *Schwartz v. Church of Holy Cross*, 60 Minn. 183, 62 N. W. 266. See § 82.

²² *Pinkham v. Mattox*, 53 N. H. 600.

²³ *Garfield v. Paris*, 96 U. S. 557, 562, 24 L. ed. 821; *Rickey v. Tenbroeck*, 63 Mo. 563.

²⁴ By the words of the statute it is sufficient if part of the goods are accepted and actually received. See *infra*, § 94.

²⁵ *Williams v. Burgess*, 10 A. & E. 499; *Gurwell v. Morris* (Cal. App.), 83 Pac. 578; *Hilliard v. Weeks*, 173 Mass. 304, 53 N. E. 818; *Fremont Carriage Co. v. Thomsen*, 65 Neb. 370, 91 N. W. 376; *Johnston v. Trask*, 116 N. Y. 136, 22 N. E. 377, 5 L. R. A. 630, 15 Am. St. Rep. 394; *Fay v. Wheeler*, 44 Vt. 292. So if that portion of a contract which is within the statute is reduced to writing the memorandum makes the whole enforceable. *Agnew v. Baldwin*, Wis. , 116 N. W. 641.

§ 74. **Acceptance and receipt is not equivalent to delivery.**—In the early English cases, involving the question of acceptance and actual receipt of, the word “delivery” is frequently used as if that word were the equivalent of acceptance and actual receipt.²⁶ The word “acceptance,” likewise, in some cases is used alone as if in itself it included the whole requirement of the statute.²⁷ One of the services to clear thinking in the law of sales rendered by Blackburn in his book on the “Contract of Sale,” was making it clear that acceptance and actual receipt were imposed by the statute as a double requirement. “As there may be an actual receipt without any acceptance, so there may be an acceptance without any receipt.”²⁸

§ 75. **Acceptance.**—The meaning of acceptance, under the statute, seems to be an assent on the part of the buyer to take specified goods as owner, though as has been shown it need not be an assent to be owner at once.²⁹ It is, however, necessary that goods should be identified in order that there may be an acceptance, and if they are still part of a larger mass there can be no acceptance.³⁰ It has also been said that if the transaction contemplates that the seller shall do something further to put the goods in deliverable condition, there can be no acceptance.³¹ This statement, however, should perhaps be qualified. It is of course possible if the parties so intend, though the presumed intention

²⁶ *Chaplin v. Rogers*, 1 East, 192; *Elmore v. Stone*, 1 Taunt. 458. See *Searle v. Keeses*, 2 Esp. 598; *Norman v. Phillips*, 14 M. & W. 277; *Vincent v. Germond*, 11 Johns. 283.

²⁷ *Howe v. Palmer*, 3 B. & Ald. 321; *Tempest v. Fitzgerald*, 3 B. & Ald. 680; *Bill v. Bament*, 9 M. & W. 36 (by Lord Abinger); *Terney v. Doten*, 70 Cal. 399, 11 Pac. 743; *Washington Ice Co. v. Webster*, 62 Me. 341, 360, 16 Am. Rep. 462.

²⁸ *Blackburn on Sales* (1st ed.), 22. See also *Kemensky v. Chapin*, 193 Mass. 500, 79 N. E. 781; *Cross v. O'Donnell*, 44 N. Y. 661, 664, 4 Am. Rep. 721; *Grant v. Milam*, Okla., 95 Pac. 424, and decisions in following section.

²⁹ The buyer “must have done

something indicating that he has accepted part of the goods and taken to them as owner,” by Lord Campbell, in *Parker v. Wallis*, 5 E. & B. 21, 26. So in *Rohde v. Thwaites*, 6 B. & C. 388, 393, *Holroyd, J.*, said: “The sugars agreed to be sold being part of a larger parcel, the vendors were to select twenty hogsheads for the vendee. That selection was made by the plaintiffs, and they notified it to the defendant, and the latter then promised to take them away. That is equivalent to an actual acceptance of the sixteen hogsheads by the defendant.” Where the action of the buyer is ambiguous and may or may not indicate acceptance, his intent is material. *Jarrell v. Young*, 105 Md. 280, 66 Atl. 50.

is otherwise, for title to pass at common law while the seller still has something to do upon the goods. It would seem equally possible for him to assent to those goods being the goods to which the bargain relates within the Statute of Frauds, and to accept them as such, the seller agreeing to do further work upon them. It has been decided at least that there may be acceptance, though the goods must be counted, weighed, or measured to fix the price.³² If goods are submitted to the examination of the ~~seller~~ to determine whether they are the goods he has agreed to take, it seems obvious that there is as yet no acceptance except upon the construction of the statute given by the recent English decisions, to which reference will be made hereafter.^{32a} Mere delivery is not sufficient,³³ and "under the statute the buyer is at liberty to refuse, even if his action could be found to have been arbitrary and wholly unreasonable."³⁴

§ 76. **Time of acceptance.**—It is clearly settled that acceptance, as well as receipt of the goods, may be subsequent to the common-law bargain to which the statute is applicable, whether a contract to sell or a sale.³⁵ A more difficult question relates to the rule covering the relative time of acceptance and receipt; that receipt

³⁰ *Terney v. Doten*, 70 Cal. 399, 11 Pac. 743; *Knight v. Mann*, 118 Mass. 143; *Atherton v. Newhall*, 123 Mass. 141, 25 Am. Rep. 47; *Rodgers v. Phillips*, 40 N. Y. 519.

³¹ *Hinchman v. Lincoln*, 124 U. S. 38, 51, 8 S. Ct. 369, 31 L. ed. 337; *Brunswick Grocery Co. v. Lamar*, 116 Ga. 1, 42 S. E. 366; *Gilman v. Hill*, 36 N. H. 311; *Outwater v. Dodge*, 7 Cow. 85; *Cooke v. Millard*, 65 N. Y. 352, 22 Am. Rep. 619; *Wegg v. Drake*, 16 U. C. Q. B. 252.

³² *Daniel v. Hannah*, 106 Ga. 91, 31 S. E. 734; *Macomber v. Parker*, 13 Pick. 175; *Cunningham v. Ashbrook*, 20 Mo. 553. In the latter two cases the goods were delivered to the buyer while still unweighed. In *Daniel v. Hannah*, they were left at an agreed public place.

^{32a} See *infra*, § 80.

³³ *Nicholson v. Bower*, 1 E. & E. 172; *Jamison v. Simon*, 68 Cal. 17, 8 Pac. 502; *Hewes v. Jordan*, 39 Md.

472; *Remick v. Sandford*, 120 Mass. 309; *Kemensky v. Chapin*, 193 Mass. 500, 79 N. E. 781; *Mechanical Boiler Co. v. Kellner*, 62 N. J. L. 544, 43 Atl. 599; *Stone v. Browning*, 51 N. Y. 211, 68 N. Y. 598; *Gibbs v. Benjamin*, 45 Vt. 124; *Bacon v. Eccles*, 43 Wis. 227.

³⁴ *Kemensky v. Chapin*, 193 Mass. 500, 79 N. E. 781.

³⁵ *Buckingham v. Osborne*, 44 Conn. 133; *Coffin v. Bradbury*, 3 Ida. 770, 35 Pac. 715, 95 Am. St. Rep. 37; *Davis v. Moore*, 13 Me. 424; *Bush v. Holmes*, 53 Me. 417; *Marsh v. Hyde*, 3 Gray, 331; *McCarthy v. Nash*, 14 Minn. 127; *Ortloff v. Klitzke*, 43 Minn. 154, 44 N. W. 1085; *Field v. Runk*, 2 Zab. 525; *McKnight v. Dunlop*, 5 N. Y. 537, 55 Am. Dec. 370; *Jackson v. Tupper*, 101 N. Y. 515, 5 N. E. 65; *Danforth v. Walker*, 40 Vt. 257; *Cotterill v. Stevens*, 10 Wis. 422.

may precede acceptance there seems no doubt. Thus: Where goods are sent in accordance with the contract and the ~~seller~~ takes them into his possession, this will constitute receipt, and when he thereafter examines them and assents to their quality, this will constitute acceptance.³⁶ It is equally true that acceptance may precede the receipt. This was finally decided in England by the case of *Cusack v. Robinson*,³⁷ and the decision has been followed in this country,³⁸ though expressions may be found which seem, literally interpreted, to indicate a contrary understanding.³⁹ This Sales Act, therefore, follows the existing law in declaring that acceptance may be either before or after delivery of the goods.⁴⁰ If, therefore, the goods in regard to which the parties are dealing are identified, the agreement of the buyer to buy these goods is in itself an acceptance of them.⁴¹

³⁶ *Knight v. Mann*, 118 Mass. 143. See also cases cited *supra*, note 33.

³⁷ 1 B. & S. 299. This case overruled certain expressions in *Saunders v. Topp*, 4 Ex. 390, to the effect that it is necessary that the acceptance should be subsequent to or contemporaneous with the receipt; but contrary expressions are to be found in *Morton v. Tibbett*, 15 Q. B. 428. In *Cusack v. Robinson*, Blackburn, J., quoted these and summarized the matter as follows: "The intention of the Legislature seems to have been that the contract should not be good unless partially executed; and it is partially executed if, after the vendee has finally agreed on the specific articles which he is to take under the contract, the vendor by the vendee's directions parts with the possession, and puts them under the control of the vendee, so as to put a complete end to all the rights of the unpaid vendor as such. We think, therefore, that there is nothing in the nature of the enactment to imply an intention, which the Legislature has certainly not in terms expressed, that an acceptance prior to the receipt will not suffice."

³⁸ *Ex parte Safford*, 2 Low. 563; *Hewes v. Jordan*, 39 Md. 472, 17 Am. Rep. 578; *Ullman v. Barnard*, 7 Gray, 554; *Cross v. O'Donnell*, 44 N. Y. 661, 4 Am. Rep. 721; *Bristol v. Mente*, 79 N. Y. App. Div. 67, 74, 80 N. Y. Suppl. 52; affirmed, without opinion, 178 N. Y. 599, 70 N. E. 1096.

³⁹ See *Jones v. Mechanics' Bank*, 29 Md. 287, 96 Am. Dec. 533; *Black v. Delbridge Co.*, 90 Mich. 56, 51 N. W. 269; *Shepherd v. Pressey*, 32 N. H. 49. In the case first cited, the court said: "There can be no acceptance under the statute without delivery by the seller," and this statement was quoted with approval in *Richardson v. Smith*, 101 Md. 15, 20, 60 Atl. 612, 70 L. R. A. 321, 109 Am. St. Rep. 552. Too much importance should not be laid on such expressions, however. This is evident from the fact that, in spite of these remarks by the Maryland court, that very court has followed *Cusack v. Robinson*, when the question was actually involved. See *Hewes v. Jordan*, *supra*, note 38.

⁴⁰ Section 4 (3).

⁴¹ See cases referred to in this section, *supra*.

§ 77. Acceptance by dealing with the goods as owner.— Though acceptance will ordinarily take place after the buyer has sufficiently examined the goods to understand their nature and quality, it is obviously possible for a buyer to accept goods without making an examination. If he assents to take specified goods as his, there seems no reason to doubt that he has accepted them within the terms of the statute. If, therefore, he does any act in relation to specified goods, which necessarily involves the conclusion that he has taken them as owner, there is an acceptance. Such an act is a resale of the goods by the buyer.⁴² So mortgaging the goods implies acceptance;⁴³ or assenting to the deposit of goods in a warehouse for the buyer and paying part of the price,⁴⁴ or removing, or otherwise dealing with property as owner.⁴⁵ Even detention of the goods for an unreasonable time may indicate acceptance.⁴⁶ In the cases that have just been put it will be observed that the buyer does not express satisfaction with the goods, he merely assumes ownership of them. If he does this it may be that in

⁴² The leading case upon this point is *Morton v. Tibbett*, 15 Q. B. 428. Lord Campbell following the earlier case of *Blenkinsop v. Clayton*, 7 Taunt. 597, held the resale an acceptance, saying: "He exercised an act of ownership over it by reselling it at a profit, and altering its destination by sending it to another wharf, there to be delivered to his vendee. The wheat was then constructively in his own possession; and could such a resale and order take place without his having accepted and received the commodity? Does it lie in his mouth to say that he has not accepted that which he has resold and sent on to be delivered to another? At any rate is not this evidence from which such an acceptance and receipt may be inferred by the jury?" To the same effect are *Marshall v. Ferguson*, 23 Cal. 65; *Phillips v. Ocmulgee Mills*, 55 Ga. 633; *Taylor v. Mueller*, 30 Minn. 343, 346, 15 N. W. 413, 44 Am. Rep. 199; *Gray v. Davis*, 10 N. Y. 285; *Roman v. Bressler*, 32 Neb. 240, 49 N. W. 368; *Hill v. McDonald*, 17

Wis. 97. But see *Jones v. Mechanics' Bank*, 29 Md. 287, 96 Am. Dec. 533.

⁴³ *Wylar v. Rothschild*, 53 Neb. 566, 74 N. W. 41.

⁴⁴ *Shaw Lumber Co. v. Manville*, 4 Ida. 369, 39 Pac. 559.

⁴⁵ *Currie v. Anderson*, 2 E. & E. 592; *Corbett v. Wolford*, 84 Md. 426, 35 Atl. 1088; *Edwards v. Brown*, 98 Me. 165, 56 Atl. 654.

⁴⁶ *Coleman v. Gibson*, 1 M. & R. 168; *Norman v. Phillips*, 14 M. & W. 277; *Parker v. Wallace*, 5 E. & B. 21; *Bushel v. Wheeler*, 15 Q. B. 442; *Treadwell v. Reynolds*, 39 Conn. 31; *Godkin v. Weber*, Mich. , 114 N. W. 924; *Schwartz v. Church of Holy Cross*, 60 Minn. 183, 62 N. W. 266; *Small v. Stevens*, 65 N. H. 209, 18 Atl. 196; *Standard Wall Paper Co. v. Towns*, 72 N. H. 324, 56 Atl. 744; *Chambers v. Lancaster*, 160 N. Y. 342, 54 N. E. 707; *Lamar v. Richmond Coöperative Institution*, 8 Utah, 305, 31 Pac. 397; *Spencer v. Hale*, 30 Vt. 314, 73 Am. Dec. 309. Compare *Hinchman v. Lincoln*, 124 U. S. 38, 52, 31 L. ed. 337.

spite of objections and even refusal to accept there may, nevertheless, be an acceptance.⁴⁷ Acts of any sort which not only indicate an assumption of ownership, but also indicate the buyer's satisfaction with the particular goods furnished him, after examination, even more clearly indicate acceptance.⁴⁸ In connection with the question of acceptance under the Statute of Frauds by assuming ownership, cases involving acceptance as an indication of transfer of the property apart from the statute may be examined.⁴⁹

§ 78. **Right of objection.**—Much discussion has arisen in regard to the question whether acceptance can take place before the purchaser has lost his right to object. In several cases statements have been made that this is impossible.⁵⁰ These *dicta* were examined in *Morton v. Tibbett*⁵¹ and held to be unfounded. The conclusion of this decision seems to follow inevitably from the decisions in the previous section and from a consideration of the matter upon principle. If a horse is sold with a warranty and the buyer takes him home and uses him, and pays the price, surely there has been an acceptance and receipt; but equally certainly the buyer may still object that the horse does not comply with the warranty.⁵² Similarly, if there is a contract to sell goods by sample, the buyer may take and use the goods that are offered to him, but this will not preclude him from afterward showing that the warranty implied in a sale by sample was not complied with.⁵³ Again, if the buyer is induced to buy goods by fraud, or

⁴⁷ *Schwartz v. Church of Holy Cross*, 60 Minn. 183, 63 N. W. 266. In this case, altars were furnished to the defendant church and were actually set up in the church. The buyer objected to them and requested the seller to remove them. Meantime one altar was used but not in such a way as to injure it. It was held that there was no acceptance, but there was a *dictum* that unreasonable detention might be equivalent to acceptance, in spite of denials or objections; actions would speak louder than words.

⁴⁸ *Beaumont v. Brengeri*, 5 C. B. 301; *Richards v. Burroughs*, 62 Mich.

117, 28 N. W. 755; *Galvin v. MacKenzie*, 21 Or. 184, 27 Pac. 1039; *Schmidt v. Thomas*, 75 Wis. 529, 44 N. W. 771; *Walker v. Boulton*, 3 U. C. Q. B. 252.

⁴⁹ See *infra*, § 483.

⁵⁰ *Howe v. Palmer*, 3 B. & Ald. 321; *Hanson v. Armitage*, 5 B. & Ald. 557; *Smith v. Surman*, 9 B. & C. 561, 577; *Norman v. Phillips*, 14 M. & W. 277.

⁵¹ 15 Q. B. 428.

⁵² *Remick v. Sandford*, 120 Mass. 309, 316, note.

⁵³ See *infra*, §§ 483, 489; *Edwards v. Brown*, 98 Me. 165, 166, 56 Atl. 654.

a mutual mistake of fact exists as to the nature of the goods, these circumstances could be shown although the buyer had taken to the goods as owner and had paid the price for them.⁵⁴

§ 79. **Right of rejection.**—By a curious substitution of a word that seems similar, but means something different, Lord Campbell's decision and statement in *Morton v. Tibbett*,⁵⁵ that an acceptance might take place though the right to object still remained, has been interpreted as deciding that acceptance could take place when a right to reject still existed.⁵⁶ It is obvious that acceptance does preclude the possibility of any assertion by the buyer that he did not at the time of the acceptance assent to become the owner either then or thereafter. The definition previously given, which seems both to accord with the natural meaning of the language of the statute and to be supported by authority, requires that the buyer shall have assented to become the owner of the goods. Though it does not follow that the buyer may not claim that the goods do not fulfill a warranty, express or implied, in regard to them, nor that he may not rescind his assent to becoming the owner, if he has been induced by fraud, duress, or mistake to give such assent (or if there has been a breach of warranty in jurisdictions where breach of warranty justifies rescission of title), it does follow that he cannot assert that he did not agree to take the property in the very goods in question, if within the meaning of the statute he has accepted them.⁵⁷

§ 80. **Modern English rule.**—The curious substitution of the word "reject" for "object" has enabled the English court to give a meaning to acceptance widely different from any meaning given by any court prior to 1878, and remarkable for its disregard of the language of the act. It is now held that if goods are offered under contract to the buyer and the buyer examines them, even though immediately upon such examination he refuses them, there

⁵⁴ *Rodgers v. Phillips*, 40 N. Y. 519, per Daniels, J.

⁵⁵ 15 Q. B. 428.

⁵⁶ *Kibble v. Gough*, 38 L. T. Rep. 204; *Page v. Morgan*, 15 Q. B. D. 228; *Taylor v. Smith*, [1893] 2 Q. B. 65; *Abbott v. Wolsey*, [1895] 2 Q. B. 97;

Edwards v. Brown, 98 Me. 165, 166, 56 Atl. 654; *Rodgers v. Phillips*, 40 N. Y. 519, per Woodruff, J.

⁵⁷ *Remick v. Sandford*, 120 Mass. 309, 316; *Simpson v. Krumdick*, 28 Minn. 352, 354, 10 N. W. 18.

is an acceptance.⁵⁸ The English Sale of Goods Act, following these decisions, now defines acceptance as meaning any act by the buyer in relation to the goods which recognizes a pre-existing contract.⁵⁹ These English cases, however, have had no following in this country⁶⁰ or even in Canada.^{60a}

§ 81. **Who may accept.**—A buyer may accept the goods by an agent.⁶¹ The power of the agent to bind his principal depends upon the law of agency. The statute imposes only the limitations immediately to be mentioned. There is a *dictum* in a New York decision that payment to an agent whose authority is derived from the same oral agreement, the validity of which is in question, will not take the agreement out of the statute.⁶² The same reasoning would be applicable to an agent to receive the goods instead of the money,⁶³ but this reasoning is open to the criticism applicable to New York decisions upon acceptance and receipt generally, that it attempts to make a rule which the words of the statute do not justify; that something other than mere oral words are always necessary to take a case out of the statute.⁶⁴ It may be observed also that unquestionably an agent as a broker or auctioneer may be authorized by parol to sign a memorandum for the buyer as part of the transaction to which the memorandum relates.⁶⁵ Whatever may be said of the New York decision, it is at least settled

⁵⁸ *Kibble v. Gough*, 38 L. T. Rep. 204; *Page v. Morgan*, 15 Q. B. D. 228; *Taylor v. Smith*, [1893] 2 Q. B. 65; *Abbott v. Wolsey*, [1895] 2 Q. B. 97.

⁵⁹ Section 4 (3). The English authorities have now defined acceptance, therefore, as an acceptance of the contract; but the statute says plainly that what is requisite is acceptance of the goods.

⁶⁰ *Dierson v. Petersmeyer*, 109 Iowa, 233, 80 N. W. 389; *Corbett v. Wolford*, 84 Md. 426, 35 Atl. 1088; *Remick v. Sandford*, 120 Mass. 309; *Mechanical Boiler Co. v. Kellner*, 62 N. J. L. 544, 43 Atl. 599; *Stone v. Browning*, 51 N. Y. 211, 68 N. Y. 598. Compare *Standard Wall Paper Co. v. Towns*, 72 N. H. 324, 56 Atl. 744; *Strong v. Dodds*, 47 Vt. 348.

^{60a} *Scott v. Melady*, 27 Ont. App. 193.

⁶¹ *Simmonds v. Humble*, 13 C. B. (N. S.) 258; *Jones v. Mechanics' Bank*, 29 Md. 287, 96 Am. Dec. 533; *Snow v. Warner*, 10 Met. 132, 43 Am. Dec. 417; *Gaff v. Homeyer*, 59 Mo. 345; *Vanderbilt v. Central R. R. Co.*, 43 N. J. Eq. 669, 12 Atl. 188; *Outwater v. Dodge*, 6 Wend. 397; *Rogers v. Gould*, 6 Hun, 229; *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17; *Alexander v. Oneida Co.*, 76 Wis. 56, 45 N. W. 21.

⁶² *Hawley v. Keeler*, 53 N. Y. 114, 120.

⁶³ See *Alexander v. Oneida Co.*, 76 Wis. 56, 60, 45 N. W. 21.

⁶⁴ This rule is discussed, *infra*, § 87.

⁶⁵ See *infra*, § 114.

that the seller himself cannot be the agent of the buyer to accept. Aside from the statute it is entirely possible for the buyer to constitute the seller his agent to appropriate goods to the bargain, and such appropriation is sufficient to transfer title at common law, but it is not sufficient to constitute an acceptance within the statute.⁶⁶ This principle is necessarily involved in the decisions which hold that delivery to a carrier or other bailee for the buyer is not a satisfaction of the statute, even though the buyer has selected and shipped the goods in accordance with the offer or contract of the consignee,⁶⁷ for the delivery to the carrier or bailee for the buyer is clearly a sufficient receipt; what is lacking is the acceptance.⁶⁸ For this reason the delivery of goods at a particular place by the buyer, in accordance with the contract, does not satisfy the statute unless there is some acceptance before or after the delivery.⁶⁹ Acceptance by one joint buyer is insufficient⁷⁰ unless he is as partner or otherwise expressly or impliedly authorized by his cobuyers to act for them.

§ 82. **Parties may withdraw before the satisfaction of the statute.**—Until the contract or sale has become enforceable under the statute either party may withdraw; consequently, the buyer may reject the goods though he has previously accepted them, provided he has not as yet received them,⁷¹ and on the other hand the seller may refuse to go on with the bargain and a subsequent acceptance by the buyer will be ineffectual.⁷²

§ 83. **Acceptance under a mistake.**—In *Rodgers v. Phillips*,⁷³ Daniels, J., said, referring to an acceptance of an alleged bill of lading by the buyer after the goods which it represented had been

⁶⁶ See *supra*, § 75; also *Sotham v. Weber*, 116 Mo. App. 104, 92 S. W. 181.

⁶⁷ See *infra*, § 89.

⁶⁸ *Lloyd v. Wright*, 25 Ga. 215; *Jones v. Mechanics' Bank*, 29 Md. 287, 96 Am. Dec. 533; *Kemensky v. Chapin*, 193 Mass. 500, 79 N. E. 781; *Cross v. O'Donnell*, 44 N. Y. 661, 4 Am. Rep. 721. See also cases cited *infra*, § 89.

⁶⁹ *Hart v. Bush*, E. B. & E. 494; *Eichberg v. Benedict Paper Co.*, 119

Mo. App. 262, 95 S. W. 963; *Finney v. Apgar*, 31 N. J. L. 266; *Brewster v. Taylor*, 63 N. Y. 587.

⁷⁰ *Chamberlain v. Dow*, 10 Mich. 319. The contrary decision of *Smith v. Milliken*, 7 Lans. 336, cannot be supported.

⁷¹ *Hatch v. Gluck*, 47 N. Y. Misc. Rep. 122, 93 N. Y. Suppl. 508. See *supra*, §§ 73, 75.

⁷² *Smith v. Hudson*, 6 B. & S. 431.

⁷³ 40 N. Y. 519.

destroyed: "What they did in this respect was done before they had received any intelligence of the misfortune to the property. And even if prior to that time they had determined to accept the shipment by accepting the bill of lading upon the supposition and belief that the property was then afloat, they became at liberty to rescind their determination and refuse to receive it as soon as they discovered that it had been formed under a mistake of a material fact affecting it." The doctrine thus stated seems open to question. By hypothesis, the requisites at common law for transfer of title have been satisfied and all that is necessary is to satisfy the statute. There seems no reason why the buyer should be protected if the requirements of the statute have actually been satisfied, even though he was induced to satisfy them by a mistaken belief in regard to an essential fact. He is only doing what he ought to do in any event, although he could not be legally compelled to do it. Where a man performs a duty, even if an unenforceable one, such as paying a debt barred by the Statute of Limitations; or accepting goods which he had bought under an oral contract, mistake affords no reason for excusing him.⁷⁴ The case presents a certain analogy to that of a memorandum used to satisfy the Statute of Frauds, though not made for that purpose.⁷⁵ Accordingly, in Massachusetts, the buyer has been held liable upon an acceptance and receipt of part made under these circumstances.⁷⁶

§ 84. **Actual receipt.**—There is less opportunity for doubt as to the meaning of actual receipt than there is as to the meaning of acceptance. Whatever difficulties exist in regard to receipt are rather due to the inherent difficulty of determining what is, in fact, possession, than to any doubt as to the meaning of the word "receipt." All cases admit that it means acquisition of possession by the buyer, and in the following sections the question of what is such possession will be considered.⁷⁷

⁷⁴ *Townsend v. Hargraves*, 118 Mass. 325. See also *infra*, § 94.

⁷⁵ See *infra*, § 106.

⁷⁶ *Townsend v. Hargraves*, 118 Mass. 325. See also *Vincent v. Germond*, 11 Johns. 283.

⁷⁷ A custom to regard something

as acceptance and receipt is not enough. *Calvert v. Schultz*, 143 Mich. 441, 106 N. W. 1123. As acceptance has reference simply to the buyer's assent to becoming owner, it would seem that any act which, by a custom binding both parties, had

§ 85. **Forcible taking or giving of possession.**—In an early English case⁷⁸ it was casually remarked by Abbott, C. J.: "I do not mean, however, to say that if the buyer were to take away the goods without the assent of the seller, that would not be sufficient to bind him." But it is probable that it would generally be held that the receipt or possession that the contract requires must be obtained with the assent of the ~~buyer~~. Certainly a forcible seizure is insufficient.⁷⁹ The constant use of the word "delivered" in the cases as a substitute for the words of the statute, "actual receipt," seems to indicate that the courts have in mind, at least, receipt acquired by an act on the part of the seller. The converse case arises where the seller attempts to force delivery on the buyer without his knowledge or assent. This was held insufficient in a recent Iowa decision.⁸⁰ The court said: "To take a contract out of the Statute of Frauds the vendor must not only act with the purpose of placing the right of possession in the vendee, but the latter must actually accept with the intention of taking possession as owner."⁸¹ If it be admitted that possession, taken

been treated as an acceptance would be sufficient for that purpose under the statute; but for actual receipt an external test, of which intent of the parties cannot wholly supply the place, is necessary. Custom might, however, indicate assent to regard a delivery to a third person or at a particular place as a receipt by the buyer, and in *Calvert v. Schultz*, seems to have done so. The court was doubtless influenced by the fact that the goods were not actually moved and the whole transaction rested in parol. See *infra*, § 86.

⁷⁸ *Tempest v. Fitzgerald*, 3 B. & Ald. 680.

⁷⁹ *Washington Ice Co. v. Webster*, 62 Me. 341, 16 Am. Rep. 462; *Baker v. Cuyler*, 12 Barb. 667; *Brand v. Focht*, 3 Keyes, 409.

⁸⁰ *Dierson v. Petersmeyer*, 109 Iowa, 233, 80 N. W. 389.

⁸¹ It may be that the court in making this remark was also influenced

by the idea that acceptance must be subsequent to delivery, an idea which seems erroneous in view of the authorities cited in § 76, *supra*. The facts of the case make the decision obviously correct for the buyer had refused to take the goods before the attempted delivery was made without his knowledge, in the place specified in the oral contract. A more difficult case would arise had there been no such prior refusal. Such a case is covered by the language in *Goodwine v. Cadwallader*, 158 Ind. 202, 204, 61 N. E. 939. The court said, quoting with approval from *Dehority v. Paxson*, 97 Ind. 253, 256; "The seller must part with his control with the purpose of vesting the right of property in the buyer who must receive with such intent on his part." Neither case, however, presented facts of the sort under discussion.

without authority by the buyer, cannot be treated by him as actual receipt within the statute, it may yet be asked whether the other party may so treat it. It would seem that he might. The question has not arisen, but in a Wisconsin decision it was held that where the buyer fraudulently obtained goods from a bailee of the seller, the seller might treat this as receipt by the buyer, and acceptance of an offer which the seller had made.⁸²

§ 86. **Receipt of goods in the hands of a third person.**— There is no doubt that goods may be received within the meaning of the statute while still remaining in the hands of a third person as bailee.⁸³ It is necessary, of course, that the buyer assent to the bailment that is made for him.⁸⁴ It is also essential, in order to make out actual receipt by the buyer in such case, that there should be assent on the part of the bailee to hold for the buyer.⁸⁵ This assent of the bailee may be given, it would seem, either by attornment by the bailee to the purchaser after the purchase, or by a negotiable promise of the bailee prior to the bargain to hold the goods for any one whom the buyer should nominate, as in a negotiable warehouse receipt, since after the negotiation of the receipt the promise of the warehouseman by its terms runs directly to the indorsee. The goods, though they may not be in the hands of a bailee at the time of the bargain, may be subsequently delivered to him. Whether they are then "received" by the buyer depends upon the terms on which the bailee receives them. If

⁸² *Somers v. McLaughlin*, 57 Wis. 358, 362, 15 N. W. 442. The court said: "It was fraud upon the plaintiff if the defendant obtained the possession of the mare from James [the bailee] by suppressing the real bargain. In such case, if the possession is obtained by fraud, it may be treated by the vendor as a delivery to complete the sale at his option."

⁸³ *Daniel v. Hannah*, 106 Ga. 91, 95, 31 S. E. 734. See also cases in the four following notes.

⁸⁴ *Calvert v. Schultz*, 143 Mich. 441, 106 N. W. 1123. In this case there

seems to have been evidence of assent subsequent to the arrangement between the seller and the bailee, but the court held it insufficient, probably because of the doctrine referred to in the next section.

⁸⁵ *Bentall v. Burn*, 3 B. & C. 423; *Farina v. Home*, 16 M. & W. 119; *Stevens v. Stewart*, 3 Cal. 140; *Gooch v. Holmes*, 41 Me. 523; *Townsend v. Hargraves*, 118 Mass. 325; *Bassett v. Camp*, 54 Vt. 232. But see *King v. Jarman*, 35 Ark. 190, 37 Am. Rep. 11; *Sahlman v. Mills*, 3 Strob. 384, 51 Am. Dec. 630.

he receives them for the buyer there is receipt;⁸⁶ but, on the other hand, if the goods are still subject to the seller's orders, though in the bailee's hands, there is no actual receipt by the buyer.⁸⁷

§ 87. **New York rule.**— In a leading case in New York⁸⁸ which has had great subsequent influence, the court laid down a rule more stringent than that suggested in the preceding paragraph. Wright, J., said: "The uniform doctrine of the cases, however, has been that in order to satisfy the statute there must be something more than mere words; that the act of accepting and receiving required to dispense with a note in writing implies more than a simple act of the mind." It may be readily admitted that the last sentence of this quotation is sound. The preceding sentence, that mere words are necessarily insufficient, is not so clear. In the case itself the court held that lumber on a dock apart from other lumber could not, as matter of law, be received by the buyer though the dock was, apparently, a public or *quasi*-public place. The lower court had left the matter to the jury with the instruction, "that if they were satisfied that it was the intention of the parties to consider the lumber delivered at the time of the bargain, and that nothing further was agreed or contemplated to be done in order to change the title in or possession of the lumber, the plaintiff was entitled to recover; that the sale was not within the Statute of Frauds and did not require any note or memorandum in writing, provided they should find from the evidence that there was a delivery and acceptance of the lumber at the time of the bargain." The majority of the upper court held that the statute could not have been satisfied, since the alleged delivery consisted merely of words. This decision and the rule on which it is based have been followed in New York⁸⁹ and some other

⁸⁶ *Dodsley v. Varley*, 12 A. & E. 632; *Cusack v. Robinson*, 1 B. & S. 299; *Schroder v. Palmer Hardware Co.*, 88 Ga. 578, 15 S. E. 327; *Moore v. Hays*, 12 Ind. App. 476, 40 N. E. 638; *Snow v. Warner*, 10 Met. 132, 43 Am. Dec. 417; *Vanderbilt v. Central R. R.*, 43 N. J. Eq. 669, 12 Atl. 188.

⁸⁷ *Shelton v. Thompson*, 96 Mo. App. 327, 70 S. W. 256. See also *Scully v. Smith*, 110 N. Y. App. Div. 88, 86 N. Y. Suppl. 998.

⁸⁸ *Shindler v. Houston*, 1 N. Y. 261, 49 Am. Dec. 316.

⁸⁹ *Marsh v. Rouse*, 44 N. Y. 643; *Hallenback v. Cochran*, 20 Hun, 416; *Hinchman v. Lincoln*, 124 U. S. 38,

States,⁹⁰ but it seems to commend itself neither as a construction of the statute nor as a practical working rule. The aim of the statute doubtless was to require certain things, because in general these things would supplement or be a substitute for parol evidence; but the statute did not and could not well do away with parol evidence nor prevent the decision of cases turning sometimes solely upon parol evidence. It did not attempt to do this, it simply prescribed certain requisites; one of them is actual receipt. If the buyer is, as a matter of fact, in possession and control of goods, the fact that he acquired the possession without any act other than words is immaterial. Where property is bulky it will not infrequently happen that transfer of possession will be made by the statement of the ~~buyer~~ that he relinquishes ownership and control to the ~~seller~~ and the assent of the ~~seller~~ to receive this. As a practical matter the New York rule is a bad one, for it is not always easy to deal with bulky property otherwise than as the parties did in the case under discussion. They should not be penalized for adopting the only natural and reasonable means of delivery. The language of this decision has been elsewhere criticised.⁹¹

§ 88. **Receipt by delivery at a particular place.**—If the agreement of the parties is that the goods shall be delivered at a particular place, which is not in the control of any one, but to which the buyer has access and from which he may take the goods when he pleases without asking permission of any one, there is receipt within the statute.⁹² If the goods at the time of the bargain are already lying in this place, the statement by the seller that he delivers them is likewise good delivery by the seller and receipt

8 S. Ct. 369, 31 L. ed. 337. The decision last cited came up from the Circuit Court for the Southern District of New York and involved a discussion of New York law.

⁹⁰ Brunswick Grocery Co. v. Lamar, 116 Ga. 1, 42 S. E. 366; Dehority v. Paxson, 97 Ind. 253; Gorman v. Bros-sard, 120 Mich. 611, 79 N. W. 903; Calvert v. Schultz, 143 Mich. 441, 106 N. W. 1123. See also Edwards v. Grand Trunk R. R. Co., 54 Me. 105.

⁹¹ Browne, Statute of Frauds, § 320.

⁹² Cusack v. Robinson, 1 B. & S. 299; Bulkley v. Waterman, 13 Conn. 328; Daniel v. Hannah, 106 Ga. 91, 31 S. E. 734; Barkalow v. Pfeiffer, 38 Ind. 214; Whaley v. Gaie, 48 Mich. 193, 12 N. W. 33; Somers v. McLaughlin, 57 Wis. 358, 362, 15 N. W. 442. But see Finney v. Appgar, 31 N. J. L. 266. And compare Howard v. Borden, 13 Allen, 299.

by the buyer,⁹³ unless where the New York rule, requiring more than mere words to satisfy the statute, prevails.⁹⁴

§ 89. **Receipt by delivery to a carrier.**—When goods have been ordered from a distance or are selected and appropriated by the buyer and shipped to him by a carrier, the statute is not satisfied by the delivery to the carrier. There is actual receipt but no acceptance.⁹⁵ It has sometimes been thought to make a difference if the buyer designated the carrier by which the goods were sent.⁹⁶ This distinction, however, is obviously unsound, for unless

⁹³ *Leonard v. Davis*, 1 Black, 476, 17 L. ed. 222; *Calkins v. Lockwood*, 17 Conn. 154, 42 Am. Dec. 729; *Boyn-ton v. Veazie*, 24 Me. 286; *Jewett v. Warren*, 12 Mass. 300, 7 Am. Dec. 74; *Carter v. Willard*, 19 Pick. 1. See also *Tansley v. Turner*, 2 Bing. N. C. 151; *Cooper v. Bill*, 3 H. & G. 722.

⁹⁴ The facts of *Shindler v. Houston*, 1 N. Y. 261, 49 Am. Dec. 316, necessarily involved this question. The same point was decided in the same way in a recent Michigan decision. *Gorman v. Brossard*, 120 Mich. 611, 79 N. W. 903. In this case the agreement related to a quantity of curbstone lying where the seller had deposited it after completing a bulky contract. *Ladnier v. Ladnier*, 90 Miss. 475, 43 So. 946. See also *Cooke v. Millard*, 65 N. Y. 352, 22 Am. Rep. 619; *Brewster v. Taylor*, 63 N. Y. 587.

⁹⁵ *Hanson v. Armitage*, 5 B. & Ald. 557; *Acebal v. Levy*, 10 Bing. 376; *Hart v. Bush*, E. B. & E. 494; *Bil-lin v. Henkel*, 9 Colo. 394, 13 Pac. 420; *Lloyd v. Wright*, 25 Ga. 215; *Brunswick Grocery Co. v. Lamar*, 116 Ga. 1, 4, 42 S. E. 366; *Keiwert v. Meyer*, 62 Ind. 587, 30 Am. Rep. 206; *Hausman v. Nye*, 62 Ind. 485, 30 Am. Rep. 199; *Jones v. Mechanics' Bank*, 29 Md. 287, 96 Am. Dec. 533; *Frostburg Min. Co. v. New England Glass Co.*, 9 Cush. 115;

Johnson v. Cuttle, 105 Mass. 447, 7 Am. Rep. 545; *Kemensky v. Chapin*, 193 Mass. 500, 79 N. E. 781; *Gatiss v. Cyr*, 134 Mich. 233, 96 N. W. 26; *Grimes v. Van Vechten*, 20 Mich. 410; *Rindskopf v. De Ruyter*, 39 Mich. 1, 33 Am. Rep. 340; *Smith v. Brennan*, 62 Mich. 349, 28 N. W. 892, 4 Am. St. Rep. 867; *Calvert v. Schultz*, 143 Mich. 441, 106 N. W. 1123; *Simmons Hardware Co. v. Mullen*, 33 Minn. 195, 22 N. W. 294; *Fontaine v. Bush*, 40 Minn. 141, 41 N. W. 465, 12 Am. St. Rep. 722; *Waite v. McKelvy*, 71 Minn. 167, 73 N. W. 727; *Salomon v. King*, 63 N. J. L. 39, 42 Atl. 745; *Shepherd v. Pressey*, 32 N. H. 49, 55; *Standard Wall Paper Co. v. Towns*, 72 N. H. 324, 56 Atl. 744; *Rodgers v. Phillips*, 40 N. Y. 519; *Allard v. Greasert*, 61 N. Y. 1; *Hudson Furniture Co. v. Freed Furniture & Carpet Co.*, 10 Utah, 31, 36 Pac. 132. See, how-ever, the contrary decision of *Strong v. Dodds*, 47 Vt. 348. In Iowa where the statute does not require acceptance it has been held that delivery to a carrier under the circumstances suggested satisfies the statute. *Bul-lock v. Tschergi*, 13 Fed. Rep. 345; *Leggett & Meyer Co. v. Collier*, 89 Iowa, 144, 149, 56 N. W. 417.

⁹⁶ *Rodgers v. Phillips*, 44 N. Y. 519, by *Daniels, J.*; *Spencer v. Hale*, 30 Vt. 314, 73 Am. Dec. 309.

the carrier were designated by the buyer expressly or impliedly, or unless the seller were given authority to select the carrier, the title to the goods would not pass at common law and there would be no need of raising any question about the statute. The carrier would not be the agent to receive for the buyer, much less the agent to accept. And even though the carrier be specially named by the buyer, it is still true that though the carrier has authority to receive for the buyer, he has not authority to accept. The agency of the carrier is to receive and carry goods, not to decide whether they conform to the contract or offer. Accordingly it is generally agreed now that even though the carrier is particularly designated by the buyer, delivery of the goods to him does not satisfy the statute.⁹⁷ It should be observed, however, that if the goods are identified by the buyer's order, or contract, and not merely by the seller's appropriation, this constitutes acceptance; and the subsequent delivery of these goods to an authorized carrier, consigned to the buyer, being a receipt, the statute is satisfied.⁹⁸ If the goods when shipped are consigned by the seller to his own order, though the bill of lading is indorsed and sent forward with a draft for the price, delivery to the carrier is no receipt by the buyer, and, therefore, though the goods were identified and assented to before shipment, the statute is not satisfied.⁹⁹ If the goods arrive at their destination and the buyer sends a truckman to haul them to the buyer's place of business, even then there may be no acceptance, for the buyer's dealing with the goods is as consistent with a temporary possession for the purpose of inspection as with an assumption of ownership.¹

§ 90. **Receipt of goods in the hands of buyer.**—It sometimes happens that at the time of a bargain the goods in question are

⁹⁷ *Jones v. Mechanics' Bank*, 29 Md. 287, 96 Am. Dec. 533; *Smith v. Brennan*, 62 Mich. 349, 28 N. W. 892, 4 Am. St. Rep. 867; *Fontaine v. Bush*, 40 Minn. 141, 41 N. W. 465, 12 Am. St. Rep. 722; *Rodgers v. Phillips*, 40 N. Y. 519, by Woodruff, J.; *Allard v. Greasert*, 61 N. Y. 1.

⁹⁸ *Ullman v. Barnard*, 7 Gray, 554; *Cross v. O'Donnell*, 44 N. Y. 661, 4 Am. Rep. 721. But not if the

seller refuses to let the car in which the goods are loaded go forward until the goods are paid for. *Scully v. Smith*, 110 N. Y. App. Div. 88, 96 N. Y. Suppl. 998.

⁹⁹ *Fort Worth Packing Co. v. Consumers Meat Co.*, 86 Md. 635, 39 Atl. 746.

¹ *Standard Wall Paper Co. v. Towns*, 72 N. H. 324, 56 Atl. 744.

already in the possession of the buyer. Under these circumstances the goods will generally be identified and no difficulty can arise in regard to acceptance. As the buyer has possession it would seem also proper to hold that he has actual receipt of the goods. This is well settled in England² and the English decision has been followed in this country.³ It will be observed, however, that these cases are obnoxious to the New York rule, to which reference has been made above,⁴ for the whole transaction rests in parol. Accordingly, several decisions of the lower courts in New York have held, under such circumstances, that the statute was not satisfied.⁵ In a recent case, however, in the Supreme Court of New York, affirmed without opinion by the Court of Appeals,⁶ the majority of the court, without citing the earlier decisions, held that where part of the goods had been sent to the buyer for his examination, and he subsequently had agreed to buy the goods thus in his possession, there was an acceptance and receipt of part of the goods within the meaning of the statute. While the decision commends itself, it seems inconsistent with the earlier cases referred to above and also with the rule of *Shindler v. Houston*,⁷ requiring something more than words to make out acceptance and receipt.⁸

§ 91. **Receipt of goods in the hands of seller.**—As has been pre-

² *Edan v. Dudfield*, 1 Q. B. 302.

³ *Devine v. Warner*, 75 Conn. 375; 379, 53 Atl. 782, 96 Am. St. Rep. 211, 76 Conn. 229, 56 Atl. 562; *Couillard v. Johnson*, 24 Wis. 533; *Snider v. Thrall*, 56 Wis. 674, 14 N. W. 814. See also *Smith v. Bryan*, 5 Md. 141, 59 Am. Dec. 104; *Norton v. Simonds*, 124 Mass. 19.

⁴ See § 86.

⁵ *Dorsey v. Pike*, 50 Hun, 534; *Follett Wool Co. v. Utica Trust Co.*, 84 N. Y. App. Div. 151; *Linde v. Huntington*, 37 N. Y. Misc. Rep. 212. In the case last cited the goods had been put into the possession of a prospective buyer for examination, and after temporary examination the buyer declined the goods; but later when the buyer offered to sell for a

lower price than at first the buyer accepted. In the other cases in this note the buyer was in possession by virtue of a previous arrangement disconnected with the ultimate sale.

⁶ *Bristol v. Mente*, 79 N. Y. App. Div. 67, 80 N. Y. Suppl. 52; *affd.*, without opinion, 178 N. Y. 599, 70 N. E. 1096.

⁷ 1 N. Y. 261, 49 Am. Dec. 316.

⁸ In *Silkman Lumber Co. v. Hunholz*, 132 Wis. 610, 112 N. W. 1081, 11 L. R. A. (N. S.) 1186, a sale of lumber which was at the time of the sale in a portion of the seller's lumber yard occupied by the buyer under a license, was held within the statute, and the doctrine of *Shindler v. Houston*, 1 N. Y. 261, 49 Am. Dec. 316, approved.

viously seen⁹ acceptance cannot be made by the seller himself acting as agent for the buyer, and as will hereafter be seen one party cannot be the agent for the other to sign a memorandum under the statute.¹⁰ By analogy it might be supposed that the seller could not act as agent or bailee for the buyer in such a way as to constitute a receipt of the goods. Under what has been called the New York rule, which requires more than mere words in order to satisfy the statute, this result is practically reached; for where the seller holds possession of the goods after the sale for the buyer, there is generally no outward dealing with the goods to indicate the change of ownership; they simply remain where they have been, but the seller has agreed to hold them in a different capacity. Accordingly, some decisions may be found which deny broadly that the seller can receive for the buyer.¹¹ Such decisions, however, are at variance with the English law. The early decisions seem to have gone almost to the length of holding that the mere making of a bargain and assenting to the transfer of the property in specified goods, of itself, operated as a receipt, since the seller thereby became bailee for the buyer by operation of law,¹² but later, though the possibility was still admitted of actual receipt taking place while the seller still retained the goods, it was decided that unless the seller ceased to hold in the character of unpaid vendor and held wholly as bailee for the buyer, there was no receipt within the statute.¹³ The same test has been adopted in jurisdictions which do not adopt the New York requirement of something other than words.¹⁴ The seller in

⁹ *Supra*, § 81.

¹⁰ *Infra*, § 114.

¹¹ *Brunswick Grocery Co. v. Lamar*, 116 Ga. 1, 42 S. E. 366.

¹² *Chaplin v. Rogers*, 1 East, 192, note; *Anderson v. Scott*, 1 Campb. 235, note; *Hodgson v. Le Bret*, 1 Campb. 233; *Elmore v. Stone*, 1 Taunt. 458; and *Blenkinsop v. Clayton*, 7 Taunt. 597. In *Blackburn, Contract of Sale* (1st ed.), p. 33, after referring to these decisions, the author says: "In all these cases there seems to have been ample evidence of an acceptance of

the goods but scanty evidence of any actual receipt, if by that is to be understood a taking of possession; indeed, in *Blenkinsop v. Clayton*, as reported, there seems to have been none. After the decision of that last case, the current of authority set the other way."

¹³ *Tempest v. Fitzgerald*, 3 B. & Ald. 680; *Bill v. Bament*, 9 M. & W. 36; *Lillywhite v. Devereux*, 15 M. & W. 285; *Marvin v. Wallis*, 6 E. & B. 726.

¹⁴ *Ex parte Safford*, 2 Low. 563; *Terney v. Doten*, 70 Cal. 399, 11

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possession will rarely have parted with his lien unless he has either been paid or has ~~been~~ given credit; in either of these events, without any express words, it seems that the holding of the seller is necessarily wholly as agent for the buyer, and if it be admitted that the seller may act as the buyer's agent to receive, there seems no reason to question that there has been an actual receipt. As payment satisfies the statute,^{14a} receipt in such a case is immaterial. The fact that at the expiration of the period of credit the lien will revive if the price has not been paid is immaterial. In the meantime the right of the buyer to demand the goods has been absolute, and actual receipt, for however short a period, is enough.¹⁵ In regard to the sufficiency of the test provided by the sellers' lien, it should also be observed that by contract in many jurisdictions the seller may reserve an equitable lien independent of actual possession; but such a lien will not, of itself, prevent actual receipt by the buyer.¹⁶

§ 92. **Symbolic receipt.**—It is not always possible in the case

Pac. 743; *Devine v. Warner*, 76 Conn. 229, 56 Atl. 562; *Edwards v. Brown*, 98 Me. 165, 56 Atl. 654; *Safford v. McDonough*, 120 Mass. 290; *Rodgers v. Jones*, 129 Mass. 420; *Kirby v. Johnson*, 22 Mo. 354; *Sotham v. Weber*, 116 Mo. App. 104, 92 S. W. 181; *Clark v. Labreche*, 63 N. H. 397; *Reinhart v. Gregg*, 8 Wash. 191, 193, 35 Pac. 1075; *Janvrin v. Maxwell*, 23 Wis. 51.

^{14a} *Infra*, § 98.

¹⁵ *Kelly v. Brooks*, 25 Ala. 523.

¹⁶ *Dodsley v. Varley*, 12 A. & E. 632. In this case the goods after the purchase were deposited on the premises of a third person, an agreement being made that they should not be removed by the buyer until paid for. The buyer exercised various rights of ownership over the goods where they were stored and the court held there was actual receipt, saying: "We think that, upon this evidence, the place to which the wools were removed must be considered as the de-

fendant's warehouse, and that he was in actual possession of it there as soon as it was weighed and packed; that it was thenceforward at his risk, and if burned must have been paid for by him. Consistently with this, however, the plaintiff had not what is commonly called a lien, determinable on the loss of possession, but a special interest, sometimes, but improperly, called a lien, growing out of his original ownership, independent of the actual possession, and consistent with the property being in the defendant. This he retained in respect of the term agreed on, that the goods should not be removed to their ultimate place of destination before payment. But this lien is consistent, as we have stated, with the possession having passed to the buyer, so that there may have been a delivery to and actual receipt by him. This, we think, is the proper conclusion upon the present evidence; and there will be no rule."

of bulky goods, or goods at a distance, for the buyer to transfer possession of the goods themselves immediately and, under the Statute of Frauds as well as in other branches of the law of sales, where delivery is impossible, the delivery of the symbol has in some cases been recognized as sufficient. The typical case always given is the delivery of a key of a room, or building, in which the goods are stored.¹⁷ Likewise where iron was lying in a separate mass and the seller said, "I deliver this iron to you."¹⁸ Similar words in regard to logs floating in a stream are sufficient.¹⁹ So where cattle are running on a range, branding them and turning them loose again is sufficient.²⁰ In these cases it will be observed that though the goods themselves are not changed from the position which they occupied before the bargain, that position is one which puts the goods as fully in the actual physical control of the buyer as of any other person; but cases may be supposed where this is not true. For instance, where goods are at sea no actual delivery is possible, but the goods are in the possession of the captain of the vessel, who for this purpose is the agent of the seller. It may be doubted whether in such a case there can be actual receipt of the goods by the buyer without a negotiable bill of lading, although there are doubtless decisions holding that there is a delivery so far as to satisfy common-law requisites of delivery between buyer and seller, or even so far as to bind creditors of the seller.

§ 93. **Documents of title.**—By far the most important kind of symbolic delivery is that made by bills of lading and warehouse receipts. There are surprisingly few cases raising the question, but upon principle it would seem that delivery of a non-negotiable document of title, though frequently called symbolic delivery, in

¹⁷ *Atwell v. Miller*, 6 Md. 10, 61 Am. Dec. 294; *Shindler v. Houston*, 1 N. Y. 261, 49 Am. Dec. 316; *Gray v. Davis*, 10 N. Y. 285. See also *Vining v. Gilbreth*, 39 Me. 496; *Packard v. Dunsmore*, 11 Cush. 282; *Wilkes v. Ferris*, 5 Johns. 335, 4 Am. Dec. 364; *Barr v. Reitz*, 53 Pa. St. 256. In the cases last cited the question of delivery did not relate to the Statute of Frauds.

¹⁸ *Calkins v. Lockwood*, 17 Conn. 154, 42 Am. Dec. 729.

¹⁹ *Leonard v. Davis*, 1 Black, 476, 17 L. ed. 222; *Boynton v. Veazie*, 24 Me. 286; *Jewett v. Warren*, 12 Mass. 300, 7 Am. Dec. 74; *Carter v. Willard*, 19 Pick. 1.

²⁰ *Walden v. Murdock*, 23 Cal. 540, 83 Am. Dec. 135.

cases not involving the Statute of Frauds, can hardly be considered as actual receipt of the goods by the buyer. The goods are, in fact, in the possession of a bailee, and until the bailee attorns to the buyer he is an agent for the seller and his possession is the seller's possession.²¹ If, however, a document of title is negotiable there seems no reason to doubt that the indorsement and delivery of the document may be a receipt of the goods. The meaning of negotiability, primarily, is: That the obligor, that is, the bailee, is directly bound by contract to the assignee of the document immediately upon its assignment — no attornment being

²¹ *Bentall v. Burn*, 3 B. & C. 423; *Farina v. Home*, 16 M. & W. 119. In the former of these cases the court said of a delivery order: "There could not have been any actual acceptance of the wine by the vendee until the dock company accepted the order for the delivery, and thereby assented to hold the wine as the agents of the vendee. They held it originally as the agents of the vendors, and as long as they continued so to hold it the property was unchanged. It has been said that the London Dock Company were bound by law, when required to hold the goods on account of the vendee. That may be true, and they might render themselves liable to an action for refusing so to do; but if they did wrongfully refuse to transfer the goods to the vendee, it is clear that there could not then be any actual acceptance of them by him until he actually took possession of them." And in the latter case, Parke, B., said of a dock warrant: "This warrant is no more than an engagement by the wharfinger to deliver to the consignee or any one he may appoint; and the wharfinger holds the goods as the agent of the consignee (who is the vendor's agent), and his possession is that of the consignee until an assignment has taken place, and the wharfinger has attorned, so to speak,

to the assignee, and agreed with him to hold for him. Then, and not till then, the wharfinger is the agent or bailee of the assignee, and his possession that of the assignee, and then only is there a constructive delivery to him. In the meantime the warrant, and the indorsement of the warrant, is nothing more than an offer to hold the goods as the warehouseman of the assignee." So in *Boardman v. Spooner*, 13 Allen, 353, the acceptance of a bill of goods stored in a general warehouse, an order for their delivery without notice to the warehouse was held insufficient to satisfy the statute. See also *Quintard v. Bacon*, 99 Mass. 185. See, however, *Wadhams v. Balfour*, 32 Or. 313, 51 Pac. 642. In *Rodgers v. Phillips*, 40 N. Y. 519, the court remarked: "Assuming, as it may properly be done, that the acceptance of the bill of lading by the defendants under ordinary circumstances would have been equivalent to the acceptance of the property mentioned in it, yet that could not be the effect of it where, as in this case, the property had been previously lost." But in this case the court was considering acceptance rather than actual receipt, and acceptance of a document of title may well indicate assent to buy the goods which it represents.

necessary. He is, therefore, agent of the buyer as soon as the buyer becomes the indorsee of the document.²²

§ 94. **Part of the goods.**—By the terms of the statute acceptance and receipt of part of the goods suffice, and it is immaterial how small the part may be. It is, therefore, sufficient if the buyer receives a sample of the goods, provided the sample is part of the bulk; that is, if it diminishes the quantity of goods subsequently to be delivered to the buyer.²³ But otherwise where the sample is merely to show what the goods are like.²⁴ A sample given merely for the purpose of examination is of course insufficient.²⁵ It is immaterial when the part is received and it seems that an executory contract for unspecified goods may be made binding by the specification and acceptance and receipt of a portion of the goods under this contract, though the remainder are unspecified.²⁶ It is essential in order to make acceptance and receipt of part suffice, that the part be accepted and received as part of the goods. If, therefore, the buyer when taking the part declines to take more, the statute is not satisfied.²⁷ But where part of the goods were taken by the buyer into his control after the destruction of the remainder, this act of the buyer was held sufficient to render him liable for all the goods.²⁸ So if an

²² *Mueller v. Guye*, 12 Mo. App. 588; *Wadhams v. Balfour*, 32 Or. 313, 51 Pac. 642. In *Wadhams v. Balfour* the receipt does not seem to have been negotiable, but the court held its delivery sufficient.

²³ *Hinde v. Whitehouse*, 7 East, 558; *Gardner v. Grout*, 2 C. B. (N. S.) 340; *Gilliat v. Roberts*, 19 L. J. Ex. 410; *Moore v. Love*, 57 Miss. 765; *Brock v. Knowler*, 37 Hun, 609.

²⁴ *Morton v. Tibbett*, 15 Q. B. 428; *Dierson v. Petersmeyer*, 109 Iowa, 233, 80 N. W. 389; *Richardson v. Smith*, 101 Md. 15, 60 Atl. 612, 70 L. R. A. 321, 109 Am. St. Rep. 552; *Moore v. Love*, 57 Miss. 765.

²⁵ *Mechanical Boiler Co. v. Kellner*, 62 N. J. L. 544, 43 Atl. 599.

²⁶ *Scott v. Eastern Counties Ry.*

Co., 12 M. & W. 33; *Rickey v. Tenbroeck*, 63 Mo. 563; *Gabriel v. Kildare Elevator Co.*, 18 Okla. 318, 90 Pac. 10. See, however, *May v. Ward*, 134 Mass. 127; *Ladnier v. Ladnier*, 90 Miss. 475, 43 So. 946.

²⁷ *Atherton v. Newhall*, 123 Mass. 141, 25 Am. Rep. 47. See also *Dixon v. Yates*, 5 B. & Ad. 313; *Pratt v. Chase*, 40 Me. 269, 273.

²⁸ *Goddard v. Demeritt*, 48 Me. 211; *Townsend v. Hargraves*, 118 Mass. 325. These decisions seem sound for the statute is satisfied according to its terms, and though the buyer may not have contemplated making himself liable for the whole, he did not repudiate the contract and his liability necessarily follows. See also *Vincent v. Germond*, 11 Johns. 283, and *supra*, § 83.

agent selling goods for his principal agrees to throw in goods of his own in order to induce the buyer to enter the bargain, and the latter goods are delivered, the statute is not satisfied as to the other goods.²⁹ Other decisions involving an acceptance and receipt of part of the goods, are given in the note below.³⁰

§ 95. **Choses in action.**—Most of the statutes which specifically include choses in action within the statute also mention acceptance and actual receipt of the evidences of the choses in action as a method of satisfying the statute, but even where evidences of the choses in action are not mentioned there can be no doubt that delivery of any document which is customarily regarded as representing the choses in action would be sufficient. Thus the acceptance and receipt of a stock certificate would satisfy the statute so far as a contract to sell stock is concerned.³¹ How far beyond the case of a document courts might go is doubtful. In *Jones v. Reynolds*³² a model of an invention as yet unpatented was delivered, and this was held sufficient to satisfy the statute when the invention was sold. In regard to choses in action having no tangible evidence, the method of satisfying the statute by acceptance and actual receipt is not suitable and resort must be had to the other methods prescribed.

§ 96. **Acceptance and receipt present questions of fact.**—It is for the jury to determine in a doubtful case whether there has been acceptance and receipt.³³ If, however, there is no evidence justifying the jury in finding more than one way, the court may properly decide the question.³⁴

§ 97. **"Or give something in earnest to bind the contract."**—At the present day, earnest as distinguished from part payment is sel-

²⁹ *McCormick Harvesting Co. v. Cusack*, 116 Mich. 647, 74 N. W. 1005. There were necessarily two sales, one by the principal and one by the agent. See *Tompkins v. Sheehan*, 158 N. Y. 617, 53 N. E. 502.

³⁰ *Elliot v. Thomas*, 3 M. & W. 170; *MacEvoy v. Aronson*, 46 N. Y. Misc. Rep. 622, 92 N. Y. Suppl. 724.

³¹ *Berwin v. Bolles*, 183 Mass. 340, 67 N. E. 323.

³² 120 N. Y. 213, 24 N. E. 279.

³³ *Edan v. Dudfield*, 1 Q. B. 302; *Lillywhite v. Devereux*, 15 M. & W. 285; *Morton v. Tibbett*, 15 Q. B. 428; *Hinchman v. Lincoln*, 124 U. S. 38, 48, 8 S. Ct. 369, 31 L. ed. 337; *Waite v. McKelvy*, 71 Minn. 167, 73 N. W. 727; *Houghtaling v. Ball*, 19 Mo. 84, 59 Am. Dec. 331; *Becker v. Holm*, 89 Wis. 86, 61 N. W. 307.

³⁴ *Hinchman v. Lincoln*, 124 U. S. 38, 48, 8 S. Ct. 369, 31 L. ed. 337.

dom or never given. Formerly a small payment was sometimes made to bind the bargain which was not regarded as part of the price.³⁵ This would perhaps still be binding and satisfy the statute, but the possibility of earnest as distinguished from part payment is now of little practical importance.³⁶ The only question that has arisen in modern times in regard to the meaning of earnest is whether a sum of money deposited with a third person as a forfeit to secure the performance of a bargain, but not to be applied as part payment is earnest within the meaning of the statute. It was held not to be.³⁷ If money were deposited with the buyer to be applied on the price if the buyer completed the bargain but otherwise to be forfeited, there would, however, seem to be a part payment.

§ 98. "**Or in part payment.**"—The statute requires no specific amount but it does require payment. Consequently a tender is

³⁵ See *Bach v. Owen*, 5 T. R. 409, where the buyer paid a halfpenny to bind the bargain, and this was held sufficient to transfer the property in the horse which was the subject of the sale.

³⁶ See *Howe v. Hayward*, 108 Mass. 54, 11 Am. Rep. 306; *Jennings v. Dunham*, 60 Mo. App. 635.

³⁷ *Noakes v. Morey*, 30 Ind. 103; *Howe v. Hayward*, 108 Mass. 54, 11 Am. Rep. 306; *Jennings v. Dunham*, 60 Mo. App. 635. In the latter case the court said, at p. 638: "Originally this 'earnest' was not necessarily a part payment. It was a custom under the common law, and seems also to have been a custom in other countries than England to give something to bind a bargain. In some countries some act was performed. Story on Sales, § 273. Benjamin states in his work on Sales, § 196, that one species of earnest in the Roman law was a payment of a sum which if the sale was carried out was to be credited on the price, but which carried the understanding that it was forfeit money if the sale

was not completed by the buyer; and if the contract was not performed by the seller, he was to return to the buyer the money advanced together with a like sum as a forfeit on his part. Whether a sum which is termed forfeit money was ever a species of earnest by the common law need not now be investigated, since it has ceased to be of practical importance. It is now considered, that giving something in earnest to bind the bargain, and giving something in payment mean the same thing; that is, a part payment of the price. Benjamin on Sales, § 189; Story on Sales, §§ 273, 275. So, while in some countries in olden times, 'earnest to bind the bargain' might consist of forfeit money, it is not so now. In modern times, earnest must be a part payment of the price. And, where the parties to a contract put up a sum of money to be forfeited to the nondefaulting party, it is not a part payment, and, therefore, does not take the contract out of the Statute of Frauds."

not enough.³⁸ Nor does it suffice that the price remain in the buyer's hands for the seller to draw upon.³⁹ It has been seen that contracts of barter are within the statute.⁴⁰ It must follow that the payment required by the statute is not necessarily a payment in money. It may be other property.⁴¹ This is put beyond doubt in the Sales Act by the provision that the price may be any personal property.⁴² So the use of property has been held a payment.⁴³ Likewise services.⁴⁴ If the contract or sale specifies a money price, however, the requirement of the statute would seem not to be satisfied by negotiable paper given for the price until the paper is paid or unless it was taken in absolute payment.⁴⁵ The buyer's note not generally being taken in absolute payment will, therefore, generally not be sufficient,⁴⁶ but the note of a third person given as absolute payment is sufficient.⁴⁷ The most

³⁸ *Davis v. Phillips* (K. B. 1907), 24 T. L. R. 4; *Hershey Lumber Co. v. St. Paul Sash Co.*, 66 Minn. 449, 69 N. W. 215; *Edgerton v. Hodge*, 41 Vt. 676.

³⁹ *Bowers v. Anderson*, 49 Ga. 143. In this case the buyer was obviously simply to remain a debtor. If the buyer became the bailee or trustee of specific money, the cases would be indistinguishable from the analogous situation in regard to goods, *supra*, § 91.

⁴⁰ See *supra*, § 56.

⁴¹ *Eastern R. R. Co. v. Benedict*, 10 Gray, 212; *Kuhns v. Gates*, 92 Ind. 66; *Wallace v. Long*, 105 Ind. 522, 526, 5 N. E. 666, 55 Am. Rep. 222; *Weir v. Hudnut*, 115 Ind. 525, 18 N. E. 24; *Howe v. Jones*, 57 Iowa, 130; *Driggs v. Bush*, 152 Mich. 53, 115 N. W. 985; *Burton v. Gage*, 85 Minn. 355, 88 N. W. 997; *Dow v. Worthen*, 37 Vt. 108; *Sharp v. Carroll*, 66 Wis. 62, 27 N. W. 832.

⁴² Section 9 (2).

⁴³ *Weir v. Hudnut*, 115 Ind. 525, 18 N. E. 24.

⁴⁴ *Wallace v. Long*, 105 Ind. 522, 526, 5 N. E. 666, 55 Am. Rep. 222; *White v. Drew*, 56 How. Pr. 53. In

Driggs v. Bush, 152 Mich. 53, 115 N. W. 985, the defendant agreed to sell and the plaintiff to buy certain hay at \$10 a ton. The hay was to be baled by the plaintiff and then transported by the defendant to an adjoining town. The plaintiff sent men to the defendant's premises who with his assent baled the hay, and the plaintiff paid them for the work. The defendant afterward refused to carry out the contract. It was held that the property had not passed to the buyer, and that, therefore, the baling of the hay inured to the benefit of the defendant, and that this benefit received in accordance with the contract was a part payment taking the case out of the statute.

⁴⁵ A check drawn by the buyer and afterward paid by the bank was held to satisfy the statute in *Hunter v. Wetsell*, 84 N. Y. 549, 38 Am. Rep. 544, and in *McLure v. Sherman*, 70 Fed. Rep. 190, and *Logan v. Carroll*, 72 Mo. App. 613, a check, though not cashed, was held to suffice.

⁴⁶ *Krohn v. Bantz*, 68 Ind. 277; *Ireland v. Johnson*, 18 Abb. Pr. 392.

⁴⁷ *Combs v. Bateman*, 10 Barb. 573.

difficult question of part payment is where the seller is indebted to the buyer on a previous account and contracts to sell, or sells, goods, in satisfaction of the claim in whole or in part. The leading case upon this point is *Walker v. Nussey*,⁴⁸ where the goods were not delivered and the court held that by the terms of the bargain the old claim was not to be extinguished until the goods should be delivered and that, therefore, there was no payment. Pollock, C. B., said, however: "Had these parties positively agreed to extinguish the debt of £4 odd, and receive the plaintiff's goods *pro tanto* instead of it, the law might have been satisfied without the ceremony of paying it to the defendant and repaying it by him. But the actual contract did not amount to that, and there has been no part payment within the statute." There seems no reason to question the correctness of this *dictum* and it has been approved in Vermont⁴⁹ and finds support elsewhere.⁵⁰ But generally it has either been overlooked or not proved convincing in subsequent decisions, for they decide, or at least say for the most part, that the mere agreement that the old account should be canceled is not enough.⁵¹ This leads to the rather curious result that though as a matter of common law the whole price has been paid by the cancellation of an indebtedness, there has not been any part payment within the statute, because the satisfaction of the price is effected wholly by parol. The statute puts no limitation on the way that the price should be paid, and it seems an unnecessary piece of judicial legislation for courts to make the requirements of the statute more stringent than the Legislature has done. This might be expected of New York, in view of the rule laid down by the courts of that State

⁴⁸ 16 M. & W. 302.

⁴⁹ *Dow v. Worthen*, 37 Vt 108.

⁵⁰ *Peake v. Conlan*, 43 Iowa, 297; *Howe v. Jones*, 57 Iowa, 130, 8 N. W. 451, 10 N. W. 299; *Cotterill v. Stevens*, 10 Wis. 422. In the case last cited the arrangement was triangular, the buyer agreeing to assume a debt of the seller's to a third person who assented to the transaction. This novation was held to amount to payment within the statute.

⁵¹ *Norton v. Davidson*, [1899] 1 Q. B. 401; *Galbraith v. Holmes*, 15 Ind. App. 34, 43 N. E. 575; *Gorman v. Brossard*, 120 Mich. 611, 79 N. W. 903; *Matthiessen v. McMahon's Adm.*, 38 N. J. L. 536; *Archer v. Zeh*, 5 Hill, 200; *Walrath v. Richie*, 5 Lans. 362; *Brabin v. Hyde*, 32 N. Y. 519; *Milos v. Covacevich*, 40 Or. 239, 66 Pac. 914. In many of these cases, as in *Walker v. Nussey*, there was merely an agreement to extinguish the debt later. Lord Halsbury in

in regard to acceptance and receipt,⁵² and of other jurisdictions which have followed New York, but with the exception of Pollock's *dictum* quoted above, and the few authorities following it, the rule seems general. The surrender of a note representing the buyer's claim is sufficiently tangible to amount to part payment.⁵³ As is indorsement upon a note,⁵⁴ or an entry in books of account.⁵⁵ Payment to a third person, in accordance with an agreement made with the seller that the price shall be so paid, is enough,⁵⁶ and of course payment to the seller's agent is enough.⁵⁷ This has been so held even though a local statute required that authority to enter into a contract required in law to be in writing can only be given in writing.⁵⁸ Payment to an agent for several sellers who were entitled to share the money paid satisfies the statute as to each of the sales.⁵⁹ So payments made on a general account and applicable to the price of several lots of goods take all the transactions out of the statute.⁶⁰ But payment for a past purchase, though made as an inducement for making a present one, is insufficient.⁶¹

§ 99. *Time of payment.*—Under the English statute and similar American statutes (including the Sales Act), it makes no

Norton v. Davison, uses language similar to that in Shindler v. Houston, 1 N. Y. 261, 49 Am. Dec. 316, that mere words are insufficient to satisfy the statute, though it is perfectly settled in England that mere words may be sufficient, *e. g.*, where the goods are already in the possession of the buyer or where the seller becomes bailee for the buyer. *Supra*, §§ 90, 91.

⁵² See *supra*, § 86.

⁵³ Sharp v. Carroll, 66 Wis. 62, 27 N. W. 832.

⁵⁴ Dieckman v. Young, 87 Mo. App. 530.

⁵⁵ Norwegian Plough Co. v. Hanthorn, 71 Wis. 529, 37 N. W. 825.

⁵⁶ Brady v. Harrahy, 21 U. C. Q. B. 340. See also Stoddard v. Graham, 23 How. Pr. 518.

⁵⁷ Hawley v. Keeler, 53 N. Y. 114. The limitation which this case seeks

to impose on the appointment of an agent by requiring that the agent shall not arise from the same parol agreement which it is sought to validate has been previously criticised. See § 81.

⁵⁸ Case v. Kramer, 34 Mont. 142, 85 Pac. 878. In this case: "An agent orally employed to sell cattle was instructed to require a part payment of the purchase price. The agent procured a purchaser who made a partial payment. Held, that the contract of sale was valid notwithstanding Civ. Code, § 3085, declaring that authority to enter into a contract required by law to be in writing can only be given in writing."

⁵⁹ Burhans v. Corey, 17 Mich. 282.

⁶⁰ Berwin v. Bolles, 183 Mass. 340, 67 N. E. 323.

⁶¹ Organ v. Stewart, 60 N. Y. 413.

difference when the payment is made with reference to the oral bargain.⁶² In New York and a number of other States, however, the statute expressly inserts the words "at the time."⁶³ Under a statute in this form it is necessary, in order to make a subsequent payment operate as a satisfaction of the statute, that there should be at least a restatement or recognition of the essential terms of the contract, when the payment is made.⁶⁴

§ 100. "Some note or memorandum in writing of the contract or sale."—The third way of satisfying the statute in regard to sales or contracts to sell, unlike the other methods, is not peculiar to the section of the statute devoted to sales of personal property. On the contrary the requirement of a writing is in the other sections the only method of satisfying the statute. Consequently, in determining the sufficiency of a memorandum in writing, decisions under any of the sections are often in point. The wording of any section under which a case comes up should, however, be observed, for many of the statutes in regard to agreements concerning land and other matters within the statute require the "contract" to be in writing in order to be enforceable, while sections relating to the sale of goods, with almost perfect uniformity, are satisfied by a "note or memorandum."⁶⁵ The difference between a contract in writing and a memorandum of a parol con-

⁶² *Davis v. Moore*, 13 Me. 424; *Thompson v. Alger*, 12 Met. 428, 436; *Dallavo v. Richardson*, 134 Mich. 226, 96 N. W. 20; *Gault v. Brown*, 48 N. H. 183, 2 Am. Rep. 210.

⁶³ California, Civ. Code (1903), § 1739; Colorado, Mills' St. (1891), § 2025; Idaho, Civ. Code (1901), § 2739; Minnesota, Rev. Laws (1905), § 3484; Montana, Civ. Code, § 2340; Nebraska, Comp. St. (1899), § 3183; Nevada, Gen. St. (1885), § 2631; New York, Birdseye's Rev. St. (1901), p. 2634; North Dakota, Rev. St. (1895), § 3958; Oregon, Hill's Annot. Laws (1892), § 785; Utah, Rev. St. (1898), § 2469; Wisconsin, Sanborn & Berryman St. (1898), § 2308; Wyoming, Rev. St. (1899), § 2954.

⁶⁴ See *Raymond v. Colton*, 104 Fed. Rep. 219, 43 C. C. A. 501; *Koewing v. Wilder*, 128 Fed. Rep. 558, 63 C. C. A. 186; *Franklin v. Matoa Gold Min. Co.*, 158 Fed. Rep. 941, C. C. A. ; *Bissell v. Balcom*, 39 N. Y. 275; *Hawley v. Keeler*, 53 N. Y. 114; *Hunter v. Wetsell*, 57 N. Y. 375, 15 Am. Rep. 508; s. c., 84 N. Y. 549, 38 Am. Rep. 544; *Jackson v. Tupper*, 101 N. Y. 515, 5 N. E. 65; *Milos v. Covacevich*, 40 Or. 239, 242, 66 Pac. 914; *Bates v. Chesebro*, 32 Wis. 594, 36 Wis. 636; *Paine v. Fulton*, 34 Wis. 83; *Kerkhof v. Atlas Paper Co.*, 68 Wis. 674, 32 N. W. 766; *Hanson v. Roter*, 64 Wis. 622, 25 N. W. 530; *Crosby Hardwood Co. v. Trester*, 90 Wis. 412, 63 N. W. 1057.

tract is important. Thus a note or memorandum may be made at any time prior to the beginning of the action⁶⁶ and as will appear from subsequent discussion, need not be made with the intent of making a memorandum. The parol evidence rule also affects differently a contract in writing from a memorandum in writing. The former is necessarily the only complete statement of the contract and the only evidence in regard to it, but a written memorandum may be shown by parol to be inaccurate or inadequate, and hence not a compliance with the statute.⁶⁷

§ 101. **Form of memorandum.**—The memorandum may be in any form, and an enumeration of particular cases that have arisen is not exclusive, but merely illustrative. The memorandum may of course be in the form of a carefully prepared written contract, but it may also be in the form of a letter or letters,⁶⁸ receipts,⁶⁹ an

⁶⁶ This section of the Statute of Georgia (Code of 1895), § 2693 (7), requires the "promise" to be in writing, but the Supreme Court of Georgia seems to lay no stress on this difference from the ordinary form of the statute. See *Foster v. Leeper*, 29 Ga. 294; *Phillips v. Ocmulgee Mills*, 55 Ga. 633. In these cases memoranda made subsequently to the oral bargain, and in the former case in the nature of an admission of a past contract rather than an expression of a present promise, were held sufficient. See, however, *Jackson v. Strowger Telephone Exchange*, 108 Ga. 646, 34 S. E. 207.

⁶⁷ See *supra*, § 71.

⁶⁸ See the distinction taken in cases where the "contract" was required to be in writing. *Halsell v. Renfrow*, 202 U. S. 287, 26 S. Ct. 610, 50 L. ed. 1032; *Zimmerman v. Zehendner*, 164 Ind. 466. Also in cases where some "note or memorandum" only was necessary. *Ingraham v. Strong*, 41 Ill. App. 46; *Catterlin v. Bush*, 39 Or. 496, 59 Pac. 706, 65 Pac. 1064. In the latter case the court said: "The memorandum and the contract or agreement are not to be confounded

as one and the same thing. The memorandum is understood to be a note or minute informally made of the agreement, which may have but a verbal existence, expressing briefly the essential terms, and was never intended to stand as and for the agreement itself. The necessary elements are that it must contain the essential terms of the contract, expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties. Mere formal or nonessential terms will be implied, but the elements necessary to a completed contract must be intelligently expressed, though ever so briefly."

⁶⁹ Many cases of this sort may be found in following passages *passim*.

⁷⁰ *Evans v. Prothero*, 1 De G. M. & G. 572; *Williams v. Morris*, 95 U. S. 444, 24 L. ed. 360; *Littell v. Jones*, 56 Ark. 139, 19 S. W. 497; *Eppich v. Clifford*, 6 Colo. 493; *Ellis v. Bray*, 79 Mo. 227; *Kidder v. Flanders*, 73 N. H. 345, 61 Atl. 675; *Gordon v. Collett*, 102 N. C. 532, 9 S. E. 486. All these decisions related to contracts to sell land.

invoice or statement of account,⁷⁰ a bill or note,⁷¹ records of municipal officers⁷² or of a private corporation,⁷³ entries in books of account⁷⁴ or memorandum books of any kind.⁷⁵ Telegrams also are sufficient.⁷⁶ The only difficulty in regard to telegrams relates to the agency of the telegraph operator who actually writes and signs the messages as delivered. Statutes in some States expressly provide that such telegrams are to be treated as the writings of the sender, but the result seems to be the same in the absence of such a statute.⁷⁷ The memorandum may be written in pencil.⁷⁸

§ 102. **Contents of memorandum — Parties.**— It is essential that the memorandum state the substance of the transaction to which it relates. It is necessary, therefore, that the memorandum state the name of both parties to the bargain.⁷⁹ It is essential, too, that

⁷⁰ *Barry v. Coombe*, 1 Pet. 640, 7 L. ed. 295 (land); *Linton v. Williams*, 25 Ga. 391 (goods).

⁷¹ *Reynolds v. Kirk*, 105 Ala. 446, 17 So. 95 (land); *Phillips v. Ocmulgee Mills*, 55 Ga. 633 (goods); *Work v. Cowhick*, 81 Ill. 317 (land); *Little v. Pearson*, 7 Pick. 301, 19 Am. Dec. 289 (land).

⁷² *Bourland v. Peoria County*, 16 Ill. 538; *Grimes v. Hamilton County*, 37 Iowa, 290; *McManus v. Boston*, 171 Mass. 152, 50 N. E. 607; *Stevens v. Muskegon*, 111 Mich. 72, 69 N. W. 227, 36 L. R. A. 777; *Curtis v. Portsmouth*, 67 N. H. 506, 39 Atl. 439 (all these decisions related to contracts concerning land); *Argus Co. v. Albany*, 55 N. Y. 495, 14 Am. Rep. 296 (not to be performed within a year).

⁷³ *Lamkin v. Baldwin Mfg. Co.*, 72 Conn. 57, 43 Atl. 593, 1042, 44 L. R. A. 786 (land and goods); *Tuffs v. Plymouth Mining Co.*, 14 Allen, 407 (not to be performed within a year).

⁷⁴ *Sarl v. Bourdillon*, 1 C. B. (N. S.) 188 (goods); *Newell v. Radford*, L. R. 3 C. P. 52 (goods).

⁷⁵ *Champion v. Plummer*, 1 B. & P. (N. R.) 252 (goods); *Coddington v. Goddard*, 16 Gray, 436 (goods);

Wiener v. Whipple, 53 Wis. 298, 10 N. W. 433, 40 Am. Rep. 775 (goods).

⁷⁶ *Little v. Dougherty*, 11 Colo. 103 (not to be performed within a year); *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511 (goods).

⁷⁷ See cases cited in the preceding note.

⁷⁸ *Merritt v. Clason*, 12 Johns. 102, 7 Am. Dec. 286 (goods); *Clason v. Bailey*, 14 Johns. 484 (goods); *Draper v. Pattina*, 2 Speers, 292 (goods); *McDowell v. Chambers*, 1 Strobb. Eq. 347, 47 Am. Dec. 539 (land).

⁷⁹ *Champion v. Plummer*, 1 B. & P. (N. R.) 252 (goods); *Vandenbergh v. Spooner*, L. R. 1 Ex. 316 (goods); *Grafton v. Cummings*, 99 U. S. 100, 25 L. ed. 366 (land); *Kingsley v. Siebrecht*, 92 Me. 23, 42 Atl. 249, 69 Am. St. Rep. 486 (land); *McElroy v. Seery*, 61 Md. 389, 48 Am. Rep. 110 (goods); *Clampet v. Bells*, 39 Minn. 272, 30 N. W. 495; *Lewis v. Wood*, 153 Mass. 321, 26 N. E. 862, 11 L. R. A. 143 (land); *Mentz v. Newwitter*, 122 N. Y. 491, 494, 25 N. E. 1044, 11 L. R. A. 97, 19 Am. St. Rep. 514; *Ward v. Hasbrouck*, 169 N. Y. 407, 62 N. E. 434; *Frahm v. Metcalf* (Neb.) 106 N. W. 227 (land).

it shall appear which party is buyer and which is seller.⁸⁰ But though a memorandum might not indicate to a person unacquainted with trade usages which party was buyer and which seller, yet if a person cognizant of such usages would be able to determine the relation of the parties the memorandum is sufficient.⁸¹

§ 103. **Contents of memorandum — Price.**— If the parties agreed upon a price, it is generally required that the price be stated in the memorandum.⁸² If, however, the agreement in fact did not mention a price, none need be mentioned in the memorandum. The law will imply an obligation to pay a reasonable price. The memorandum need be no more definite than the contract actually was, and the law will make the same implication in regard to the memorandum that it does in regard to the promise.⁸³ If the contract is sufficiently definite for the law to enforce aside from the statute, the memorandum, if it states the contract exactly, will

⁸⁰ *Frank v. Eltringham*, 65 Miss. 281, 3 So. 665 (goods). In *Vanderburgh v. Spooner*, L. R. 1 Ex. 316, the following memorandum was held insufficient for this reason: "D. Spooner agrees to buy the whole of the lots of marble purchased by Mr. Vanderburgh, now lying at the Lyme Cobb, at 1s. per foot. (Signed) D. Spooner." So in *Bailey v. Ogden*, 3 Johns. 399, the statute was held not to be satisfied by the following memorandum:

14 DECEMBER.

J. Ogden and Co. Bailey & Bogart.
Brown, 12½. }
White, 16¼. } 60 and 10 days.
Debiture part pay.

⁸¹ Thus in *Newell v. Radford*, L. R. 3 C. P. 52, the following memorandum was held sufficient:
Mr. Newell, 32 sacks culasses at 39s.,
280 lbs., to wait orders.

JUNE 8. JOHN WILLIAMS.
And in *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446, 14 L. ed. 493, the following was held sufficient:

Sept. 19,— W. W. Goddard, 12 mos.
300 bales S. F. drills . . . 7¼
100 cases blue do. . . 8¾
Credit to commence when ship sails;
not after Decr. 1— delivered free
of charge for truckage.

The blues, if color satisfactory to
purchasers.

R. M. M.

W. W. G.

⁸² *Reid v. Diamond Plate Glass Co.*, 85 Fed. Rep. 193, 29 C. C. A. 110; *Elmore v. Kingscote*, 5 B. & C. 583; *Acebal v. Levy*, 10 Bing. 376; *Goodman v. Griffiths*, 1 Hurl. & N. 574; *Turner v. Lorillard Co.*, 100 Ga. 645, 28 S. E. 383, 62 Am. St. Rep. 345; *Waterman v. Meigs*, 4 Cush. 497; *Ashcroft v. Butterworth*, 136 Mass. 511; *James v. Muir*, 33 Mich. 223; *Stone v. Browning*, 68 N. Y. 598, 604; *Hall v. Misenheimer*, 137 N. C. 183, 49 S. E. 104, 107 Am. St. Rep. 474; *Ide v. Stanton*, 15 Vt. 685, 40 Am. Dec. 698; *Scott v. Melady*, 27 Ont. App. 193.

⁸³ *Hoadly v. M'Laine*, 10 Bing. 492; *Valpy v. Gibson*, 4 C. B. 837; *O'Neil v. Crain*, 67 Mo. 250.

likewise be sufficient. The question of price would not need further discussion were it not for the statement frequently made, and sometimes enacted by statute, that the consideration need not be stated in a memorandum under the Statute of Frauds. This doctrine arose from decisions under the section of the statute relating to guarantees.⁸⁴ In some States, at least, the same rule is by statute applicable to other sections of the statute, including that relating to the sales of goods.⁸⁵ In the case of an executory contract for the purchase or sale either of land or goods, it is impossible where performance of the defendant's promise is conditional upon the payment or performance to be given or promised by the other party to make an accurate statement of that promise, whether that of the seller or of the buyer, without stating the consideration, for the defendant's promise is not absolute but conditional either on the payment of the price or on the other performance promised by the plaintiff, and similarly the consideration of the buyer's promise is either the transfer of title to the property or the promise to transfer the title, and the buyer's promise to pay the price is conditional upon this transfer. Accordingly there is, or may be, an inconsistency between the statements that the price must be stated in the memorandum and that the consideration need not be. Perhaps the best way to harmonize, as far as possible, the two statements is by construing consideration as used in the latter rule to mean executed consideration only. Under this construction, where a contract for the sale of goods is unilateral, only the promisor's promise need be stated, but where it is bilateral, even though the performance of one promise is not made expressly conditional upon the performance of the other, the memorandum must contain sufficient to make it appear what the obligation of both parties was, in order to make it a sufficient memorandum for the promise of either.⁸⁶

⁸⁴ *Wain v. Warlters*, 5 East, 10. This decision required the consideration for a guarantee to be expressed, but the rule of the case seems not to have been acceptable in England and a number of other jurisdictions and either by statute or by decision, it is laid down that the consideration need not be stated. 29 Am. & Eng.

Encyc. (2d ed.) 870. In England the statute (19 & 20 Vict. c. 97, § 3), is confined to guarantees.

⁸⁵ This was held to be the case in Maine and Michigan. *Williams v. Robinson*, 73 Me. 186, 40 Am. Rep. 352; *Reid v. Diamond Plate Glass Co.*, 85 Fed. Rep. 193. 29 C. C. A. 110; and the New Jersey statute

§ 104. Contents of memorandum — Other terms of the contract.

The property to which the sale, or contract to sell, relates, must be

must certainly be construed in the same way.

⁸⁰ The question has been discussed in a few cases. The fullest discussion is in the case of *Hayes v. Jackson*, 159 Mass. 451, 34 N. E. 683. This was an action upon a contract for the sale of land, the only memorandum of the sale stated the sale to be "for the sum of \$14,140, subject to a mortgage of \$9,000." It was agreed by both parties at the trial that the assumption of the mortgage was part of the consideration and went to make up the sum of \$14,140. A majority of the court held the contract enforceable, holding that Pub. Sts. c. 78, § 2, making any statement of the consideration unnecessary, made an erroneous statement unimportant. Holmes, J., delivering the opinion of the majority, said: "Of course it may be said that, in a bilateral contract like the present, the contemporaneous payment of the price is a condition of the promise, and, therefore, that the promise cannot be set forth truly unless the consideration is stated. But the language of the section is general, and should be read as no doubt it was meant. The only effect is that a promise set forth as absolute may be subject to an implied condition of performance on the other side. When such an implied condition exists it will be construed into the writing, and knowledge of the law gives notice of its possible existence. In some cases it has been held unnecessary to state the consideration, even when there is no provision like our section 2, although the consideration was executory. *Thornburg v. Masten*, 88 N. C. 293; *Miller v. Irvine*, 1 Dev. & Bat. 103; *Ellis v. Bray*, 79 Mo. 227; *Violett v. Patton*, 5 Cranch, 142, 3 L. ed. 61; *Camp v.*

Moreman, 84 Ky. 635, 2 S. W. 179. In *Howe v. Walker*, 4 Gray, 318, Thomas, J., plainly indicated the opinion that section 2 of the statute applies in all cases, pointing out that this does not mean that when the parties are reversed the oral agreement will be sufficient to sustain an action." Field, C. J., with whom Knowlton, J., concurred, wrote an elaborate dissenting opinion, saying in part: "I do not know whether the majority of the court intend to make a distinction between contracts of sale described in the first section of Pub. Sts. c. 78 [land], and contracts of sale described in the fifth section [goods, wares, and merchandise]. . . . When the whole contract or promise of the defendant is to do a certain thing, and this is an absolute promise, resting upon a consideration which has been executed, there is some reason in saying that the memorandum signed by the defendant need not contain the consideration or inducement of the contract or promise. But in a contract executory on both sides, where the promises are mutual, and each is the consideration of the other, the promises are conditional, and one party agrees to perform his part of the contract only on condition that the other will perform his part, and it cannot be known what the promise of the one is without knowing the express or implied promise of the other. A promise to convey land because the promise has actually received \$1,000 is not the same as a promise to convey land if the promisor will pay \$1,000 on receiving the conveyance, and a promise to convey land for \$1,000 to be paid on the delivery of the deed is not the same as a promise to convey land for \$10,000 to be paid on the delivery of the deed. The con-

described in the memorandum.⁸⁷ So, although the contract appearing in the memorandum seems to be complete upon its face, if,

ditions on which the vendor agrees to convey are often many and complicated, and involve the assumption of mortgages and the performance of other acts. If a mere acknowledgment in writing by the vendor that he has agreed to convey specific land to the vendee on terms which are not expressed is sufficient to satisfy the Statute of Frauds, then it is open to the vendee to prove by oral testimony the price to be paid, and all the other terms of the contract to be performed by him, and the statute will no longer prevent frauds and perjuries. If it is a condition of the promise of the vendor that it is not to be performed unless at the time of the performance the vendee pays money and gives or assumes mortgages, the condition qualifies the promise and is a part of it, and the writing should contain all that is essential to show what the promise or contract on the part of the vendor in fact was. The decision of the court seems to me in great part to nullify the statute.⁷ The rule which the majority of the courts here enforce has been applied in contracts for the sale of land in Nebraska and Texas. *Ruzicka v. Hotovy*, 72 Neb. 589, 101 N. W. 328; *Dyer v. Winston*, 33 Tex. Civ. App. 412, 77 S. W. 227. But in New York after the repeal of a statutory requirement that the consideration must be expressed in the memorandum, the court said, in dealing with a bilateral contract to employ and to serve: "The agreement of the defendants in this case was not merely to pay so much money to plaintiff. It was to pay him that money for his services as salesman to be thereafter rendered. For what the payment was to be made consti-

tuted a material and essential element of the agreement on the part of the defendants; an important condition of the contract on their side. Their agreement was not absolute to pay the money. It was conditioned upon the rendition of the stipulated services. Any memorandum which omits the condition falsifies the agreement which they actually made, and represents them as agreeing to pay the money absolutely when they did not so contract. It is no answer that the omitted condition, coupled with the other party's promise of performance, constituted a consideration for his own agreement, and so need not be expressed." *Drake v. Seaman*, 97 N. Y. 230, 235. In New York it is to be observed that at least no statute provided that the consideration need not be expressed, but in Michigan, though construing the statute of that State as enacting that the consideration in a contract for the sale of goods need not be expressed, the Circuit Court of Appeals, nevertheless, held that the price, if agreed upon by the parties, must be stated. *Reid v. Diamond Plate Glass Co.*, 85 Fed. Rep. 193, 29 C. C. A. 110. See also *Kelley v. Holbrook*, 191 Mass. 565, 77 N. E. 1037, where the court held that a memorandum signed by an auctioneer which misstated the price was not good, because the auctioneer was not authorized to sign such a memorandum.

⁸⁷ *Peoria Grape Sugar Co. v. Babcock*, 67 Fed. Rep. 892; *Waterman v. Meigs*, 4 Cush. 497; *May v. Ward*, 134 Mass. 127; *New England Wool Co. v. Standard Worsted Co.*, 165 Mass. 328, 43 N. E. 112, 52 Am. St. Rep. 516. And see cases cited in the following section.

in fact, there were additional terms, the memorandum is insufficient.⁸⁸ Thus, if there is a warranty,⁸⁹ or a condition of approval by the buyer,⁹⁰ or a term of credit, or security,⁹¹ or if the place or time of delivery is agreed upon, these must be included in the memorandum.⁹² But if no time is agreed upon the law will imply a reasonable time and the memorandum need contain no reference to time.⁹³ Any other terms are subject to the same rule.⁹⁴ But

⁸⁸ *Stewart v. Cook*, 118 Ga. 541, 45 S. E. 598. The contract in this case referred to square and round bales of cotton. The court said: "If nothing more appeared, it might be that evidence could have been introduced to show what was the standard weight and trade meaning of square bale and round bale. Pol. Code, § 1 (4); Civil Code, § 3675 (2). But the petition shows that the parties themselves agreed that the bales should be of a particular weight. It, therefore, appears that there was a parol agreement, when the law requires that the contract of sale shall be in writing (Civil Code, § 2693, par. 7); by which it of course means the entire contract, with all stipulations and provisions which have been assented to by the parties at the time of the sale." So in another Georgia decision the writing stated a contract for the sale of a given number of pounds of "ribs." The evidence showed that the term "ribs" is ambiguous, there being several distinct kinds of "ribs" known to the trade, and the plaintiff understood from the parol agreement that the ribs referred to were of a particular kind and of average weight. It was held the writing did not sufficiently identify its subject-matter, nor contain the entire agreement. *Borum v. Swift & Co.*, 125 Ga. 198, 53 S. E. 608.

And see the cases in the following notes.

⁸⁹ *Fisher v. Andrews*, 94 Md. 46, 50 Atl. 407.

⁹⁰ *Boardman v. Spooner*, 13 Allen, 353.

⁹¹ *Lester v. Heidt*, 86 Ga. 226, 12 S. E. 214, 10 L. R. A. 108 (land); *Norris v. Blair*, 39 Ind. 90, 10 Am. Rep. 135; *Fisher v. Andrews*, 94 Md. 46, 50 Atl. 407; *Morton v. Dean*, 13 Met. 385 (land); *Davis v. Shields*, 26 Wend. 341; *Soles v. Hickman*, 20 Pa. St. 180 (land). The terms "regular" and "net," attached to the prices named in a memorandum, may be given a meaning by parol evidence. *Olson v. Sharpless*, 53 Minn. 91, 55 N. W. 125.

⁹² *Fisher v. Andrews*, 94 Md. 46, 50 Atl. 407; *Kriete v. Myer*, 61 Md. 558; *Gault v. Stormont*, 51 Mich. 636, 17 N. W. 214 (land); *Smith v. Shell*, 82 Mo. 215, 52 Am. Rep. 365; *Lehenbeuter Co. v. McCord*, 65 Mo. App. 507; *Kidder v. Flanders*, 73 N. H. 345, 61 Atl. 675; *Davis v. Shields*, 26 Wend. 341.

⁹³ *Kidder v. Flanders*, 73 N. H. 345, 61 Atl. 675. See also cases cited in the preceding notes.

⁹⁴ *Kingsley v. Siebrecht*, 92 Me. 23, 42 Atl. 249, 69 Am. St. Rep. 486 (land); *Biest v. Ver Steeg Shoe Co.*, 97 Mo. App. 137, 70 S. W. 1081 (contract not to be performed within a year).

a separate bargain, though made at the same time as that in question, need not be mentioned in the memorandum.⁹⁵

§ 105. **Certainty of description.**—The question often arises whether a memorandum states with sufficient certainty the bargain to which it relates. Even though all the terms are included, they may be written in such an abbreviated way or with such brief description of the property that it is not apparent to an uninstructed person what the meaning of the writing may be. The question involved is the same whether the abbreviated description is of the parties, the goods, or other terms of the bargain. The general rule applicable to such cases was thus stated in a recent Massachusetts case:⁹⁶ “While parol evidence is not competent to contradict or vary the terms of such a memorandum to show what is intended, we are of opinion that the situation of the parties and the surrounding circumstances at the time when the contract was made may be shown to apply the contract to the subject-matter.” It has been further held that abbreviations used by the parties or a private code could be translated and the meaning of them shown by parol evidence.⁹⁷ It is on this principle

⁹⁵ *Coddington v. Goddard*, 16 Gray, 436. In this case the court said: “Nor does it affect the validity of the memorandum that the broker did not include in it the stipulation made by the defendant that he should have the right to add to the sale 100,000 pounds of copper the next day. This was a wholly separate and independent agreement which in no way affected the sale actually made.” It may perhaps be questioned whether the court did not go too far. See also *Agnew v. Baldwin*, — Wis. —, 116 N. W. 641.

⁹⁶ *New England Wool Co. v. Standard Worsted Co.*, 165 Mass. 328, 332, 43 N. E. 112, 52 Am. St. Rep. 516.

⁹⁷ The leading case upon this point is *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446, 14 L. ed. 493. In that case the following memorandum was held sufficient:

Sept 19,—W. W. Goddard, 12 mos.

300 bales S. F. drills..... 7¼

100 cases blue drills..... 8¾

Credit to commence when ship sails;
not after Decr. 1—delivered free
of charge for truckage.

R. M. M.

W. W. G.

The blues, if color is satisfactory to purchaser.

So in *Bibb v. Allen*, 149 U. S. 481, 37 L. ed. 819, the memorandum relied on was made up of slip contracts. The court said: “It is no valid objection to these ‘slip contracts,’ executed in duplicate, that the sales purported to be made on account of ‘Albert,’ ‘Alfred,’ ‘Alexander,’ ‘Amanda,’ and ‘Winston,’ etc., which names were adopted by the defendants, and which represented them and their account. Parol evidence was clearly competent to show

that the doctrine must be rested, that if a memorandum names A. as one of the parties to the transaction, though A. can be held personally liable,⁹⁸ it may, if desired, be shown by parol that A. was agent for B. in an action brought either by B. or against him.⁹⁹ The same doctrine has been applied where the agent's name appeared professedly as that of an agent but the paper did not name his principal.¹ If, however, the agent's name appears on the paper, not as that of a contracting party, either as principal or agent, the name will not serve as a substitute for the name of a party to the contract.² Instead of naming the parties they are

that these fictitious names, which defendants had adopted, represented them as the parties for whose account the sales were made." And in *Newell v. Radford*, L. R. 3 C. P. 52; *American Mfg. Co. v. Midland Steel Co.*, 101 Fed. Rep. 200; *Sanborn v. Flagler*, 9 Allen, 474, initials used to designate the parties were held sufficient. In *Haskell v. Tukesbury*, 92 Me. 551, 43 Atl. 500, 69 Am. St. Rep. 529 (guarantee), "Friend Geo." and "Pop Dyer" were held sufficient designations. So in *Lee v. Cherry*, 85 Tenn. 707, 4 S. W. 835, 4 Am. St. Rep. 800 (land), "Mr. Lee" was held to be sufficient description of one of the parties. In *Heffron v. Armsby*, 61 Mich. 505, 28 N. W. 672, "300 cases B. M. corn" was held a sufficient description. In *New England Wool Co. v. Standard Worsted Co.*, 165 Mass. 328, 43 N. E. 112, 52 Am. St. Rep. 516, "F. C." was held a sufficient description of a certain kind of wool. On the other hand in *North v. Mendel*, 73 Ga. 400, the court refused to allow proof that "Mendel" meant the firm of M. Mendel & Bro. This decision seems hard to reconcile with others previously cited, although it is to be observed that not only was Mendel an incomplete designation of the firm intended, but also naturally meant an individual member of the firm. The decision seems too strict.

See also *Frank v. Miller*, 38 Md. 450; *Flash v. Rossiter*, 116 N. Y. App. Div. 88, 102 N. Y. Suppl. 449. Whether a memorandum in cipher agreed upon orally and, therefore, wholly untranslatable without parol evidence of one of the parties is a good memorandum has not as yet perhaps been settled.

⁹⁸ *Higgins v. Senior*, 8 M. & W. 834.

⁹⁹ *Wilson v. Hart*, 7 Taunt. 295; *Truman v. Loder*, 11 A. & E. 589; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446, 14 L. ed. 493; *Haskell v. Tukesbury*, 92 Me. 551, 43 Atl. 500, 69 Am. St. Rep. 529; *Kingsley v. Siebrecht*, 92 Me. 23, 42 Atl. 249, 69 Am. St. Rep. 486; *Williams v. Bacon*, 2 Gray, 387; *White v. Dahlquist Mfg. Co.*, 179 Mass. 427; *Tobin v. Larkin*, 183 Mass. 389, 67 N. E. 340; *Haubelt v. Rea & Page Co.*, 77 Mo. App. 672; *Dykens v. Townsend*, 24 N. Y. 57; *Thayer v. Luce*, 22 Ohio St. 62; *Brodhead v. Reinbold*, 200 Pa. 618, 623, 50 Atl. 229, 86 Am. St. Rep. 735. But see *Ward v. Hasbrouck*, 169 N. Y. 407, 62 N. E. 434.

¹ *Tobin v. Larkin*, 183 Mass. 389, 67 N. E. 340.

² *Grafton v. Cummings*, 99 U. S. 100, 25 L. ed. 366; *Nichols v. Johnson*, 10 Conn. 192; *O'Sullivan v. Overton*, 56 Conn. 102, 14 Atl. 300; *McGovern v. Hern*, 153 Mass. 308, 26 N. E. 861,

sometimes described, and if the description is sufficiently definite, the memorandum is good.³ On the other hand it is obvious that this principle must have some limitation. A description of the sellers by the word "sellers," or "vendors," is obviously insufficient.⁴ So such a description as H. "and those associated with him."⁵ These descriptions are absolutely accurate, and if parol evidence of all surrounding circumstances were admitted, it would probably be evident what the meaning of the description was. But this is not sufficient. The description in the writing itself is too general. The same kind of question arises in regard to a description of the property sold. The goods must be sufficiently described for reasonable identification. A distinction should be noticed between sales or contracts to sell specific goods, and contracts to sell goods of a certain kind. In a contract of the latter sort, a memorandum need be no more definite than the contract. If the contract is definite enough

10 L. R. A. 815, 25 Am. St. Rep. 632; *Sherbourne v. Shaw*, 1 N. H. 157, 8 Am. Dec. 47. All the cases just cited related to sales at auction, and it was held that the auctioneer's name appearing as that of the auctioneer was insufficient to supply the place of the name of his principal. The doctrine was thus expressed in *McGovern v. Hern*, *supra*: "The trouble with the memorandum in the case before us is that the seller is not named nor described. Sullivan Bros. were indicated in one corner of the paper as the auctioneers, and it cannot be fairly considered that they were anything else. Their function as auctioneers was recognized in the memorandum, as something distinct from that of parties contracting for unnamed principals."

³ *Sale v. Lambert*, L. R. 18 Eq. 1; *Rossiter v. Miller*, 5 Ch. D. 648. In these cases the word "proprietor" was held sufficient. *Catling v. King*, 5 Ch. D. 660. In this case, "Trustee selling under a trust for sale,"

was held sufficient. In *Carr v. Lynch*, [1900] 1 Ch. 613, the words "In consideration of you this day having paid me the sum of £50," was held to furnish sufficient description of the buyer as it furnished means of identifying him. Compare with these decisions the case of *Selby v. Selby*, 3 Meriv. 2, where the signature to a letter "your affectionate mother," was held an insufficient signature. This decision is criticised by Browne, *Statute of Frauds*, § 362. The question whether such words are a sufficient signature is not precisely the same question as whether the description of a party to the bargain is sufficient to make the memorandum a complete statement of all the terms of the transaction.

⁴ *Catlin v. King*, 5 Ch. D. 665; *McGovern v. Hern*, 153 Mass. 308, 26 N. E. 861, 10 L. R. A. 815, 25 Am. St. Rep. 632.

⁵ *Seymour v. Cushway*, 100 Wis. 580, 76 N. W. 769, 69 Am. St. Rep. 957.

to be enforced, a memorandum which states the contract as it was made will be sufficient, and, on the other hand, if the memorandum is more general than the actual contract, the memorandum will be insufficient, though seeming good on its face because not fully stating the contract the parties made.⁶ Where, however, the sale or contract relates to specific goods, there can be no question about lack of definiteness in the contract itself so far as concerns the goods to which the bargain relates; the question is wholly whether the memorandum sufficiently describes these goods. This question has risen more frequently in regard to sales of real estate than in regard to sales of personal property; still there are a few decisions in regard to goods.⁷ It will be seen from the decisions cited below that the American courts have re-

⁶ See *supra*, § 104; also American Mfg. Co. v. Midland Steel Co., 101 Fed. Rep. 200, where billets "4 x 5 or 5 x 5" was held sufficient description.

⁷ New England Wool Co. v. Standard Worsted Co., 165 Mass. 328, 43 N. E. 112. In this case the property described was "about 2,000 to 2,500 lbs. F. C." The property in regard to which the parties were bargaining was in fact, 2,443 lbs. of "F. C." wool. The court held the description sufficient because when it was shown "who and where the parties were at the time of making the contract, and what property the plaintiff had on hand of the kind described, it is clear without more that the memorandum referred to the 2,443 lbs. of wool on hand." No doubt the court is right in saying that it was possible to translate the memorandum when the surrounding circumstances and the time and place of the bargain was shown but that would also be true of a memorandum which read: "I have sold you the goods you looked at, at the usual price," but it may be doubted whether this memorandum would be sufficient. In Burgess Sulphite Fibre Co. v.

Broomfield, 180 Mass. 283, 62 N. E. 367, the words, "all your iron which you may desire to sell," were held a sufficient description of iron on the premises of the plaintiff's mill. In Brewer v. Horst-Lachmund Co., 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240, the subject-matter of the sale was a certain lot of hops. Samples had been given from these hops and, in accordance with a custom in the trade, samples were designated by a number—in this case, "13." The reference to the goods in a telegram as "13" was held a sufficient description of them. A more extreme case is Macdonold v. Longbottom, 1 E. & E. 977, where evidence was admitted to show that the words, "your wool," referred to certain particular wool which the plaintiff had under his control at the time of the contract. Many cases have arisen, presenting similar questions as to real estate, and the cases show some conflict. See Wood on the Statute of Frauds, § 353. In Mead v. Parker, 115 Mass. 413, it was held, following Hurley v. Brown, 98 Mass. 545, that in a memorandum of sale, dated at Boston, the words "a house on Church street" sufficiently described the

quired somewhat greater particularity in descriptions of real estate than in descriptions of goods. In the cases relating to real estate it may be that too great stress is laid upon a description

property. Wells, J., in delivering the opinion of the court, said: "The most specific and precise description of the property intended requires some parol proof to complete its identification. A more general description requires more. When all the circumstances of possession, ownership, situation of the parties, and of their relation to each other and to the property, as they were when the negotiations and the writing was made, are disclosed, if the meaning and application of the writing, read in the light of those circumstances, are certain and plain, the parties will be bound by it as a sufficient written contract or memorandum of their agreement." *Mead v. Parker* was followed by *Slater v. Smith*, 117 Mass. 96. In *Doherty v. Hill*, 144 Mass. 465, 11 N. E. 581, the description "Stoneham Estate on Congress street, owned by Sarah A. Hill" was held insufficient because Sarah A. Hill owned more than one estate on Congress street. In *Hodges v. Kowing*, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87, "his place in Stratford containing about fifteen acres" was held sufficient, but in *Andrew v. Babcock*, 63 Conn. 109, 26 Atl. 715, "a tract of land with all the buildings thereon, adjoining the New Haven and Derby R. R., in the town of Orange, and containing some twenty acres more or less" was said to be insufficient, though apparently the seller owned no other property answering the description. In *Fortesque v. Crawford*, 105 N. C. 29, 10 S. E. 910, "his land" was held "too vague and indefinite to admit parol evidence to locate the land." In *Falls of Neuse*

Mfg. Co. v. Hendricks, 106 N. C. 485, 11 S. E. 568, "his land where he now lives" was held sufficient if susceptible of identification by extrinsic evidence. In *Lowe v. Harris*, 112 N. C. 472, 17 S. E. 539, 22 L. R. A. 379, the description was also "his land," but since the earlier cases and since the cause of action arose in this case, the Legislature had enacted that parol testimony might be introduced to identify the land. The description was held insufficient, a majority of the court holding that the act could not operate retroactively. In *Jones v. Tye*, 93 Ky. 390, 20 S. W. 388, "land adjoining the McKebly land" was held insufficient, the seller having two parcels answering that description. In *Holmes v. Evans*, 48 Miss. 247, 12 Am. Rep. 372, "a piece of property on the corner of Main and Pearl streets, city of Natchez, county of Adams, State of Mississippi," was held insufficient, because there was no reference in the memorandum itself to anything extrinsic that would define which corner was intended. The court said, however: "Extraneous evidence so referred to, and any other evidence in connection with it, which may serve to identify and fix the limits of the land intended is admissible and proper. There would appear to be no limit in that direction except what is to be found in the general reference of the contract. For example, if a contract purports to embrace all the land owned by the vendor in a certain county, it would be admissible to prove any and all the land owned by him in that county." In *Mellon v. Davison*, 123 Pa. St. 298, 16 Atl. 431, "a lot of

that will identify beyond possibility of doubt the subject-matter of the sale. "John Smith" in a memorandum does not identify, beyond a peradventure, a party so designated, but it is a sufficient description of a person of that name intended. It may, perhaps be questioned whether "Estate on Congress Street, owned by Sarah A. Hill," is not a sufficient description of the estate the parties were bargaining about, although the description may be applicable to another piece of property also. The particularity of description essential in a memorandum must ultimately resolve itself into one of degree. This has been so well expressed by an English writer that his remarks are quoted below.⁸

ground fronting about 190 feet on the P. R. R. in the 21st ward, Pittsburgh, Pa.," was held insufficient, though the seller owned but one piece of land in the ward named. See also *Rineer v. Collins*, 156 Pa. St. 342, 27 Atl. 28. In *Thompson v. New South Coal Co.*, 135 Ala. 630, 34 So. 31, 62 L. R. A. 551, 93 Am. St. Rep. 49, "coal lands," was held an insufficient description. See also *Ryan v. United States*, 136 U. S. 68, 34 L. ed. 447; *Daniels v. Rogers*, 108 N. Y. App. Div. 338, 96 N. Y. Suppl. 642; *Penshorn v. Kunkel* (Tex. Civ. App.), 90 S. W. 719. With these American decisions should be contrasted the English cases in *Ogilvie v. Foljambe*, 3 Meriv. 53. The description "Mr. Ogilvie's house" was supposed to be sufficient. In *Bleakley v. Smith*, 11 Sim. 150, "The property in Cable St." was held to be sufficient, and in *Shardlow v. Cotterell*, 20 Ch. D. 90 (C. A.), the court went much farther. It was an auction sale, and the memorandum was contained in the following receipt signed by the auctioneer. "Received of Mr. A. Shardlow the sum of £21 as deposit on property purchased at £420 at Sun Inn, Pinxton, on the above date. Mr. George Cotterell, Pinxton,

owner." Lush, L. J., said (at p. 97); "Suppose a horsedealer having a great number of horses offers one of them for sale; the horse is trotted out and approved of, but the parties differ about the price. Suppose the next day the seller writes and says, 'I will let you have that horse for £50,' and the buyer writes to accept the offer, would not parol evidence be admissible to show what horse was meant?"

⁸ F. Vaughan Hawkins, Esq., on the Principles of Legal Interpretation with Reference Especially to the Interpretation of Wills, 2 Judicial Soc. Papers, 298 (p. 326 *et seq.*): "The other limit of interpretation of which I have spoken is the result of the necessity of there being a sufficient written expression; the meaning of the words cannot be added to or corrected beyond a certain point, or the words cease to be capable of bearing the interpretation to be put upon them; and though the intent may be known, there is no expression in which it can clothe itself. It cannot be too often repeated that legal interpretation is not a mere ascertaining of the intent; it acts only by putting a meaning consistent with the intent.

§ 106. **Intent to make a memorandum is not requisite.**—As the purpose of the statute is to require a formality of proof in order to make a contract enforceable, not to impose a new rule of law

upon the words. And the answer to the question, What is a sufficient written expression? will vary largely with different classes of writings, and under different systems of jurisprudence. In this respect it is manifest that private documents must be interpreted more strictly than public. A deed or will made by a private person is made with the knowledge of the command of the law, which requires the writer to express himself fully and completely, and gives validity to the instrument only on the condition of reasonable compliance with the demand which it has imposed. On the other hand a document, such as a treaty, which as to its form is almost wholly independent of everything but the will of the contracting parties, leaves the amount of the expression much less determinate; and, although an intention must fail of effect which has no corresponding expression of any kind in the document, yet the interpreter must resort very much to the inferred will of the parties themselves for a criterion of sufficiency of expression, which thus becomes almost wholly merged in the general inquiry after the probable intention,—meaning as I do, by *intention*, wherever it occurs in this paper, not a mere inchoate act of the mind, that which a person intended to do, but took no step toward doing, but something which as a mental act was complete, and which the writer endeavored to express by the words he made use of, although those words in fact express his meaning more or less imperfectly. In the interpretation of writings where the latitude allowed to the interpreter is considerable, and particularly

where direct evidence of intention not contained in the writing is admitted, the question of what is a sufficient written expression becomes evidently of great practical importance. If a perfectly definite intent can be collected by the aid only of collateral evidence of it, coupled with the meaning of the words, it is probable that the latter element, that of the meaning of the words, bears a sufficiently great proportion to the former, to assure the interpreter that the words will bear the meaning and express it sufficiently. But this security does not exist where parol declarations of intention, for example, are admissible. The undoubted fact that no general definition of what is in such cases a sufficient expression can be fixed upon beforehand is made use of by Sir James Wigram as a constant argument against admitting evidence of intention generally. ‘Once admit,’ says he (p. 128), ‘that the person or thing intended by the testator need not be adequately described in the will, and it is impossible to stop short of the conclusion that a mere mark will in every case supply the place of a proper description.’ Surely there is no impossibility such as here contended. It is reasonable to say that if a testator, for instance, describes a person by his surname and Christian name, that is a sufficient description to satisfy the letter of the law, though it may in fact be insufficient completely to identify the person intended. If, on the other hand, a testator should say, ‘I give so and so to *my son*,’ when he has nine sons, it would probable be right to decide that such a description was not a sufficient one, since it was one

as to what constitutes a valid contract, it is immaterial with what purpose the requirement of the statute is fulfilled. In this connection, however, it is especially important to distinguish decisions under statutes which require the "contract" to be in

which the writer must have known, or ought to have known, would prove ambiguous, and to allow of an addition to which by parol testimony would be to offer a great temptation to perjury. It is evident that a line must be drawn somewhere, and when necessary it will doubtless be drawn in practice; but as yet the boundary of testamentary interpretation on this side is somewhat imperfect, and there is no rule forbidding the introduction of parol testimony of intention to fill up even such a manifestly inadequate description as that I have last supposed. Many questions on the sufficiency of expression arise upon the interpretation of informal writings, as, for instance, contracts; what part of a contract required by law to be in writing need be expressed in the writing: how far usages and customs of trade may be imported, and the like. In fact all the most difficult problems of interpretation arise upon the limits of it, upon the extent to which the meaning of words may be modified by other signs of the intent; upon the contest in short, as it is often termed, between the letter and the spirit. Into the principles which questions of this nature involve, I will not at present enter more minutely: they will suggest themselves in relation to the different classes of legal writings to any one who clearly appreciates the real nature of the process of what I have called inferential interpretation, a process in reality simple, and which, like reasoning, is practiced correctly every day by persons who have never considered what it is they do, when they perform it, but which can never be

understood so long as it is confounded with the mere grammar and dictionary operation of ascertaining the meaning of words. One consideration, however, I will not pass over: I mean the great differences which exist in the measure of interpretation as applied under different judicial systems and by different judicial minds, and the consequent necessity for accumulating a certain mass of decisions, in order to supply a uniform standard, and to fix the nearest approach to absolute correctness by striking an average of opinions through a long series of years. It is sometimes said, in relation particularly to testamentary interpretation, that authorities can be of no service, that to quote cases is to construe one man's nonsense by another man's nonsense, and that all a judge has to do is to read the writing and endeavor to make out from it the meaning of the testator. Now, if interpretation were, like the determination of the meaning of words whose signification is fixed, something that can be done with absolute certainty, in which one man would come to the same conclusion as another, and which is, so to speak, the same all the world over, the study of previous authorities might indeed be unnecessary. But, in truth, it would be as reasonable to say that no authorities were to be consulted on a question of equity; that a judge ought to act upon his own notions of what was equitable; and that as circumstances are infinitely various, one case could never show what it was right to do in another. Experience shows that the limits of interpretation will be fixed at very different points by different persons; and

writing.⁹ Such a statute can hardly be satisfied unless the writing was made by the parties as the expression of the contract, but the requirement of a note or memorandum is satisfied by a letter which, after stating the terms of the bargain, repudiates it.¹⁰ So a letter written by the party to be charged to his own agent, or any other third person, is enough if it contains the terms of the bargain.¹¹ It should follow that a document retained wholly within the control of the party to be charged may also be a good memorandum. By hypothesis the bargain at common law is com-

there is perhaps no legal subject which brings out peculiarities of individual bias and disposition more strongly than difficult problems of construction. By the combined result of the decisions of a succession of judges, each bringing his mind to bear on the views of those who preceded him, a system of interpretation is built up, which is likely to secure a much nearer approach to perfect justice than if each interpreter were left to set up his own standard of how far it was right to go in supplying the defective expression, or of what amounted to a conviction of the intent as distinguished from mere speculative conjecture. *Rules* of construction are matters, the expediency of which may be more doubtful; but that *principles* of construction there must be in every system of rational interpretation, and that these are only to be gathered by a comparison of a large number of important cases, and by striking the average of a large number of individual minds, will not, I think, be denied by any one who considers interpretation to be, as I have described it, a process of reasoning from probabilities, a process of remedying, by a sort of equitable jurisdiction, the imperfections of human language and powers of using language, a process whose limits are necessarily indefinite and yet continually requiring to be practically determined,—

and not, as it is not, a mere operation requiring the use of grammars and dictionaries, a mere inquiry into the meaning of words.”

⁹ The statutes relating to the sale of goods do not use this word, but a number of statutes relating to agreements in regard to land do. See § 100.

¹⁰ *Bailey v. Sweeting*, 9 C. B. (N. S.) 843; *Wilkinson v. Evans*, L. R. 1 C. P. 407; *Buxton v. Rust*, L. R. 7 Ex. 1, 279; *Elliott v. Dean*, Cab. & E. 283; *Drury v. Young*, 58 Md. 546, 42 Am. Rep. 343; *Heideman v. Wolfstein*, 12 Mo. App. 366; *Cash v. Clark*, 61 Mo. App. 636; *Spencer-Turner Co. v. Robinson*, 55 N. Y. Misc. 280, 105 N. Y. Suppl. 98; *Louisville Varnish Co. v. Lorick*, 29 S. C. 533, 8 S. E. 8; *Martin v. Haubner*, 26 Can. S. C. 142. See *Westmoreland v. Carson*, 76 Tex. 619, 13 S. W. 559.

¹¹ *Moore v. Hart*, 1 Vern. 110; *Ayliffe v. Tracy*, 2 P. Wms. 65; *Owen v. Thomas*, 3 Myl. & K. 353; *Gibson v. Holland*, L. R. 1 C. P. 1; *Moss v. Atkinson*, 44 Cal. 3; *Spangler v. Danforth*, 65 Ill. 152; *Wood v. Davis*, 82 Ill. 311; *Gaines v. McAdam*, 79 Ill. App. 201; *Fugate v. Hansford's Ex.*, 3 Litt. 262; *Kleeman v. Collins*, 9 Bush, 460; *Moore v. Mountcastle*, 61 Mo. 424; *Cunningham v. Williams*, 43 Mo. App. 629; *Cash v. Clark*, 61 Mo. App. 636; *Mizell v. Burnett*, 4 Jones L. 249; *Nicholson*

plete, and written evidence of it alone is necessary. There seems no reason for doubting the sufficiency of an undelivered writing for this purpose and this view finds support in many cases.¹² It has, however, been held in a number of cases, relating to real estate, that a document remaining wholly unpublished in the possession of the writer could not be used as a memorandum.¹³ A

v. Dover, N. C., 58 S. E. 444; *Lee v. Cherry*, 85 Tenn. 707, 4 S. W. 835, 4 Am. St. Rep. 800; *Kearby v. Hopkins*, 14 Tex. Civ. App. 166, 36 S. W. 506; *Singleton v. Hill*, 91 Wis. 51, 64 N. W. 588. But see the contrary decisions: *First Bank v. Sowles*, 46 Fed. Rep. 731; *Steel v. Fife*, 48 Iowa, 99, 30 Am. Rep. 388; *Morrow v. Moore*, 98 Me. 373, 57 Atl. 81, 99 Am. St. Rep. 410; *Kinloch v. Savage*, *Speers' Eq.* 464; *Buck v. Pickwell*, 27 Vt. 157, 167.

¹² *Alford v. Wilson*, 95 Ky. 506, 26 S. W. 539 (land); *Drury v. Young*, 58 Md. 546, 42 Am. Rep. 343 (goods); *Johnson v. McCue*, 34 Pa. St. 180 (agreement to devise). See also *Witman v. Reading*, 191 Pa. St. 134, 43 Atl. 140 (land). An undelivered deed under this rule is, therefore, a sufficient memorandum. *Jenkins v. Harrison*, 66 Ala. 345; *Johnson v. Jones*, 85 Ala. 286, 4 So. 748; *Griel v. Lomax*, 89 Ala. 420, 6 So. 741; *Hart v. Carroll*, 85 Pa. St. 508; *Bowles v. Woodson*, 6 Gratt. 78; *Parrill v. McKinley*, 9 Gratt. 1, 58 Am. Dec. 212. See also *Kopp v. Reiter*, 146 Ill. 437, 34 N. E. 942, 22 L. R. A. 273, 37 Am. St. Rep. 156; *Thayer v. Luce*, 22 Ohio St. 62; *Cooper v. Thomason*, 30 Or. 161, 174, 45 Pac. 296; *Campbell v. Thomas*, 42 Wis. 437, 24 Am. Rep. 427; *Popp v. Swanke*, 68 Wis. 364, 31 N. W. 916. See also decisions holding corporation records sufficient, *supra*, § 101.

¹³ *Remington v. Linthicum*, 14 Pet. 84, 93, 10 L. ed. 364; *Steel v. Fife*, 48 Iowa, 99, 30 Am. Rep. 388; *Newburger v. Adams*, 92 Ky. 26, 17 S. W.

162 (but see *McBrayer v. Cohen*, 92 Ky. 479, 18 S. W. 123; *Alford v. Wilson*, 95 Ky. 506, 26 S. W. 539); *Dickinson v. Wright*, 56 Mich. 42, 22 N. W. 312; *Chesebrough v. Pingree*, 72 Mich. 438, 40 N. W. 747; *Johnson v. Brook*, 31 Miss. 17, 66 Am. Dec. 547; *Montauk Assoc. v. Daly*, 62 N. Y. App. Div. 101; *affd.*, without opinion, 171 N. Y. 659, 63 N. E. 1119; *Grant v. Levan*, 4 Pa. St. 393. See also *Callanan v. Chapin*, 158 Mass. 113, 117, 32 N. E. 941. Accordingly in such jurisdictions an undelivered deed is insufficient, not only as a conveyance, but as a memorandum of a contract to convey. *Freeland v. Charnley*, 80 Ind. 132, 134; *Steel v. Fife*, 48 Iowa, 99, 30 Am. Rep. 388; *Logsdon v. Newton*, 54 Iowa, 448, 6 N. W. 715; *Morrow v. Moore*, 98 Me. 373, 57 Atl. 81, 99 Am. St. Rep. 410; *Merriam v. Leonard*, 6 Cush. 151; *Parker v. Parker*, 1 Gray, 409; *Ducett v. Wolf*, 81 Mich. 311, 45 N. W. 829; *Kroll v. Diamond Match Co.*, 113 Mich. 196, 71 N. W. 630; *Comer v. Baldwin*, 16 Minn. 172; *Johnson v. Brook*, 31 Miss. 17, 66 Am. Dec. 547; *Wier v. Batdorf*, 24 Neb. 83, 38 N. W. 22; *Soward v. Moss*, 59 Neb. 71, 80 N. W. 268; *Schneider v. Vogler* (Neb.), 97 N. W. 1018; *Brown v. Brown*, 33 N. J. Eq. 650; *Cagger v. Lansing*, 43 N. Y. 550; *Allebach v. Godshalk*, 116 Pa. St. 329, 9 Atl. 444. See also *Henderson v. Beard*, 51 Ark. 483, 11 S. W. 766; *Swain v. Burnette*, 89 Cal. 564, 26 Pac. 1093; *Sullivan v. O'Neal*, 66 Tex. 433, 1 S. W. 185.

somewhat similar question arises in regard to the sufficiency of a written offer to constitute a memorandum, for at the time that such a writing is made, the writer does not deliver the writing as then binding him, the obligation does not arise until the offer is accepted. The writing, therefore, cannot have been delivered as a memorandum of a contract. It is generally held that a written offer accepted by parol is a sufficient memorandum.¹⁴ Under statutes which require the "contract" to be in writing, a written offer has been held in some cases, not without reason, insufficient.¹⁵ A written instruction to an agent to make an offer is not a sufficient memorandum of an oral contract which the agent thereafter makes in accordance with the instruction.¹⁶ The question already considered of acceptance and receipt made under a mistake may also be referred to for analogy in connection with the questions dealt with in this section.¹⁷

§ 107. **Separate documents — Physical attachment.**—A memorandum need not be contained in one writing; any number may be

¹⁴ *Egerton v. Mathews*, 6 East, 307 (goods); *Hoadly v. McLaine*, 10 Bing. 482 (goods); *Reuss v. Picksley*, L. R. 1 Ex. 342 (promise not to be performed within year); *Stewart v. Edowes*, L. R. 9 C. P. 311 (goods); *Gradle v. Warner*, 140 Ill. 123, 29 N. E. 1118 (land); *Doherty v. Hill*, 144 Mass. 465, 11 N. E. 581 (land); *Lydig v. Braman*, 177 Mass. 212, 218, 58 N. E. 696 (goods); *Howe v. Watson*, 179 Mass. 30, 60 N. E. 415 (promise to will property); *Austrian v. Springer*, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350 (goods); *Kessler v. Smith*, 42 Minn. 494, 44 N. W. 794 (goods); *Waul v. Kirkman*, 27 Miss. 823 (promise to pay debt of another); *Lash v. Parlin*, 78 Mo. 391 (goods); *Argus Co. v. Albany*, 55 N. Y. 495, 14 Am. Rep. 296 (promise not to be performed within a year); *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190 (goods); *Bristol v. Mente*, 79 N. Y. App. Div. 67 (goods); *Thayer v. Luce*, 22 Ohio St. 62 (land); *Himrod Co. v. Cleve-*

land Co., 22 Ohio St. 451 (promise not to be performed within a year); *Lee v. Cherry*, 85 Tenn. 707, 4 S. W. 835, 4 Am. St. Rep. 800 (land); *Bailey v. Leishman*, Utah, , 89 Pac. 78 (goods); *Lowber v. Connit*, 36 Wis. 176 (land); *Hawkinson v. Harmon*, 69 Wis. 551, 35 N. W. 28 (goods). But see *contra*, *Banks v. Harris Mfg. Co.*, 20 Fed. Rep. 667 (goods); *Cable Co. v. Hancock*, 2 Ga. App. 73, 58 S. E. 319 (goods); *American Leather Co. v. Porter*, 94 Iowa, 117, 62 N. W. 658 (goods).

¹⁵ *Newlin v. Hoyt*, 91 Minn. 409, 98 N. W. 323; *Kingman v. Davis*, 63 Neb. 578, 88 N. W. 777; *Spence v. Apley* (Neb.), 94 N. W. 109; *Montauk Assoc. v. Daly*, 62 N. Y. App. Div. 101; *affd.*, without opinion, 171 N. Y. 659, 63 N. E. 1119. All these decisions relate to land.

¹⁶ *Carskaddon v. South Bend*, 141 Ind. 596, 39 N. E. 667, 41 N. E. 1; *Haw v. American Nail Co.*, 89 Iowa, 745, 56 N. W. 501.

¹⁷ See *supra*, § 83.

taken together to make out the necessary written expression of the terms of the bargain provided there is sufficient connection made out between the papers without the aid of parol evidence further than to identify papers to which reference is made. This connection may be made out either from the physical attachment¹⁸ of the different papers at the time of signature, or by reference. Thus; if documents are pinned together it is enough.¹⁹ So a letter and the envelope in which it was sent may be taken together and the envelope used to show the name of the person to whom the letter was addressed when that name did not appear in the letter itself.²⁰ So a memorandum in a book which does not contain the name of the seller is sufficiently connected with a leather cover upon which the seller's name is stamped, to allow the name to be treated as part of the memorandum.²¹ So a writing indorsed upon the back of another may be taken as part of it.²² A more extreme case is suggested in an English decision;²³ a

¹⁸ *Fisher v. Kuhn*, 54 Miss. 480, 483 (land); *Coe v. Tough*, 116 N. Y. 273, 277, 22 N. E. 550 (goods); and cases cited in the following notes.

¹⁹ *Tallman v. Franklin*, 14 N. Y. 584 (land). See also *Busch v. Hart*, 62 Ark. 330, 35 S. W. 534 (written contract not within statute).

²⁰ *Pearce v. Gardner*, [1897] 1 Q. B. 688. In *Coe v. Tough*, 116 N. Y. 273, however, where two documents were put in the same envelope the court, though holding the papers could be read together because of reference of one to the other, did not mention the inclusion of the papers in the same envelope as a reason for its holding.

²¹ *Jones v. Joyner*, 82 L. T. (N. S.) 768.

²² *Jelks v. Barrett*, 52 Miss. 315 (land). See also *Gage v. Cameron*, 212 Ill. 146, 172, 72 N. E. 204. The contrary was decided in *Wilstach v. Heyd*, 122 Ind. 574, 23 N. E. 963, following *Ridgway v. Ingram*, 50 Ind. 145, 19 Am. Rep. 706. In these Indiana cases the face of the memorandum con-

tained no description of the property, but a description was indorsed on the back. This was held insufficient on the ground that an indorsement was no better than a separate paper, and if it contained no reference to the face could not be used. The decisions seem clearly wrong. Of course, if a signed indorsement refer to the face of the document there can be no difficulty in reading the two together. *Flowers v. Steiner*, 108 Ala. 440, 19 So. 321 (contract of married woman); *Thomas v. Drennen*, 112 Ala. 670, 20 So. 848 (land); *Corning v. Loomis*, 111 Mich. 23, 69 N. W. 85 (land); *Tunstall v. Cobb*, 109 N. C. 316, 14 S. E. 28 (land).

²³ *Kenworthy v. Schofield*, 2 B. & C. 945. "It occurred to me at first that this might be likened to the case of a will consisting of several detached sheets, when a signature of the last, the whole being on the table at the time, would be considered a signing of the whole; but there the sheet signed is a part of the whole." The

signature to one of several sheets which are together at the time but not in any way united. It seems doubtful whether both papers could be used in such a case, though if both sheets were put in one envelope possibly that would be a sufficient connection between them.

§ 108. **Separate documents — Incorporation by reference.**—

Where there are several documents not physically attached to each other, it may be supposed either that all the documents which it is desired to use are signed by the party to be charged or that some are unsigned. In the former case the rule seems to be that all the papers which show by their contents a connection with the bargain sought to be enforced may be taken together though the writing do not refer to each other.²⁴ Parol evidence is not admissible, however, to show that even signed writings relate to the same transaction.²⁵ Where some of the papers which it is sought to include are unsigned, it is sometimes said that one paper must refer to the other, or that there must be mutual reference,²⁶ but this is inaccurate. What is essential is that the signature of the party to be charged shall authenticate the whole of the writing. It is, therefore, necessary to incorporate all the documents into a signed writing. It will not be enough to incorporate all into an unsigned writing, and it is, therefore, insufficient and immaterial that the unsigned writing refers to the signed writing. What is necessary, then, is that a signed writing refer to all unsigned writings that are sought to be

case decided that the signature of an auctioneer in his book was not sufficiently connected with the conditions of the sale contained in another document, and being in the same room, since there was no reference in the book to the memorandum. See *contra* (erroneously), *McBrayer v. Cohen*, 92 Ky. 479, 18 S. W. 123.

²⁴ *Studds v. Watson*, 28 Ch. D. 305 (land); *Oliver v. Hunting*, 44 Ch. D. 205 (land); *Brewer v. Horst-Lackmund Co.*, 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240 (goods); *Biest v. Versteeg Shoe Co.*, 97 Mo. App. 137, 156, 70 S. W. 1081 (contract not to

be performed within a year); *Boeckeler v. McGowan*, 12 Mo. App. 507 (land); *Levin v. Dietz*, 48 N. Y. Misc. Rep. 593, 96 N. Y. Suppl. 468; *Thayer v. Luce*, 22 Ohio St. 62 (land); *Browne*, Statute of Frauds, § 348.

²⁵ *Jacob v. Kirk*, 2 M. & R. 221 (goods); *Potter v. Peters*, 64 L. J. Ch. (N. S.) 357 (land); *Rahm v. Klerner*, 99 Va. 10, 37 S. E. 292 (contract not to be performed within a year).

²⁶ *Devine v. Warner*, 76 Conn. 229, 56 Atl. 562.

made a part of the memorandum.²⁷ It is not important in what language reference is made; it is certainly enough if a plain reference is made by a document signed by the party to be charged whatever its nature to any other writing.²⁸ The question of identifying by parol evidence a document referred to in a signed writing is entirely analogous to the questions dis-

²⁷ *Wilkinson v. Taylor Mfg. Co.*, 67 Miss. 231, 7 So. 356; *Donovan v. Schoenhofen Brewing Co.*, 92 Ill. App. 341, 348; *Johnson v. Buck*, 35 N. J. L. 338, 10 Am. Rep. 243; *Coe v. Tough*, 116 N. Y. 273, 277, 22 N. E. 550; *Thayer v. Luce*, 22 Ohio St. 62. The case last cited was a suit for specific performance of a contract to sell land. The original memorandum contained no description of the property, and the plaintiff relied also on a deed which was signed but not delivered. *McIlvaine, J.*, in delivering the opinion of the court, said: "That several writings, though executed at different times, may be construed together, for the purpose of ascertaining the terms of a contract and for the purpose of taking an action founded thereon out of the operation of the Statute of Frauds, is fully settled. 3 Taunt. 169; 1 Bing. 8; 3 Myl. & K. 353; 14 How. (U. S.) 447; 14 N. Y. 584. In such cases, however, the mutual relation of the several writings to the same transaction must appear in the writings themselves, parol evidence being inadmissible for the purpose of showing their connection. If one only of such papers be signed by the party to be charged in the action, the rule seems to be that special reference must be made therein to those papers that are not so signed; but if the several papers relied on be signed by such party, it is sufficient if their connection and relation to the same transaction can be ascertained and determined by inspection and comparison. In this case, upon inspection and

comparison of the memorandum and the deed, although no reference is made in either to the other, we find with reasonable certainty that they do relate to the same transaction, and contain fully the terms of a contract of bargain and sale between the parties. The coincidences of names, dates, amount of purchase money, and reference to and description of fractional lots, are quite sufficient. But when these coincidences are considered in connection with the averments and admissions in the pleadings, and the *res gestæ*, we arrive at a degree of certainty far beyond that which is required in determining civil issues."

²⁸ *Griffiths Cycle Co. v. Humber*, [1899] 2 Q. B. 414; *Drovers Bank v. Albany Bank*, 44 Fed. Rep. 183 (guarantee); *Woodruff v. Butler*, 75 Conn. 679, 55 Atl. 167 (land); *Tippins v. Phillips*, 123 Ga. 415, 51 S. E. 410 (land); *Turner v. Lorillard Co.*, 100 Ga. 645, 28 S. E. 383, 62 Am. St. Rep. 345 (goods); *North v. Mendel*, 73 Ga. 400, 54 Am. Rep. 879 (goods); *Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279 (guarantee); *Savage v. Robinson*, 93 Me. 262, 44 Atl. 926 (guarantee); *Olson v. Sharpless*, 53 Minn. 91, 55 N. W. 125 (goods); *Swallow v. Strong*, 83 Minn. 87, 85 N. W. 942 (land); *Waul v. Kirkman*, 27 Miss. 283 (land); *Fisher v. Kuhn*, 54 Miss. 480, 483; *Fowler Elevator Co. v. Cottrell*, 38 Neb. 512, 57 N. W. 19 (goods); *Hickey v. Dole*, 66 N. H. 336, 31 Atl. 900, 49 Am. St. Rep. 614 (land).

cussed above,²⁹ in regard to the necessary certainty of description of the parties, subject-matter, and terms of the contract. While occasionally expressions may be found that parol evidence is not admissible to identify a document so referred to, this is erroneous both on principle and authority.³⁰ It has been decided in a single case,³¹ that a reference to a paper hereafter to be made was sufficient to incorporate the paper when thereafter made before the bringing of the action. It may be doubted, however, whether the court did not place its decision upon too broad a ground. Certainly a memorandum signed by the party to be charged to this effect: "I, A., will sell B. the goods we may write on a paper to-morrow, at the prices we shall thereto affix," should not be good. Assuming the subsequent paper to be made, it is not authenticated by the signature of A., and this is a requirement of the statute.³²

²⁹ § 105.

³⁰ *Bauman v. James*, L. R. 3 Ch. 508; *Long v. Millar* (C. A.), 4 C. P. D. 450; *Oliver v. Hunting*, 44 Ch. D. 205; *Beckwith v. Talbot*, 95 U. S. 289, 24 L. ed. 496; *Turner v. Lorillard Co.*, 100 Ga. 645, 28 S. E. 383, 62 Am. St. Rep. 345; *Ansley v. Green*, 82 Ga. 181, 7 S. E. 921; *Wilkinson v. Taylor Mfg. Co.*, 67 Miss. 231, 7 So. 356; *Gough v. Williamson*, 62 N. J. Eq. 526, 50 Atl. 323. In *Beckwith v. Talbot*, Mr. Justice Bradley said: "It is undoubtedly a general rule that collateral papers adduced to supply the defect of signature of a written agreement under the Statute of Frauds should on their face sufficiently demonstrate their reference to such agreement without the aid of parol proof. But the rule is not absolute. *Johnson v. Dodgson*, 2 M. & W. 653; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446, 14 L. ed. 493. There may be cases in which it would be a violation of reason and common sense to ignore a reference which derives its significance from such proof. If there is ground for any doubt in the matter, the general rule should be enforced. But where

there is no ground for doubt, its enforcement would aid, instead of discouraging fraud. Suppose an agreement be made out and signed by one of the parties, the other being absent. On the following day, the latter writes to the party who signed it as follows: 'My son informs me that you yesterday executed our proposed agreement, as prepared by J. S. I write this to let you know that I recognize and adopt it.' Would not this be a sufficient recognition, especially if the parties should act under the agreement? And yet parol proof would be required to show what agreement was meant."

³¹ *Freeland v. Ritz*, 154 Mass. 257, 28 N. E. 226, 12 L. R. A. 561, 26 Am. St. Rep. 244 (land).

³² In *Freeland v. Ritz*, the defendant agreed to take a lease of a portion of a building from the plaintiff who was to receive, but had not yet received, a lease of the whole building from its owner, a third person. The defendant agreed to take a lease of the portion of the building for which he was bargaining, subject to the terms and conditions of the lease thereafter to be made to the plaintiff. It is submitted

It should be further noticed that even if a signed paper does refer to an unsigned paper it may do so in such a way as will not incorporate the contents of the latter under the signature of the former. Thus A.'s letter may refer to B.'s which contains an accurate statement of the contract, but if A.'s letter repudiates B.'s statement of the contract A. has certainly not signed such a memorandum as the statute requires. Indeed, A.'s letter must not only refer to B.'s, but by implication at least indicate assent to the accuracy of B.'s statement in order that A. should be bound.³³

§ 109. **Separate documents — Incorporation by necessary inference.**— Until comparatively recently the authorities did not extend the right to make out a memorandum from separate documents, some of which were unsigned, beyond the case of reference by a signed document to an unsigned. Both in England and in this country, however, an extension has been made by some decisions. The basis of these decisions is either that the documents on being placed together necessarily indicate that they relate to the same transaction, or that they contain an express reference to a specific contract or sale although not to each other. The leading case for the former doctrine is *Lerned v. Wannemacher*.³⁴ This decision may be taken as a type of all. There were two documents nearly identical, one signed by each party. The copy signed by the defendant, however, did not contain the name of the plaintiff, and the other had a special stipulation afterward written and signed

that this memorandum of the defendant would have been good if it had referred to a future oral bargain between the plaintiff and a third person. Suppose A. agrees to buy goods of B. at the price which B. has to pay C. for them, or on the same terms and conditions that B. has to make with C. Such a memorandum contains the whole of the bargain between A. and B., and ought to satisfy the Statute of Frauds, irrespective of whether B.'s arrangement with C. was oral or written. In the case just put as well as in the Massachusetts decision, the parties made a full memorandum of all the terms of their contract; there

was nothing for further agreement between them. See *Bowers v. Ocean Accident, etc., Corp.*, 110 N. Y. App. Div. 691, 694, 97 N. Y. Suppl. 485. In the supposititious case put in the text, on the other hand, the parties had not come to a full agreement when the party to be charged signed. In such a case it seems hard to see how the signature, unless newly adopted in some way, can authenticate the subsequent writing.

³³ *Wilson v. Lewiston Mill Co.*, 150 N. Y. 314, 44 N. E. 959, 55 Am. St. Rep. 680.

³⁴ 9 Allen, 412.

by the plaintiff. The court held that as the documents evidently related to the same transaction, the signature of the defendant would be taken as applicable to both. This case has been followed by others to the same effect,³⁵ and the doctrine has been applied especially to correspondence between the parties. It seems to be supposed by many courts that where parties have a correspondence in regard to any matter ~~that~~ the whole correspondence, including the letters of both parties, can necessarily be made use of in order to make out a memorandum, at least if the letters relate to the same subject-matter.³⁶ In the case of letters, reference is generally made by each succeeding letter to the preceding, but this is not invariably the case, and in a telegraphic correspondence it is perhaps not common.³⁷ It seems impossible to justify this extension of the doctrine in regard to several documents. There

³⁵ *White v. Breen*, 106 Ala. 159, 19 So. 59, 32 L. R. A. 127 (land); *Strouse v. Elting*, 110 Ala. 132, 20 So. 123 (guarantee); *McBrayer v. Cohen*, 92 Ky. 479, 18 S. W. 123 (land); *Smith v. Colby*, 136 Mass. 562 (goods); *Freeland v. Ritz*, 154 Mass. 257, 28 N. E. 226, 12 L. R. A. 581, 26 Am. St. Rep. 244 (land); *Louisville Varnish Co. v. Lorick*, 29 S. C. 533, 8 S. E. 8 (goods). See also *Leonard v. Woodruff*, 23 Utah, 494, 65 Pac. 199 (land).

³⁶ *Ryan v. United States*, 136 U. S. 68, 83, 10 S. Ct. 913, 34 L. ed. 447; *Crystal Flouring Co. v. Butterfield*, 15 Colo. App. 246, 61 Pac. 479 (goods); *Elbert v. Los Angeles Gas Co.*, 97 Cal. 244, 32 Pac. 9 (contract not to be performed within a year); *Austin v. Davis*, 128 Ind. 472, 476, 26 N. E. 890, 12 L. R. A. 120, 25 Am. St. Rep. 456 (contract to make will); *Thames Trust Co. v. Beville*, 100 Ind. 309 (land); *Swallow v. Strong*, 83 Minn. 87, 85 N. W. 942 (land); *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511 (goods); *Peay v. Seigler*, 48 S. C. 496, 26 S. E. 885, 59 Am. St. Rep. 731; *Watson v. Baker*, 71 Tex. 739, 9

S. W. 867 (land); *Cobb v. Glenn Lumber Co.*, 57 W. Va. 49, 49 S. E. 1005, 110 Am. St. Rep. 734. Most of these decisions were doubtless correct upon their facts, because the letters of the defendants referred to the letters of the plaintiffs, which it was sought to incorporate with them. In *Watson v. Baker*, 71 Tex. 739, 9 S. W. 867, however, this was clearly not the case. The only letter which contained a description of the property, though it did not contain the ultimate bargain of the parties, was neither written by the party sought to be charged nor referred to in any of his subsequent correspondence, yet the court admitted it as part of the correspondence, saying broadly: "It is sufficient if the contract can be plainly made out in all its terms from any writing of the party or from his correspondence."

³⁷ See *Brewer v. Horst-Lachmund Co.*, 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240; *Cobb v. Glenn Lumber Co.*, 57 W. Va. 49, 49 S. E. 1005, 110 Am. St. Rep. 734, and many decisions collected in 50 L. R. A. 240, note.

is no difficulty in making out a written memorandum that evidently relates to the same transaction, but the memorandum is not signed by the party to be charged,—a simple illustration will indicate this. A. writes a letter to B., saying: “I will sell you the property of which we spoke yesterday for \$5,000 cash.” B. replies: “I understand that you will sell me the following described property of which we spoke yesterday (describing the property) at \$5,000 cash. I hereby accept your proposition.” According to the doctrine here criticised B.’s reply could be read with A.’s letter to charge A.; they evidently refer to the same transaction, and the description of the property contained in B.’s letter could be incorporated in A.’s writing. But it is obvious that A. has never authenticated the description by his signature, and to allow the description written by B. to be used by B. in enforcing the contract against A., is nothing other than to allow B. to write an essential term of the memorandum himself and charge A. with it as written.³⁸ It is, however, permissible to use so many of the letters of the party to be charged as evidently relate to the same transaction, irrespective of any reference in them to one another, provided they are all signed.³⁹ It is not enough, therefore, that there be a continuous correspondence between the parties. It is essential to examine specifically the papers not signed by the parties to be charged, which it is sought to incorporate with the paper or papers that are so signed, and determine whether the unsigned papers have been adopted by the signed papers.⁴⁰ The only extension of the doctrine requiring an express reference in the signed papers that seems permissible is where the signed paper at the time of the signature can be shown from its contents to be based on an adoption of a then existing unsigned paper.⁴¹

³⁸ This case is suggested by the decision of *Watson v. Baker*, 71 Tex. 739, 9 S. W. 867. Compare the correct decision of *Wilson v. Lewiston Mills Co.*, 150 N. Y. 314, 44 N. E. 959.

³⁹ See *supra*, § 108.

⁴⁰ This doctrine is upheld by *Fowler Elevator Co. v. Cottrell*, 38 Neb. 512, 57 N. W. 19 (goods); *Brown v. Whipple*, 58 N. H. 229; *Wilson v. Lewiston Mill Co.*, 150 N. Y. 314, 44

N. E. 959; *Darling v. Cumming*, 92 Va. 521, 23 S. E. 880. *Devine v. Warner*, 76 Conn. 229, 56 Atl. 562, also supports the requirements suggested by the text but goes still farther (without justification) in requiring a mutual reference between the papers.

⁴¹ This is well illustrated by a recent New Jersey decision, *Baldwin v. Trowbridge*, 62 N. J. Eq. 468, 50 Atl. 494, where a check signed by the

§ 110. **Separate documents—Reference to the same transaction.**

—Recent English cases have adopted a doctrine going quite as far as the doctrine criticised in the preceding section. Where a signed document refers to the transaction in question an unsigned memorandum describing the transaction has been treated as incorporated therewith.⁴² One or two similar decisions have been made in this country.⁴³ Such decisions go beyond what seems permissible, for the signature of the party to be charged does not authenticate an unsigned memorandum of the purchase merely because the signed paper makes some reference to the purchase. The signature vouches for the fact that there was a purchase, but it does not vouch for the terms of the purchase as described in the unsigned paper.⁴⁴

§ 111. **Consistency of separate documents.**—It is sometimes said

defendant was held to establish a memorandum of a trust. The amount of the check was taken from entries in an account-book kept by the book-keeper of the defendant, the party to be charged, and the entries contained the data necessary for a memorandum. It is reasonably clear that the maker of a check by making it for the amount indicated in the account-book authenticated with his signature the entries in the book.

⁴² *Long v. Millar* (C. A.), 4 C. P. D. 450. The defendant signed the following receipt: "Received of Mr. George Long the sum of thirty-one pounds as a deposit *on the purchase* of three plots of land at Hammer-smith. £31 0 0. Chas. W. Millar." The plaintiff was allowed to treat as incorporated in this receipt a memorandum of the purchase which had been signed by him on the same day, and which contained the full terms of the bargain. It will be noticed that the receipt does not refer to a document at all, but refers to a transaction. See also *Studds v. Watson*, 28 Ch. D. 305; *Oliver v. Hunting*, 44 Ch. D. 205, where, however, both

papers were signed by the parties to be charged.

⁴³ *Smith v. Colby*, 136 Mass. 562. In this case these words in the paper signed by the defendant, "Upon the terms agreed upon when at your place," were held sufficient to enable the plaintiff to make use of a memorandum of those terms. Compare *Beckwith v. Talbot*, 95 U. S. 289, 24 L. ed. 496. In this case a signed paper referred to a previous "agreement." It was held that a previously written agreement was thereby incorporated by the signed paper. This decision seems sound for the word "agreement" seems to have referred to this writing rather than to the oral agreement of which the writing was the evidence. *McBrayer v. Cohen*, 92 Ky. 479, 18 S. W. 123, is still more open to the criticism made in the text.

⁴⁴ This view is supported by *Darling v. Cumming*, 92 Va. 521, 23 S. E. 880. The words "according to an understanding between us" were held an insufficient reference to an unsigned paper containing a statement of the bargain between the parties.

that separate papers constituting a memorandum must be consistent with each other in order to be used.⁴⁵ Reflection shows that there are obvious limits to any such principle. In the first place it is necessary to distinguish between a written contract and a memorandum of an oral contract. If each of two inconsistent writings purports to be a written contract a difficulty arises which has no relation to the Statute of Frauds, but has to do either with lack of mutual assent or a mistaken expression thereof. If there was lack of mutual assent, which would happen if one party intended one form and so expressed himself, and the other party another form and so expressed himself, there is no bargain.⁴⁶ If on the other hand one form of expression was that which the parties intended and the other form was caused by mistake, the case is one for equitable reformation of the incorrect instrument and as a court of law could reach the same result by giving effect to the accurately expressed writing and disregarding the other, it is probable that it would do so. If, however, writings which are merely memoranda of the contract are inconsistent, no such difficulty arises. If one or more papers express accurately the oral bargain of the parties, it is obviously no valid ground of objection that there are other papers in existence which express the bargain inaccurately. The statute requires nothing more than one accurate memorandum; if that exists the statute is satisfied.⁴⁷ As parol evidence is always admissible to show that a memorandum, which is not a written contract, does not accurately express the bargain,⁴⁸ it must be equally admissible to show that a writing is an accurate memorandum. The decisions which are cited in support of the requirement of consistency for the most part go no farther than this. A signed paper, incomplete in itself and professing to incorporate into itself another paper also insufficient in itself, must incorporate the latter paper in its entirety. If this will result in a writing repugnant in its terms the papers cannot be a memorandum.⁴⁹

⁴⁵ Benjamin, Sale (5th Eng. ed.), 244; Mechem, Sales, § 427.

⁴⁶ Thornton v. Kempster, 5 Taunt. 786.

⁴⁷ See Morton v. Clark, 181 Mass. 134, 63 N. E. 409; s. c., 184 Mass. 555, 69 N. E. 309.

⁴⁸ See *supra*, § 104.

⁴⁹ In Cooper v. Smith, 15 East, 163, a letter of the defendants was sought to be used in connection with an entry in the plaintiff's books, but the letter was inconsistent with the books. In this case neither document

§ 112. **Signature.**—All sections, both of the English and American statutes, require signature. It was early held that this did not mean a signature at the end of the writing, and there is no doubt that a signature may be put at any place in the writing unless the statute expressly requires subscription.⁵⁰ Some of these decisions have gone very far in holding a name written in the memorandum to be a signature when there seemed little to indicate that the name was written for the purpose of signing or authenticating the writing, and the English court, following such decisions to their logical conclusion, has recently held “that a signature to a document which contains the terms of a contract is available for the purpose of satisfying the statute though put *alio intuitu* and not in order to attest or verify the contract”⁵¹ No decisions in this country have gone to this extreme length.⁵² In New York and some other States the statute has been changed from the English model so far as to require that the signature be “subscribed.” Under a statute in this form there can be no doubt that the signa-

was a complete memorandum and the letter did not adopt and incorporate the entry in the books. This is the whole ground of the decision. To the same effect is *Smith v. Surman*, 9 B. & C. 561, where a letter from the defendant was held not to incorporate with itself a previous letter from the plaintiff's attorney which it contradicted. See also *Buxton v. Rust*, L. R. 7 Ex. 1, 279; *Haughton v. Morton*, 5 Ir. C. L. 329. See also *infra*, § 116.

⁵⁰ *Lemayne v. Stanley*, 3 Lev. 1; *Knight v. Crockford*, 1 Esp. 190; *Holmes v. Mackrell*, 3 C. B. (N. S.) 789; *Barry v. Coombe*, 1 Pet. 640, 7 L. ed. 295; *Nichols v. Johnson*, 10 Conn. 192; *McConnell v. Brillhart*, 17 Ill. 354, 65 Am. Dec. 661; *Drury v. Young*, 58 Md. 546, 42 Am. Rep. 343; *Penniman v. Hartshorn*, 13 Mass. 87; *Hawkins v. Chace*, 19 Pick. 502; *Traylor v. Cabanné*, 8 Mo. App. 131; *Merriitt v. Clason*, 12 Johns. 102, 7 Am. Dec. 286; *Tingley v. Bellingham Co.*, 5 Wash. 644, 32 Pac. 737, 33

Pac. 1055; *Anderson v. Wallace Lumber Co.*, 30 Wash. 147, 70 Pac. 247.

⁵¹ *Griffiths Cycle Co. v. Humber*, [1899] 2 Q. B. 414, 418; *Jones v. Victoria Dock Co.*, 2 Q. B. D. 314. Compare *Hucklesby v. Hook*, 82 L. T. 117.

⁵² In *Boardman v. Spooner*, 13 Allen, 353, 358, the court said: “The stamping of the purchasers' name and a date on the bill and memorandum of weights at some time while these papers were in their possession, without evidence when or for what purpose this was done, did not show that they had adopted such a stamp as a signature, and affixed it to the instruments with the intent to bind themselves thereby.” So in *Kling v. Bordner*, 65 Ohio St. 86, 100, 61 N. E. 148, the court said: “No special formality in the execution of the writing is necessary, provided, as held in *Anderson v. Harold*, 10 Ohio, 399 it is signed for the purpose of giving it authenticity as an agreement.”

ture must be at the end of the writing.⁵³ The signature may be in an abbreviated form, as by the use of initials,⁵⁴ or the first name only.⁵⁵ The signature may be by mark,⁵⁶ or any code sign which may be adopted by the writer.⁵⁷ The signature may be made in pencil,⁵⁸ or rubber stamp,⁵⁹ or a printed signature already on the paper may be adopted.⁶⁰ There seems no reason to doubt the sufficiency of a description of the party to be charged if it is written with intent to attest or verify the writing.⁶¹ The case of a signature in blank coupled with authority, afterward exercised, to fill in over the signature a contract within the Statute of Frauds, has been discussed in a few cases not wholly harmonious.⁶²

⁵³ *Coon v. Rigden*, 4 Colo. 275; *Davis v. Shields*, 26 Wend. 341; *James v. Patten*, 6 N. Y. 9, 55 Am. Dec. 376; *Doughty v. Manhattan Brass Co.*, 101 N. Y. 644, 4 N. E. 747.

⁵⁴ *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446, 14 L. ed. 493; *Sanborn v. Flagler*, 9 Allen, 474.

⁵⁵ *Zann v. Haller*, 71 Ind. 136, 36 Am. Rep. 193; *Walker v. Walker*, 175 Mass. 349, 56 N. E. 601. See also *Fessenden v. Mussey*, 11 Cush. 127.

⁵⁶ *George v. Surrey*, 1 M. & M. 516; *Baker v. Dening*, 8 A. & E. 94; *Selby v. Selby*, 3 Meriv. 2, 6; *Dyas v. Stafford*, 9 L. R. Ir. 520; *Foye v. Patch*, 132 Mass. 105; *Zimmerman v. Sale*, 3 Rich. 76; *Brown v. McClanahan*, 9 Baxt. 347.

⁵⁷ *Brown v. Butcher's Bank*, 6 Hill, 443, 41 Am. Dec. 755. In this case, the figures "1, 2, 8," were written on the back of a bill, and held sufficient to bind the writer as an indorser.

⁵⁸ *Geary v. Physic*, 5 B. & C. 234; *Merritt v. Clason*, 12 Johns. 102, 7 Am. Dec. 286; *Clason v. Bailey*, 14 Johns. 484; *Draper v. Pattina*, 2 Speers, 292.

⁵⁹ *Bennett v. Brumfitt*, L. R. 3 C. P. 28; *Deep River Bank's App.*, 73 Conn. 341, 47 Atl. 675.

⁶⁰ *Schneider v. Norris*, 2 M. & S.

286; *Saunderson v. Jackson*, 2 B. & P. 238; *Drury v. Young*, 58 Md. 546, 42 Am. Rep. 343; *Grieb v. Cole*, 60 Mich. 397, 27 N. W. 579, 1 Am. St. Rep. 533.

⁶¹ In *Selby v. Selby*, 3 Meriv. 2, a signature to a letter in the words "your affectionate mother," was held to be insufficient, but the case seems rightly criticised in *Browne* on the Statute of Frauds, § 362. The words were undoubtedly written with the intent of signing the letter, and the description is far more adequate for the purpose of identifying the writer than initials or marks used as a private code.

⁶² In *Ulen v. Kittredge*, 7 Mass. 233, it was held that a guarantee might be filled in by a holder of a promissory note above the signature of the defendant indorsed on a note, the circumstances implying authority so to do, and that when the guarantee was so written in, the Statute of Frauds was satisfied. A similar decision was made in *Underwood v. Hossack*, 38 Ill. 208. In *Blacknall v. Parish*, 6 Jones Eq. 70, an incomplete deed left with the grantor's agent was with the grantor's authority completed by his agent by filling in the name of the grantee. It was held that while this document when delivered by the agent

On principle it seems clear that as a party may authorize an agent to make a memorandum entirely and sign it either with the principal's name or with the agent's, ~~that~~ he may also authorize an agent to make a portion of a memorandum, that is, to fill in blanks. After the agent has thus exercised his authority the memorandum should certainly be as effectual as if he had made it altogether. The principal is not willing to trust him to the extent of the whole memorandum but directs him to make use for the purpose of a specified signature and perhaps other written portions of a memorandum.⁶³ Where attempt is made to authorize the other party to the contract to fill in the blanks an insuperable difficulty arises. As will be seen,⁶⁴ one party to a contract cannot make the other his agent to execute a memorandum. An agency to fill in blanks seems in effect the same thing. At the time the signature is made it does not authenticate the memorandum and unless the blanks are filled in by some one, himself capable of signing the document effectually, so that his adoption of the signature already there may be regarded as a signing at that time, there can be no signed memorandum. The question in regard to the correction of a memorandum is similar. Anybody but the other party to the contract may be authorized to correct an existing memorandum, but the other party on principle may not.⁶⁵

§ 113. "By the party to be charged."—The English statute originally read "parties to be charged." The singular, "party," has been generally used in this country, and in the English Sale of Goods Act the singular also is used, as it has been in the Sales

was not a good conveyance, it was a good memorandum of a contract to convey. On the other hand in *Hodgkins v. Bond*, 1 N. H. 284, 287, it was held that a guarantee written over a blank signature on the back of a promissory note did not make a good memorandum. The same was held in *Jackson v. Titus*, 2 Johns. 430, in regard to an assignment in blank of an interest in land after the blanks had been filled in.

⁶³ The case of *Blacknall v. Parish*,

6 Jones Eq. 70, referred to in the preceding note, is satisfactorily explained on this ground. In *Ayres v. Probasco*, 14 Kans. 175, the same result might have been reached in regard to a mortgage except that by the law of Kansas the authority of an agent to convey land must be in writing.

⁶⁴ See *infra*, § 114.

⁶⁵ In *Bluck v. Gompertz*, 7 Exch. 862, 869, a memorandum of guarantee of two bills for £200 and £146, re-

Act. No stress seems to have been laid on whether the singular or plural number was used, and it is well settled that in contracts for the sale of goods the memorandum need be signed only by the defendant, whether the defendant be buyer or seller.⁶⁶ A contrary rule in some States in regard to contracts for the sale of land need be referred to only in passing.⁶⁷ It should be observed that the requirement of only the defendant's signature has nothing to do

spectively, had been signed by the defendant. It was later found that the amount for which the second bill should be drawn was £150, and it was so drawn. The bills were delivered by the guarantor to the creditor (who later became plaintiff in the case), and upon delivering them the guarantor wrote across the face of his guarantee for the plaintiff's signature an acknowledgment of the receipt of "the two drafts (one being for £150 instead of £146, there being an error in the invoice of £4)." The plaintiff signed this receipt. It was held that the words of the receipt written by the defendant might be regarded as authenticated by his previous signature of the guarantee, although the words of the receipt were not written with the intent of being signed by the defendant. The decision seems sound, for there is no doubt that the words of the receipt were written by the defendant on the guarantee itself, at least in part for the purpose of making a correction in the earlier writing, which he himself had signed.

⁶⁶*Allen v. Bennet*, 3 Taunt. 169 (goods); *Thornton v. Kempster*, 5 Taunt. 786, 789 (goods); *Laythoarp v. Bryant*, 2 Bing. N. C. 735 (land); *Cavanaugh v. Casselman*, 88 Cal. 543, 26 Pac. 515 (land); *Easton v. Montgomery*, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123 (land); *Hodges v. Kowing*, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87 (land); *Perkins v. Had-*

sell, 50 Ill. 216 (land); *Shirley v. Shirley*, 7 Blackf. (Ind.) 452 (land); *Burke v. Mead*, 159 Ind. 252, 64 N. E. 880 (land); *Engler v. Garrett*, 100 Md. 387, 59 Atl. 648 (land); *Williams v. Robinson*, 73 Me. 186, 40 Am. Rep. 352 (goods); *Old Colony R. R. Corp. v. Evans*, 6 Gray, 25, 66 Am. Dec. 394 (land); *Morin v. Martz*, 13 Minn. 191 (goods); *Ivory v. Murphy*, 36 Mo. 534 (land); *Cunningham v. Williams*, 43 Mo. App. 629 (goods); *Moore v. Thompson*, 93 Mo. App. 336, 348, 67 S. W. 680 (contract not to be performed within a year); *Gartell v. Stafford*, 12 Neb. 545, 11 N. W. 732, 41 Am. Rep. 767 (land); *Sabre v. Smith*, 62 N. H. 663 (goods); *Clason v. Bailey*, 14 Johns. 484 (goods); *McCrea v. Purmont*, 16 Wend. 460, 30 Am. Dec. 103 (land); *Justice v. Lang*, 42 N. Y. 493, 1 Am. Rep. 576 (goods); *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190 (goods); *Lord v. Cronin*, 154 N. Y. 172, 47 N. E. 1083 (land); *Case Threshing Machine Co. v. Smith*, 16 Or. 381, 18 Pac. 641 (goods); *Douglass v. Spears*, 2 Nott & McC. 267, 10 Am. Dec. 588 (goods); *Dyer v. Winston* (Tex. Civ. App.), 77 S. W. 227 (land).

⁶⁷A few States because of the form of the statute, or for other reasons, require that in contracts for sale of land the vendor shall sign the memorandum. See 3 *Parsons on Contracts* (9th ed.), 10, note.

with the questions previously treated,⁶⁸ whether the names of both parties to the bargain must appear or whether the consideration furnished by the plaintiff either by way of counter-promise or executed consideration must be stated in the memorandum.⁶⁹

§ 114. **Or his agent in that behalf.**—The original statute allowed signature by an agent and this has been universally followed in this country. Who may be an agent and how his authority may be shown depend upon the principles of the law of agency, but some special applications of that law may be mentioned here. Conceivably the agent may sign either his principal's name without mentioning his own; he may sign his principal's name stating in the writing that the signature of the principal is made by him as agent; he may sign his own name stating in the writing that he is agent for a specified principal; he may sign his own name stating in the writing that he is an agent, but without mentioning for whom; or, finally, he may sign his own name without mentioning any agency. Though it is more proper generally for an agent to disclose his agency upon the memorandum, the principal, if in fact he authorized the agent, will be bound by a memorandum signed even in the last form stated.⁷⁰ One person may act as agent for both parties, so far as making the memoran-

⁶⁸ See *supra*, §§ 102, 103.

⁶⁹ These questions were confused in the case of *Wilkinson v. Heavenrich*, 58 Mich. 574, 26 N. W. 139, 55 Am. Rep. 708, and the court there also raised an additional difficulty in regard to consideration, suggesting that as the contract could not be enforced against the plaintiff, there was no consideration for the defendant's promise. This suggestion is unsound. A voidable or unenforceable promise is sufficient consideration for a counter-promise, though a void promise is not. Thus an infant's promise has always been held sufficient consideration to make the counter-promise of an adult binding. *Wald's Pollock on Contracts* (3d ed.), § 66. Likewise a voidable promise of an insane person. *Atwell v. Jenkins*, 163

Mass. 362, 40 N. E. 178, 28 L. R. A. 694, 47 Am. St. Rep. 463. And under the Statute of Frauds there are many decisions involving the same question. See note 66, § 113, *supra*. Even specific performance is allowed of a contract for the purchase or sale of land, where one party only has signed a memorandum. *Browne*, Statute of Frauds, § 366.

⁷⁰ *Trueman v. Loder*, 11 Ad. & El. 589, 594; *Higgins v. Senior*, 8 M. & W. 834; *Hunter v. Giddings*, 97 Mass. 41, 93 Am. Dec. 54; *Huntington v. Knox*, 7 Cush. (Mass.) 371; *Phillips v. Cornelius* (Miss.), 28 So. 871; *Haubett v. Rea & Page Co.*, 77 Mo. App. 672; *Stowell v. Eldred*, 39 Wis. 614; *Wiener v. Whipple*, 53 Wis. 298, 10 N. W. 433, 40 Am. Rep. 775.

dum is concerned, though it will ordinarily be impossible for the agent to represent both parties in entering into the transaction of which the memorandum is the record.⁷¹ It is, however, well settled that one party to the transaction cannot be the agent for the other to sign a memorandum.⁷² If one person is specifically appointed to sign a memorandum as agent, the authority cannot be delegated,⁷³ but a signature made in the presence and under the immediate direction of the authorized agent might perhaps be distinguished on the ground that in such a case the agent was merely making use of the hand of the subordinate for the purpose of carrying out his own authority.⁷⁴

§ 115. **Auction sales.**—In part at least, from the necessity of the case rather than from evidence of actual authority, it has from early times been continuously held that the auctioneer at an auction sale is not only the agent of the seller, but is also the agent of the buyer for the purpose of making and signing a memorandum.⁷⁵ The signature by the auctioneer must, however, be made immediately or it will not be binding, so temporary is his au-

⁷¹ The decisions in regard to auctioneers and brokers referred to hereafter, §§ 115, 116, sufficiently indicate the possibility of one person being agent for both in making a memorandum. As to the limitations of the power of one person to be agent for two parties to the same transaction in general, see *Mechem, Agency*, § 67.

⁷² *Wright v. Dannah*, 2 Campb. 203; *Farebrother v. Simmons*, 5 B. & Ald. 333; *Sharman v. Brandt*, L. R. 6 Q. B. 720; *Bent v. Cobb*, 9 Gray, 397, 69 Am. Dec. 295; *Boardman v. Spooner*, 13 Allen, 353, 90 Am. Dec. 196; *Tull v. David*, 45 Mo. 444, 100 Am. Dec. 385; *Dunham v. Hartman*, 153 Mo. 625, 55 S. W. 233, 77 Am. St. Rep. 741; *Johnson v. Buck*, 35 N. J. L. 338, 10 Am. Rep. 243; *Wilson v. Lewiston Mill Co.*, 150 N. Y. 314, 44 N. E. 959, 55 Am. St. Rep. 680; *Adams v. Scales*, 1 Baxt. 337, 25 Am. Rep. 772; *Strong v. Dodds*,

47 Vt. 348. Compare *Bird v. Boulter*, 4 B. & Ad. 443; *Murphy v. Boese*, L. R. 10 Ex. 126; *Snyder v. Wolford*, 33 Minn. 175, 22 N. W. 254, 53 Am. Rep. 22; *Brent v. Green*, 6 Leigh, 16.

⁷³ *Henderson v. Barnewall*, 1 Y. & J. 387.

⁷⁴ See *Williams v. Woods*, 16 Md. 220.

⁷⁵ *Simon v. Metivier*, 1 W. Bl. 599; *Emmerson v. Heelis*, 2 Taunt. 38; *White v. Proctor*, 4 Taunt. 209; *Bird v. Boulter*, 4 B. & Ad. 443; *Mews v. Carr*, 1 H. & N. 484; *White v. Farley*, 81 Ala. 563, 8 So. 215; *Craig v. Godfroy*, 1 Cal. 415, 54 Am. Dec. 299; *Ansley v. Green*, 82 Ga. 181, 7 S. E. 921; *Doty v. Wilder*, 15 Ill. 407, 60 Am. Dec. 756; *Jones v. Kokomo Assoc.*, 77 Ind. 340; *Thomas v. Kerr*, 3 Bush, 619, 96 Am. Dec. 262; *McBrayer v. Cohen*, 92 Ky. 479, 18 S. W. 123; *Garth v. Davis* (Ky.), 85 S. W. 692; *O'Donnell v. Leeman*, 43 Me. 158, 160, 69 Am.

thority,⁷⁶ and between the fall of the hammer and the writing of the memorandum, the bidder has a *locus penitentiæ* and may withdraw his bid,⁷⁷ or the owner of the property may revoke the auctioneer's authority.⁷⁸ If the auctioneer is himself interested as a seller, he cannot by his signature bind the buyer,⁷⁹ even though the buyer was aware of the auctioneer's personal interest and assented expressly to his signing the memorandum. The difficulty is insuperable of one party to a transaction signing a memorandum as agent for the other.⁸⁰ The authority of the auctioneer to sign a memorandum extends to his clerk,⁸¹ and the clerk is not subject to the limitation upon the auctioneer, for if the auctioneer's goods are sold to a third person, the clerk can bind both the auctioneer and the buyer by his signature to the memorandum.⁸²

§ 116. **Brokers' notes.**—There have been numerous English decisions in regard to contracts made by brokers upon the question of memoranda under the Statute of Frauds. The English practice is for a broker employed to make a purchase or sale, to enter the bargain when made in a private memorandum book, and immediately to send to the respective principals in the transaction a

Dec. 54; *Ijams v. Hoffman*, 1 Md. 423; *Bent v. Cobb*, 9 Gray. 397, 69 Am. Dec. 295; *Springer v. Kleinsorge*, 83 Mo. 152; *Johnson v. Buck*, 35 N. J. L. 338, 10 Am. Rep. 243; *McComb v. Wright*, 4 Johns. Ch. 659; *Mentz v. Newwitter*, 122 N. Y. 491, 494, 25 N. E. 1011, 11 L. R. A. 97, 19 Am. St. Rep. 514; *Pugh v. Cheseldine*, 11 Ohio 109, 37 Am. Dec. 414; *Meadows v. Meadows*, 3 McCord, 458, 15 Am. Dec. 645; *Harvey v. Stevens*, 43 Vt. 653; *Walker v. Herring*, 21 Gratt. 678, 8 Am. Rep. 616; *Atkinson v. Washington & Jefferson College*, 54 W. Va. 32, 39, and cases cited. But see *Dunham v. Hartman*, 153 Mo. 625, 55 S. W. 233, 77 Am. St. Rep. 741; *Adams v. Scales*, 1 Baxt. 337, 25 Am. Rep. 772.

⁷⁶ *Smith v. Arnold*, 5 Mason. 414, 419; *Craig v. Godfrey*, 1 Cal. 415, 54 Am. Dec. 299; *Horton v. McCarty*, 53

Me. 394, 398; *Gill v. Bicknell*, 2 Cush. 355, 358; *Jelks v. Barrett*, 52 Miss. 315; *Schmidt v. Quinzel*, 55 N. J. Eq. 792; *Hicks v. Whitmore*, 12 Wend. 548.

⁷⁷ *Pike v. Balch*, 38 Me. 302, 311, 61 Am. Dec. 248; *Dunham v. Hartman*, 153 Mo. 625, 55 S. W. 233, 77 Am. St. Rep. 741; *Gwathney v. Cason*, 74 N. C. 5, 21 Am. Rep. 484.

⁷⁸ *Byrne v. Fremont Realty Co.*, 120 N. Y. App. Div. 692, 105 N. Y. Suppl. 838.

⁷⁹ *Bent v. Cobb*, 9 Gray, 397, 69 Am. Dec. 295; *Tull v. David*, 45 Mo. 444, 100 Am. Dec. 385; *Johnson v. Buck*, 35 N. J. L. 338, 10 Am. Rep. 243.

⁸⁰ See *supra*, § 114.

⁸¹ See cases cited, *supra*, note 75.

⁸² *Johnson v. Buck*, 35 N. J. L. 338, 10 Am. Rep. 243.

bought note and a sold note. In this country there are few decisions in regard to the matter and probably it is more common here than in England for brokers to contract as principals. Moreover, in bargains made on Exchanges the rules of the Exchange often require arbitration and forbid setting up the Statute of Frauds. The various forms in which the brokers' notes may be made have been thus summarized:

"The first is where on the face of the notes the broker professes to act for both the parties whose names are disclosed in the note. The sold note then in substance says: 'Sold for A. B. to C. D.,' and sets out the terms of the bargain; the bought note begins: 'Bought for C. D. of A. B.' or equivalent language, and sets out the same terms as the sold note, and both are signed by the broker.

"The second form is where the broker does not disclose in the bought note the name of the seller, nor in the sold note the name of the buyer, but still shows that he is acting as broker, not principal. The form then is simply: 'Bought for C. D.;' and 'Sold for A. B.'

"The third form is where the broker, on the face of the note, appears to be the principal, though he is really only an agent. Instead of giving to the buyer a note: 'Bought for you by me,' he gives it in this form: 'Sold to you by me.' By so doing he assumes the obligation of a principal, and cannot escape responsibility by parol proof, that he was only acting as broker for another, although the party to whom he gives such a note is at liberty to show that there was an unnamed principal, and to make this principal responsible.

"The fourth form is where the broker professes to sign as a broker, but is really a principal, in which case his signature does not bind the other party, and he cannot sue on the contract."⁸³

The English law formerly required that a broker in the city of London should make an entry in a book kept for the purpose. Largely because of this statutory requirement the entry in the book was regarded as the written contract between the parties,⁸⁴ but since this requirement no longer exists, the question seems to

⁸³ Benjamin, Sale (5th Eng. ed.), 285, 286.

⁸⁴ Benjamin, Sale (5th Eng. ed.), 287.

be, Was any writing intended as the definite expression of the bargain between the parties and, if so, what was that writing? If the entry in the broker's book and the two notes are harmonious in their terms and each contains the full terms of the bargain, no difficulty under the Statute of Frauds can arise. Sometimes, however, the notes differ from the entry in the book, and sometimes from each other. It seems probable that if either of the notes or the entry in the books could be shown to represent the actual contract of the parties in all its terms, it would be sufficient.⁸⁵ Where, however, the terms of the contract cannot be made out without resort to more than one writing, and the writings are inconsistent, or if the broker's notes are to be regarded as intended to constitute a written contract, and they are inconsistent, no recovery seems possible unless it be possible to reform the written expression of the bargain.⁸⁶ The bought and sold notes are regarded in the cases as a single document.⁸⁷ If both are signed this doctrine seems sound.⁸⁸ Authority to make a contract is sufficient to indicate that a broker has authority to make and sign a memorandum of the contract,⁸⁹ but a broker whose only employment is to bring the parties together has no such implied authority.⁹⁰ As in case of auctioneers, the authority of the broker to sign may be revoked at any time before the memorandum is actually made out.⁹¹

⁸⁵ *Rowe v. Osborne*, 1 Stark, 140; *Moore v. Campbell*, 10 Ex. 323; *Heyworth v. Knight*, 17 C. B. (N. S.) 298. In the case last cited the bought and sold notes varied from each other and the court allowed the contract to be shown by the correspondence between the parties. See also *Parton v. Crofts*, 16 C. B. (N. S.) 11, where the court allowed the contract to be proved by one note, the other not being produced. The court held that the two would be presumed to be alike.

⁸⁶ *Grant v. Fletcher*, 5 B. & C. 436; *Gregson v. Ruck*, 4 Q. B. 737. By the majority of the court in *Sievwright v. Archibald*, 17 Q. B. 103, dissenting, Erle, J.; per Willes, J., in

Caerleon Tin-Plate Co. v. Hughes, 65 L. T. 118, 119; *Peltier v. Collins*, 5 Wend. 459, 20 Am. Dec. 711; *Suydam v. Clark*, 2 Sandf. 133; *Bacon v. Eccles*, 43 Wis. 227.

⁸⁷ *Grant v. Fletcher*, 5 B. & C. 436; *Goom v. Aflalo*, 6 B. & C. 117; *Sievwright v. Archibald*, 17 Q. B. 103; *Bibb v. Allen*, 149 U. S. 481, 495, 13 S. Ct. 950, 37 L. ed. 819. The principle runs through all the cases.

⁸⁸ See *supra*, § 108.

⁸⁹ *Coddington v. Goddard*, 16 Gray, 436.

⁹⁰ *Aguirre v. Allen*, 10 Barb. 74.

⁹¹ *Farmer v. Robinson*, 2 Campb. 339, note; *Warwick v. Slade*, 3 Campb. 127.

§ 117. **Time of making the memorandum.**— It is commonly said that a memorandum may be made at any time subsequent to the making of a contract, and prior to the bringing of an action. It may, however, be made even before the contract is made, as the cases previously cited⁹² to the effect that a written offer is sufficient memorandum indicate. That the memorandum need not be closely contemporaneous with the transaction to which it relates is shown by many of the cases cited in the previous section. It may be made after breach of the contract,⁹³ or after the destruction of the goods to which the memorandum relates.⁹⁴ According to the great weight of authority the memorandum cannot be made after action brought so as to enable that action to be sustained.⁹⁵ The memorandum is often said to relate back to the time when the oral contract was made, but it is not necessary to resort to the fiction of a relation to explain the situation. It is the oral contract which is enforced, but it can be enforced only when the statute has been satisfied. The statute does not require the satisfaction to be simultaneous with the bargain, and it is unnecessary to make the fictitious assumption that it is in fact simultaneous in a case where it is not. Satisfaction of the statute does, however, result in an oral bargain theretofore unenforceable becoming binding as of the date of the oral contract, and there seems to be no limit, except that imposed by the Statute of Limitations, upon the power of a party to an oral contract at any time to make a memorandum binding upon himself.⁹⁶ Justice forbids, however, that after third parties have acquired property on the assumption that a certain person is the owner, that this person should thereafter invalidate their title by making a memorandum which for the first time makes effective a prior oral transfer.

⁹² See *supra*, § 106.

⁹³ *Bird v. Munroe*, 66 Me. 337, 22 Am. Rep. 571.

⁹⁴ *Phillips v. Ocmulgee Mills*, 55 Ga. 633. See also decisions holding that acceptance and actual receipt of part of the goods, after the destruction of the remainder, is a satisfaction of the statute, *supra*, § 94.

⁹⁵ *Bill v. Bament*, 9 M. & W. 36; *Lucas v. Dixon*, 22 Q. B. D. 357;

Gaines v. McAdam, 79 Ill. App. 201; *Bird v. Munroe*, 66 Me. 337, 347, 22 Am. Rep. 571. A contrary decision under the section of the statute relating to land is *Remington v. Linthicum*, 14 Pet. 84, 10 L. ed. 364. See also *Cash v. Clark*, 61 Mo. App. 636. See also *supra*, § 71.

⁹⁶ See *Emery v. Boston Terminal Co.*, 178 Mass. 172, 59 N. E. 763, 86 Am. St. Rep. 473.

Doubtless the memorandum will bind the maker of it, but it will not affect the title of a third person to the property. This principle is generally expressed by saying, in analogy with the law of ratification of an unauthorized agency, that the memorandum has no retroactive effect as to third persons. However the principle be expressed, its effect is evident.⁹⁷

§ 118. **Written contracts may be varied by subsequent agreement at common law.**—"By the general rules of the common law, if there be a contract which has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make a new contract, which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement."⁹⁸ It is also true that if the agreement to discharge or vary a contract is made after its breach, it is equally immaterial whether the original bargain was or was not in writing. The latter agreement is

⁹⁷ The leading case is *Felthouse v. Bindley*, 11 C. B. (N. S.) 869. In that case the seller of a horse by an oral sale put up property, including horse in question, at auction, and the horse, together with the other property, was sold by the auctioneer. Subsequently the seller wrote a letter to the buyer which was assumed by the court to be a sufficient memorandum of the oral bargain. The buyer, under the oral bargain, sued the auctioneer for conversion, and it was held that he could not recover. See to the same effect *Bird v. Munroe*, 66 Me. 337, 22 Am. Rep. 571; *Emery v. Boston Terminal Co.*, 178 Mass. 172, 59 N. E. 763, 86 Am. St. Rep. 473. It would seem in *Felthouse v. Bindley*, the buyer might have successfully maintained action against the seller, though he could not sue the auctioneer nor the buyer

at the auction sale. *Shelton v. Thompson*, 96 Mo. App. 327, 70 S. W. 256.

⁹⁸ *Goss v. Lord Nugent*, 5 B. & Ad. 58, 64. See in accord, *Swain v. Seamen*, 9 Wall. 254, 271, 19 L. ed. 554; *Pioneer Savings Co. v. Nonnemacher* (Ala.), 30 So. 79; *Calliope Min. Co. v. Herzinger*, 21 Colo. 482, 42 Pac. 668; *Ward v. Walton*, 4 Ind. 75; *Walter v. Victor G. Bloede Co.*, 94 Md. 80, 85, 50 Atl. 433; *Cummings v. Arnold*, 3 Met. 486, 489, 37 Am. Dec. 155; *Barton v. Gray*, 57 Mich. 622, 24 N. W. 638; *Van Santvoord v. Smith*, 79 Minn. 316, 82 N. W. 642; *Chouteau v. Jupiter Iron Works*, 94 Mo. 388, 7 S. W. 467; *Warren v. Mayer Mfg. Co.*, 161 Mo. 112, 121, 61 S. W. 644; *Bryan v. Hunt*, 4 Sneed, 543, 70 Am. Dec. 262; *Montgomery v. American Ins. Co.*, 108 Wis. 146, 159, 84 N. W. 175.

an accord, and if the parties so intend will operate at once without performance to discharge the liability for breach of the original contract.⁹⁹

§ 119. **Contracts within the Statute of Frauds — Rescission.**—

If an executory contract is within the Statute of Frauds and is in writing or a proper written memorandum has at some time been made, a subsequent oral agreement to rescind the contract is effectual if the oral agreement fulfills the requisites of a contract at common law. The Statute of Frauds does not mention contracts of rescission or discharge and such contracts are, therefore, not affected by its terms.¹ It should be noticed, however, that if a contract has been partly executed by the transfer of either real or personal property, an agreement of rescission which contemplates not simply a discharge of unexecuted obligations but a retransfer of the property must certainly be within the section of the statute relating to sales of land or that relating to sales of goods.² But if the agreement to rescind was paid for with anything other than an executory promise, or if anything was done in accordance with the agreement which could operate

⁹⁹ Wald's *Pollock on Contracts* (3d ed), 834.

¹ *Goss v. Lord Nugent*, 5 B. & Ad. 58, 66; *Wulschner v. Ward*, 115 Ind. 219, 17 N. E. 273. An exception to this rule should, perhaps, be made in the case of contracts relating to land, as such contracts create immediately an equitable interest in the land. Equitable interests are within the statutes. *Toppin v. Lomas*, 16 C. B. 145; *Smith v. Burnham*, 3 Sumn. 435; *Dougherty v. Catlett*, 129 Ill. 431, 21 N. E. 932; *Browne*, Statute of Frauds, § 229. The contract to rescind necessarily involves the surrender of an interest in land. This has been so held. *Catlett v. Dougherty*, 21 Ill. App. 116 (see *Dougherty v. Catlett*, 129 Ill. 431); *Dial v. Crain*, 10 Tex. 444, 454 (see also *Huffman v. Mulkey*, 78 Tex. 556,

14 S. W. 1029, 22 Am. St. Rep. 71). And the reasoning seems unanswerable, but there is contrary authority. *Goss v. Lord Nugent*, 5 B. & Ad. 58, 66. See, however, *Harvey v. Grabham*, 5 A. & E. 61, 73; *Buel v. Miller*, 4 N. H. 196; *Mahon v. Leech*, 11 N. Dak. 181, 90 N. W. 807; *Wadge v. Kittleson*, 12 N. Dak. 452, 97 N. W. 856; *Wisner v. Field*, 15 N. Dak. 43, 106 N. W. 38; *Boyce v. McCullough*, 3 W. & S. 429, 39 Am. Dec. 35; *Brownfield's Ex. v. Brownfield*, 151 Pa. St. 565, 25 Atl. 92. See also *Browne*, Statute of Frauds, § 431 *et seq.*, which makes no distinction between contracts for an interest in land and other contracts within the statute.

² *Wulschner v. Ward*, 115 Ind. 219, 17 N. E. 273.

as an accord and satisfaction, the original agreement doubtless would be effectually discharged.³

§ 120. **Variation of contract within the Statute of Frauds—General doctrine.**—More difficult questions are presented when the subsequent oral agreement does not purport totally to rescind but only to vary some of the terms of an original bargain, which was within the Statute of Frauds but of which a memorandum had been made. It seems clear on principle that no right of action can lie for breach of the second agreement or of the first and second combined. To allow such a right would be to enforce a contract within the statute when some terms at least of the contract were oral.⁴ On the other hand, if the terms of the oral contract have been performed, such performance operates as a satisfaction of the liability on the original contract. The Statute of Frauds does not apply to contracts executed either by delivery of the goods or by payment, so that when the oral agreement is performed its performance has the effect which the parties agreed it should have.⁵ If the terms of the oral agreement have not been performed, the original contract still remains in force. Though an oral agreement to rescind without more would be effectual, where the rescission is to be effected only by the necessary implication contained in the agreement to substitute a new contract differing in some of its terms from the old one, there can be no

³ *Burns v. Fidelity Real Estate Co.*, 52 Minn. 31, 36, 53 N. W. 1017; *Warren v. Mayer Mfg. Co.*, 161 Mo. 112, 122, 61 S. W. 644; *Long v. Hartwell*, 34 N. J. L. 116; *Miller v. Pierce*, 104 N. C. 389, 10 S. E. 554; *Jones v. Booth*, 38 Ohio St. 405; *Phelps v. Seely*, 22 Gratt. 573; *Jordan v. Katz*, 89 Va. 628, 630, 16 S. E. 866.

⁴ *Stead v. Dawber*, 10 A. & E. 57 (overruling *Cuff v. Penn*, 1 M. & S. 21); *Marshall v. Lynn*, 6 M. & W. 109; *Noble v. Ward*, L. R. 1 Ex. 117; *Carpenter v. Galloway*, 73 Ind. 418; *Bradley v. Harter*, 156 Ind. 499, 60 N. E. 139; *Cummings v. Arnold*, 3 Mete. 486, 491, 37 Am. Dec. 155; *King v. Faist*, 161 Mass. 449, 456, 37

N. E. 456; *Heisley v. Swanstrom*, 40 Minn. 196, 41 N. W. 1029; *Burns v. Fidelity Real Estate Co.*, 52 Minn. 31, 53 N. W. 1017; *Thompson v. Thompson*, 78 Minn. 379, 81 N. W. 204, 543; *Rucker v. Harrington*, 52 Mo. App. 481; *Warren v. Mayer Mfg. Co.*, 161 Mo. 112, 61 S. W. 644; *Dana v. Hancock*, 30 Vt. 616.

⁵ *Moore v. Campbell*, 10 Ex. 323; *Leather Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 140; *Swain v. Seamens*, 9 Wall. 254, 19 L. ed. 554; *Long v. Hartwell*, 34 N. J. L. 116, 127; *Jackson v. Litch*, 62 Pa. St. 451; *Ladd v. King*, 1 R. I. 224, 231, 51 Am. Dec. 624. Compare *Dana v. Hancock*, 30 Vt. 616.

rescission if the agreement for substitution is invalid.⁶ Even if one party offers to perform his promise under the new agreement, the other party may, according to the better view, still insist on the original contract, and refuse to accept the substituted performance to which he had orally agreed.⁷

§ 121. **Variation of contracts within the statute — Massachusetts doctrine.**—In an early case,⁸ however, the Supreme Court of Massachusetts adopted a distinction that was suggested by Lord Ellenborough in *Cuff v. Penn*,⁹ between the contract and its performance. "The statute," Wilde, J., says, "requires a memorandum of the bargain to be in writing, that it may be made certain; but it does not undertake to regulate its performance." The court then proceeds to argue that as a substituted performance would operate as a satisfaction of the original contract, and tender is equivalent to performance, the plaintiff could sue on the original contract and prove in support of it an offer to perform with the alterations later agreed upon. But the sounder view even in the case of a binding contract of accord, is that tender is not equivalent to performance, and there is no satisfaction even if the tender is wrongfully refused.¹⁰ However this may be, a tender where there is no obligation to accept it cannot possibly have the effect of performance. The learned author of the leading text-book on the subject¹¹ gives his approval to the decision, but the current of authority seems strongly against it.

§ 122. **Amount of variation.**—No distinction is taken in the

⁶ *Noble v. Ward*, L. R. 2 Ex. 135; *Hasbrouck v. Tappen*, 15 Johns. 200; *Barton v. Gray*, 57 Mich. 622, 632, 24 N. W. 638.

⁷ *Stowell v. Robinson*, 3 Bing. N. C. 928; *Noble v. Ward*, L. R. 2 Ex. 135; *Plevins v. Downing*, 1 C. P. D. 220; *Swain v. Seamens*, 9 Wall. 254, 271, 19 L. ed. 554; *Lawyer v. Post*, 109 Fed. Rep. 512, 47 C. C. A. 491; *Bradley v. Harter*, 156 Ind. 499, 60 N. E. 139; *Walter v. Victor G. Bloede Co.*, 94 Md. 80, 50 Atl. 433; *Rucker v. Harrington*, 52 Mo. App. 481; *Warren v. Mayer Mfg. Co.*, 161 Mo. 112, 61 S. W. 644; *Clark v. Fey*, 121 N. Y. 470,

24 N. E. 703. See also *Dana v. Hancock*, 30 Vt. 616.

⁸ *Cummings v. Arnold*, 3 Mete. 486, 37 Am. Dec. 155.

⁹ 1 M. & S. 21. The suggestion was repudiated in *Stead v. Dawber*, 10 A. & E. 57, and *Marshall v. Lynn*, 6 M. & W. 109, and is wholly discredited in England.

¹⁰ *Wald's Pollock on Contracts* (3d ed.), § 832.

¹¹ *Browne, Statute of Frauds*, § 424. See also *Smith v. Loomis*, 74 Me. 503; *Lee v. Hawks*, 68 Miss. 669, 9 So. 828. Compare *Wiessner v. Ayer*, 176 Mass. 425, 57 N. E. 672.

cases between large changes from the original agreement and slight ones, such as the extension for a brief period of the time for performance. The validity of such a distinction has been explicitly denied.¹² "Every part of the contract in regard to which the parties are stipulating must be taken to be material."¹³

§ 123. **Part performance of varied agreement.**—Though an attempted oral modification of a contract within the statute is wholly ineffectual to accomplish the intent of the parties, yet the actual forbearance by one party at the request of the other to enforce a contract at the time when performance was due may produce important legal consequences. In *Ogle v. Vane*,¹⁴ it was held that the plaintiff who had contracted to buy iron from the defendant in July, and who, after waiting at the defendant's request till the following February, then bought in the market, could charge the defendant for damages based on the price in February, though the price was higher then than in July. The court relied to some extent on the fact that though there was forbearance at the defendant's request there was no agreement to forbear, but it seems an agreement would have made no difference, for the agreement would neither have rescinded the original contract nor have had any effect itself except in so far as it was performed.¹⁵

§ 124. **Hickman v. Haynes.**—In *Hickman v. Haynes*¹⁶ the plaintiff had agreed to sell and the defendant to buy iron in the future. The defendant had requested, before the time for performance, an enlargement of the time for taking delivery. This was granted, but the defendant ultimately refused altogether to take the iron. In an action on the contract the defendant set up that the plaintiff was not himself ready and willing to perform the contract at the time when performance was due according to the written memorandum. The court held that though before that time "either party could have changed his mind and

¹² *Goss v. Lord Nugent*, 5 B. & Ad. 67; *Harvey v. Grabham*, 5 A. & E. 74; *Marshall v. Lynn*, 6 M. & W. 116.

¹³ Per Parke, B., *Marshall v. Lynn*, 6 M. & W. 116, 117.

¹⁴ L. R. 2 Q. B. 275, L. R. 3 Q. B. 272.

¹⁵ *Smiley v. Barker*, 83 Fed. Rep. 684, 55 U. S. App. 125, 28 C. C. A. 9; *Barton v. Gray*, 57 Mich. 622, 636, 24 N. W. 638. See *Hasbrouck v. Tappen*, 15 Johns. 200. Compare *Sanderson v. Graves*, L. R. 10 Ex. 234.

¹⁶ L. R. 10 C. P. 598.

required the other to perform the contract according to its original terms,"¹⁷ yet after having induced the plaintiff to withhold delivery the defendant could not thereafter insist that prompt delivery was a condition precedent to a right of action. In this case, as in the preceding, the court said there was no agreement to forbear, but merely a voluntary forbearance, but here also it is hard to see that a mutual agreement, which was unenforceable, would have altered the decision.¹⁸

§ 125. **Performance of part of contract within the statute.**—If so much of a contract as is within the Statute of Frauds is fully performed, other obligations or liabilities on the contract may obviously be discharged or modified in any way that contracts not within the statute may be. Thus in *Negley v. Jeffers*,¹⁹ there was a contract for the sale of land and the land was actually conveyed. After the conveyance an agreement was made by the vendee for valuable consideration to waive certain conditions precedent to his obligation to pay the price. It was held this agreement though oral was binding.

§ 126. **Conflict of laws.**—The fact that a large number of States have no provision corresponding to the seventeenth section of the English Statute of Frauds makes it peculiarly easy for questions to arise in the sale of goods involving the conflict of laws. It was decided in England in the often-cited case of *Leroux v. Brown*,²⁰ that an oral contract not to be performed within a year, which was made in France, and not required to be in writing by the law of that country, could not be enforced in England. The court took a distinction between the wording of the fourth section of the English statute which was the section involved and the wording of the seventeenth section. The fourth section provides that "no action shall be brought" unless there is a writing. The seventeenth section provides that no contract which does not satisfy the statute "shall be allowed to be good." The words of the fourth section,

¹⁷ *Quære* if the change of mind was so near the time for performance as to make performance extremely difficult for the other party. See *Tyers v. Rosedale Co.*, L. R. 8 Ex. 305, L. R. 10 Ex. 195.

¹⁸ *Smiley v. Barker*, 83 Fed. Rep.

684, 55 U. S. App. 125, 28 C. C. A. 9; *Barton v. Gray*, 57 Mich. 622, 636, 24 N. W. 638. But see *Sanderson v. Graves*, L. R. 10 Ex. 234.

¹⁹ 28 Ohio St. 90.

²⁰ 12 C. B. 801.

the court held, indicated that the statute related to the remedy, and, therefore, the plaintiff could not maintain his action. There are *dicta* in the case that the seventeenth section relates to the substance of the contract, not to the remedy, and that, therefore, in sales of personal property the statute where the contract was made would be the one which governed. In this country in contracts for the sale of goods, these *dicta* have been followed.²¹ In view of the rule generally recognized that the Statute of Frauds establishes a rule of procedure or of evidence and that a failure to comply with its provisions makes a contract unenforceable only,²² it is difficult to see how it can fairly be said that the satisfaction of the statute relates to the substance of the contract rather than to the remedy upon it. The distinction suggested by the English court between the words "no action shall be brought" and "no contract shall be allowed to be good," has not been generally adopted in other cases than those involving the conflict of laws, and the distinction seems an undesirable refinement. In this country where the precise words of both sections have frequently been changed and the change has not been regarded as changing the meaning of the English prototype, the distinction is not only oversubtle but is unimportant. It must be admitted, however, that though these decisions on the conflict of laws as applied to sales of goods within the Statute of Frauds are difficult to justify in theory, they produce a satisfactory result. Parties to a contract or sale naturally observe the formalities requisite to make an enforceable contract in the place where they are contracting. They may fairly be held to that standard of care; and on the other hand to deprive the plaintiff of a remedy if the defendant moves from a State where no Statute of Frauds was in force, and where the bargain was made, to a State where a Statute of Frauds is in force, is undeniably a practical injustice.

²¹ *Allen v. Schuchardt*, 1 Fed. Cas. No. 236; *Low v. Andrews*, 1 Story, 38; *Kling v. Fries*, 33 Mich. 275; *Houghtaling v. Ball*, 19 Mo. 84, 59 Am. Dec. 331, 20 Mo. 563; *Dacosta v. Davis*, 4 Zab. 319; *Hunt v. Jones*, 12 R. I. 265, 34 Am. Rep. 635; *Green*

v. Lewis, 26 U. C. Q. B. 618. A number of decisions upon other sections of the statute are collected in 19 L. R. A. 792, note, 64 L. R. A. 119, note.

²² See *supra*, §§ 71, 72.

CHAPTER IV.

SUBJECT-MATTER OF THE CONTRACT.

- Section 127. Statutory provision as to future goods.
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149. Reason for the English view, and its validity.
150. Buyer becomes tenant in common with other owners.
151. Consequences of the doctrine of tenancy in common.
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154. Elevator cases.
155. Sale of a portion of a mass.
156. The weight of American authority supports this view.
157. Incidents of the tenancy in common.
158. Selection.
159. What are fungible goods.
160. Provision of Sales Act as to destruction of goods sold.
161. A sale of specific goods is void if goods not in existence.
162. Deterioration or partial destruction of the goods prior to the sale.
163. Provision of Sales Act as to destruction of goods contracted to be sold.
164. A contract may be avoided if the goods are destroyed or injured.
165. Rules of the civil law.

§ 127. Future goods — Provisions of the Sales Act.—

Sec. 5. EXISTING AND FUTURE GOODS.— (1.)

The goods which form the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract to sell, in this act called "future goods."

(2.) There may be a contract to sell goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3.) Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods.¹

§ 128. Contract to sell future goods.— There is no doubt of the possibility at common law of contracting to sell goods which the seller does not own at the time. Contracts by a manufacturer for the sale of his future product form a typical instance. Contracts to sell goods, especially stocks and staple commodities like grain and cotton, which the seller does not own at the time have, however, been made the means of speculations depending so greatly on chance that they have sometimes been classed as gambling transactions and treated as contrary to public policy. The limits both statutory and at common law of the rules of public policy governing this question will be hereafter considered.² It is enough to say in this connection that the common law never forbids any contract to sell merely because the seller does not own the goods which are the subject of the bargain,³ and that statutes, even though purporting to have an effect as wide as this

¹This follows section 5 of the English Sale of Goods Act in meaning, and the only change in language is in the use in (1) of the words "contract to sell" twice instead of "contract of sale:" the use of the same words in (2) instead of "contract for the sale of" and the substitution in (3) of "where the parties purport" for "where by a contract of sale the seller purports."

²*Infra*, § 664.

³*Watts v. Friend*, 10 B. & C. 446 (crop not yet sown); *Hibblewhite v. M'Morine*, 5 M. & W. 462 (goods which seller can only acquire by purchase); *Mortimer v. McCallan*, 6 M. & W. 58 (stock not owned by seller); *Ajello v. Worsley*, [1898] 1 Ch. 274 (piano of a rival maker not yet purchased). Many American cases involving such contracts are cited, *infra*, § 135.

(as occasionally happens), have been construed, in view of the mischief at which they were aimed, to have a narrower construction.⁴

§ 129. **The acquisition of the goods by the seller may depend upon a contingency.**—What has been said in the preceding section is applicable also to the provisions of subsection 2. As parties to a contract may make what promises they choose so long as they are not illegal, so they may make these promises subject to any conditions which they choose which are not illegal; and making the contract conditional upon the acquisition of the goods is not, without more, illegal. A typical instance of such contracts as are referred to in the subsection in question may be found in “sales to arrive.” The words “to arrive” in such bargains have been construed to mean, in effect, “if they shall arrive,” not, “which I agree shall arrive.”⁵ The promise of each party is, therefore, subject to the same condition, the arrival of the goods.⁶

§ 130. **Sale of future goods.**—It is obvious in the nature of the case that it is impossible for a seller to transfer title to goods of which he has neither ownership nor possession at the time of the sale. As he has no title he can give none.⁷ There are, however, some cases where an attempt by a seller to sell goods, which he did not at the time own but which he afterward acquired, has been thought to have a wider effect than a mere contract to sell. These cases may be classified under the heads of estoppel; sale of an expectation, sale of property in the potential possession of the

⁴ See *infra*, § 664.

⁵ *Johnson v. McDonald*, 9 M. & W. 600; *Neldon v. Smith*, 36 N. J. L. 148; *Abe Stein Co. v. Robertson*, 167 N. Y. 101, 60 N. E. 329; *Rogers v. Woodruff*, 23 Ohio St. 632, 13 Am. Rep. 276. See also *Hale v. Rawson*, 27 L. J. C. P. 189.

⁶ See further as to sales to arrive, § 188.

⁷ “It is a common learning in the law that a man cannot grant or charge that which he hath not.” *Perkins’ Profitable Book*, Tit. Grant, § 65. “The law has long been set-

tled that a person cannot by deed, however solemn, assume that which is not in him. In other words, that there cannot be a prophetic conveyance.” *Belding v. Read*, 3 H. & C. 955, 961, per Pollock, C. B. *Lunn v. Thornton*, 1 C. B. 379: “The common-law maxim is conclusive upon the point, *nemo dat quod non habet*.” *Emerson v. European, etc., Ry. Co.*, 67 Me. 387, 24 Am. Rep. 39. See also *Skipper v. Stokes*, 42 Ala. 255, 94 Am. Dec. 646, and, further, the American cases cited in the following notes.

seller, and equitable property rights acquired by contracts to sell future goods. These may be treated in order.

§ 131. **Estoppel.**—If a seller purports to make a present sale of goods which he does not own, and the buyer is ignorant of the seller's lack of title, the seller will be estopped in any contest with the buyer to deny that he himself had title when he purported to make a sale. By assuming to sell the goods, the seller represents that he is the owner of them. The buyer by buying them indicates his reliance on the seller's representations, and suffers damage by such reliance. If the seller never acquires the goods, this estoppel clearly can have no effect upon the title. But if the seller actually acquires the goods after he has purported to sell them, it is said that title to the goods passes by estoppel, thereby giving the buyer a property right.⁸ Cases arise more commonly upon this point in regard to real estate,⁹ but since it is now recognized that in a sale of personal property a warranty of title is implied,¹⁰ the principle does not seem to differ whether the property in question is realty or personalty. Though it is generally said that the title passes by estoppel, it seems on principle that the exact statement is rather that the seller is estopped to deny that title has passed. Therefore, in any contest as to the ownership of the goods with him, or with those who stand in his place, the buyer will prevail.¹¹ If, however, after the buyer has acquired title and while he has possession of the goods he sells and delivers them to a purchaser for value who has no notice of the previous sale, the later purchaser should

* *Littlefield v. Perry*, 21 Wall. 205, 22 L. ed. 577; *The Idaho*, 93 U. S. 575, 23 L. ed. 978; *Gottfried v. Miller*, 104 U. S. 521, 26 L. ed. 851; *Curran v. Burdsall*, 20 Fed. Rep. 835; *Rowley v. Bigelow*, 12 Pick. 307, 23 Am. Dec. 607; *Clark v. Slaughter*, 34 Miss. 65; *Hickman v. Dill*, 39 Mo. App. 246; *Gardiner v. Suydam*, 7 N. Y. 357, 363; *Frazer v. Hilliard*, 2 Strob. 309; *Sherman v. Transportation Co.*, 31 Vt. 162. See also *Kane v. Loder*, 56 N. J. Eq. 268, 38 Atl. 966; *Harvey v. Harvey*, 13 R. I. 598; *Coolidge v. Ayers*, 76 Vt. 405, 57

Atl. 970. The contrary suggestion in *Bryans v. Nix*, 4 M. & W. 775, 791, it should be noticed, was made before it was settled that a seller impliedly warranted his title to the goods. See *Morley v. Attenborough*, 3 Ex. 500.

⁸ See *Bigelow*, *Estoppel* (4th ed.), 377 *et seq.*

¹⁰ See *infra*, § 218.

¹¹ If for any reason there is no implied warranty of title there will be no estoppel. *Scranton v. Clark*, 39 N. Y. 220, 100 Am. Dec. 430.

be protected, for the seller actually had the title to the goods, and though he, on account of an equitable rule binding him personally, cannot assert this title, the purchaser for value, not being subject to the equity, may do so. The decisions in regard to real estate upon this point are in great conflict.¹² The weight of authority seems to be, however hard it may be to explain the result in theory, that a title good against all the world actually passes to the buyer upon the acquisition of title by the seller. While the difference between transferring a real title to the buyer and merely estopping the seller to deny that the buyer has title has not been much discussed in the cases on personal property, some of the decisions seem to involve the question and to decide in accordance with the weight of authority in the cases relating to land that a title good against third persons passes.¹³ There are other cases where the buyer may get title by the estoppel of the owner of goods. Thus far the estoppel of the seller only has been considered, but sometimes an owner of goods intrusts another with such appearance of title that not only will the person intrusted be estopped to assert a title against one to whom he has sold the goods, but the person intrusting will also be estopped. Such cases are considered in a subsequent chapter.¹⁴

§ 132. **Sale of an expectation.**—There has been considerable discussion in the civil law in regard to the sale of an expectation. The rule of the civil law has been thus summarized: "When what is bought is a thing which does not as yet exist, and which may never exist at all, or the quantity or value of which is so indeterminate that it may, as we say, come to nothing, the transaction is called *emptio spei*. If the intention of the parties is that the purchase money shall be paid in any case, whether the hoped-for equivalent comes to anything or not, it is commonly termed, for the sake of distinction, *emptio spei simplicis*: if it is that it shall not be paid in proportion to what the purchaser actually gets, it is termed *emptio rei speratae*. The first is presumed to be intended in such cases as where one agrees to buy

¹² Rawle, Covenants, § 256 *et seq.*; Bigelow, Estoppel (4th ed.), 420 *et seq.*; 11 Am. & Eng. Encyc. of Law (2d ed.), 417 *et seq.*

¹³ The Idaho, 93 U. S. 575, 23 L. ed. 978; Rowley v. Bigelow, 12 Pick. 307, 23 Am. Dec. 607; Frazer v. Hilliard, 2 Strob. 309.

¹⁴ Chapter X, *infra*, § 310 *et seq.*

the fish that shall be caught in such or such a net or nets, the game that shall be killed in such or such a battue, the minerals that shall be extracted from such or such a mine to be opened. The second, which is in fact the purchase of a future thing conditionally on its coming into existence, is presumed to be intended when one buys a thing which may reasonably be expected to come into existence in the ordinary course of nature: *e. g.*, the offspring of a slave woman now actually with child, the lambs to be born in the following spring on a particular sheep run, or next season's yield from a certain farm, garden, or vineyard. In such a case the quality of the produce has no effect upon the amount of the purchase money, which, as it cannot be increased because the quality is better, similarly cannot be diminished because it is worse in fact than was expected. The presumption, however, in favor of either construction can be rebutted by evidence of a contrary intention. For instance, if one were to agree to buy for a fixed sum the whole of next year's vintage on a particular vineyard, this would be an *emptio spei*; but if the agreement were for ten casks of the wine which so and so should make next year from his vineyard, it would be an *emptio rei speratae*, and if only five casks were made, or none at all, the purchaser would have to pay only for five or none; while conversely the vendor would not be liable to deliver more than was made in fact, though he might have agreed to sell more." ¹⁵ In one case it was said by Martin, B. "a man may buy the chance of obtaining the goods," ¹⁶ and in an Alabama case, ¹⁷ Saffold, J., said: "The fisherman may sell the next cast of his net." Neither case, however, involved the question, and probably by "buy" and "sell" the judges meant no more than contract to buy and sell. There seem to be but two rights in our law which the buyer can acquire by a bargain for goods which the seller may thereafter acquire, and neither of these rights is a property right in the strict sense of the term. The seller may grant the buyer a power to take the goods when they come into existence so that they never come into the posses-

¹⁵ Moyle, Contract of Sale in the Civil Law, 30. In our law this sort of question has been very little discussed.

¹⁶ Buddle v. Green, 27 L. J. Ex. 33, 34.

¹⁷ Jones v. Webster, 48 Ala. 109, 112.

sion of the seller. Thus if the seller wished to sell the animals that he might catch in his traps, or the legacy which he might receive from an uncle when the latter died, he could give a power authorizing the buyer to take the animals, or receive the legacy, and when the buyer exercised the power he would immediately become the owner of the property. Instead of giving such a power the seller might contract to transfer the goods to the buyer as soon as he, the seller, received them. That is, he might make a contract to sell. But the mere acquisition of the goods by the seller does not, it seems, in our law operate as a transfer of title to the buyer even though the parties intend that it shall do so.¹⁸

§ 133. **Potential possession—General rule.**—In an early case¹⁹ it was held that in certain cases a seller might transfer title to goods which he did not then own. The case related to a future crop of corn and it was held that a buyer of the corn from a lessee of the land had a better title than the reversionary owner of the lease, though at the time of the litigation the lessee's estate had ended. The court said: "And though the lessor had it not actually in him, nor certain, yet he had it potentially; for the land is the mother and root of all fruits. Therefore he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant, as 21 Hen. VI. A parson may grant all the tithewool that he shall have in such a year, yet perhaps he shall have none; but a man cannot grant all the wool that shall grow upon his sheep that he shall buy

¹⁸ *Robinson v. Macdonnell*, 5 M. & S. 228; *Low v. Pew*, 108 Mass. 347, 11 Am. Rep. 357. In the latter case fishermen purported to "sell, assign, and set over, all halibut which may be caught by the master and crew of the schooner 'Florence Reed' on the voyage upon which she is about to proceed." While the schooner was upon her voyage the fishermen became bankrupt, and it was held that their assignees in bankruptcy had title to the fish that had been caught, as against the buyer. The unconsidered dictum, quoted in the text from *Jones v. Webster*, 148 Ala. 109, 112, cannot be given much weight as a contrary authority. The whole doctrine that future goods cannot be sold, and that a mortgage of such goods is at most binding in equity, unnecessarily proceeds upon the assumption of the principle stated in the text. See further, *supra*, § 6; *infra*, § 274; Benjamin, *Sales* (5th ed.), 127.

¹⁹ *Grantham v. Hawley*, [1616] Hob. 132. Though *Grantham v. Hawley* is the leading case, the doctrine is nearly 200 years older. Y. B. 21 H. VI, 43, stated in Benjamin (5th Eng. ed.), 130.

hereafter; for there he hath it neither actually nor potentially." The doctrine of this case has often been repeated, but the illustrations given have always been confined to crops and the young of animals. It may be assumed that the doctrine would not now be extended beyond these cases. Its precise limits even in these cases are not very clear. It is obvious, in the nature of the case, title cannot pass when the bargain is made, but it would be possible to say that title passed as soon as the goods came into existence, and, as shown by the preceding section, this would be an extension beyond the general rule of the common law as to future goods. The rule, however, seems to have a wider meaning than this when carried to its full extent. It seems to be assumed that title passes as of date of the bargain. Accurately expressed, this means that when the goods come into existence, title to them passes free from any defects of title due to rights which have accrued since the time of the original bargain.²⁰

§ 134. **Potential possession—Modern English law.**—The doctrine of potential possession has not been much applied in England. It was, however, applied in one modern case in which *Grantham v. Hawley*²¹ was cited and followed.²² This case escaped the attention of the draughtsman of the English Sale of Goods Act,²³

²⁰ Thus in *Grantham v. Hawley*, Hob. 132, at the time when the corn had actually been grown, the seller no longer had title to the land, and it would have been impossible for him to transfer title to the corn at that time.

²¹ Hob. 132.

²² *Petch v. Tutin*, 15 M. & W. 110. In this case a mortgagee of a crop not then planted was preferred to a creditor who levied upon the crop when it had been grown as the property of the mortgagor. The doctrine was also referred to in *Lunn v. Thornton*, 1 C. B. 379.

²³ "There is no rational distinction between one class of future goods and another, and the supposed rule [in regard to potential possession] appears never to have been acted upon.

Indeed, *Langton v. Higgins*, 28 L. J. Ex. 252, closely looked at, seems to negative it." Chalmers, *Sale of Goods Act* (5th ed.), 19. *Langton v. Higgins* is not in conflict with the case of *Petch v. Tutin*, 15 M. & W. 110, or with the doctrine of potential possession generally. It was not the case of the sale of a future crop, as such, but a sale of the oil of peppermint to be manufactured from the crop. The seller was to prepare and bottle the oil which he derived from the crop. The doctrine of potential possession has not been applied to a bargain of this sort. It is true that in *Story, Sales*, § 185, the author states as an illustration that the owner of a vineyard may make a valid sale of the wine a vineyard is expected to produce. The illustra-

and, therefore, no exception was made to the general rule of subsection (3) of section 5 of the English act, providing that what purports to be a present sale of future goods shall operate as an agreement to sell. Since the passage of the act in England, it may be assumed that the doctrine of potential possession is abolished.

§ 135. **American law — Crops.**— In this country the doctrine of potential possession has received frequent recognition from the courts, especially in the case of the transfer of crops to be thereafter grown. Nearly all the cases relate to mortgages, but, so far as concerns the legal title, there seems no difference between the power of the owner of land to mortgage and to sell the crops growing thereon. It is held in most of the States where the question has arisen that the owner of land may

tion, however, is but one of several and was not warranted by any decision. The illustration was doubtless suggested by the author's reading in the civil law. Story's language, including the illustration in question, has been quoted in several cases. *Shaw v. Gilmore*, 81 Me. 396, 17 Atl. 314; *McCown v. Mayer*, 65 Miss. 537, 541, 5 So. 98; *Fidelity Co. v. Sturtevant*, 86 Miss. 509, 521, 38 So. 783, 109 Am. St. Rep. 716. In none of these cases, however, was the passage quoted with reference to the illustration of the vineyard, and none of the cases involved the question of manufactured goods. In *Van Hoozer v. Cory*, 34 Barb. 9, it is true it was held that the doctrine of potential possession applied to cheese to be made from milk furnished by the grantor's cows. This decision stands alone, however, and must be regarded as questionable. There can be no doubt that the ordinary presumption applies to such a case, that if something remains to be done by the seller to put the goods in deliverable condition, an intention to pass title im-

mediately will not be presumed. *Northwestern State Bank v. Silberman*, 154 Fed. Rep. 809, 83 C. C. A. 525. In this case, the seller contracted to sell 6,600 fleeces, about 50,000 pounds of wool, to be clipped from native sheep, the understanding, if not the contract, being that the wool was to be clipped from the seller's flock, though not necessarily from all of the flock. The bargain was held to be wholly executory because of the things remaining to be done by the seller to put the goods in deliverable condition. The doctrine of potential possession was not referred to. See also *Welter v. Hill*, 65 Minn. 273, 68 N. W. 26. This rule deferring change of ownership where something remains to be done to the goods, to be sure, is merely one of presumption, but even if the parties clearly intend a sale, it may be doubted whether their intention could be given effect in view of the artificial character of the doctrine of potential possession, and the fact that none of the early authorities warrant the extension of the doctrine to manufactured goods.

mortgage a future crop.²⁴ In a few States, however, the crop must be actually planted in order that the mortgage should be valid.²⁵ It may be assumed that the same doctrine would be applied in cases of sales.²⁶ It is obvious, however, that there may be serious practical difficulty in applying the doctrine of potential possession. If it be true that the legal title to a future crop passes, it would seem that a man might mortgage the crops on his land for any number of years in advance and that the mortgagee's title would prevail over a purchaser for value of the matured crop or any subsequent purchaser of the crop, though he had no knowledge where it was grown and could have none, and the mortgagee's title would also prevail over the title of one who purchased the land prior to the time when the crop was raised. The fact that the

²⁴ *Butt v. Ellett*, 19 Wall. 544, 22 L. ed. 183; *Briggs v. United States*, 143 U. S. 346, 12 S. Ct. 391, 36 L. ed. 180; *Lambeth v. Ponder*, 33 Ark. 707 (statutory); *Wilkinson v. Ketler*, 69 Ala. 435; *Smith v. Fields*, 79 Ala. 335; *Keyser v. Maas*, 111 Ala. 390, 21 So. 346; *Leslie v. Hinson*, 83 Ala. 266, 3 So. 443; *Arques v. Wasson*, 51 Cal. 620, 21 Am. Rep. 718; *Wilkerson v. Thorp*, 128 Cal. 221, 60 Pac. 679; *Wheeler v. Becker*, 68 Iowa, 723, 28 N. W. 40; *Norris v. Hix*, 74 Iowa, 524, 38 N. W. 395; *Strawhacker v. Ives*, 114 Iowa, 661, 87 N. W. 669; *Shaw v. Gilmore*, 81 Me. 396, 17 Atl. 314; *Kelley v. Goodwin*, 95 Me. 538, 50 Atl. 711. See also *Thurlough v. Dresser*, 98 Me. 161, 56 Atl. 654; *Dickey v. Waldo*, 97 Mich. 255, 56 N. W. 608, 23 L. R. A. 449; *Minnesota Oil Co. v. Maginnis*, 32 Minn. 193, 20 N. W. 85; *Close v. Hodges*, 44 Minn. 204, 46 N. W. 335; *Hogan v. Atlantic Works*, 66 Minn. 344, 69 N. W. 1; *McCown v. Mayer*, 65 Miss. 537, 5 So. 98; *Stadeker v. Loeb*, 67 Miss. 200, 6 So. 687; *Gandy v. Dewey*, 28 Neb. 175, 44 N. W. 106; *Sporer v. McDermott*, 69 Neb. 533, 538, 96 N. W. 232 (but see Nebraska cases in the following note); *Cumberland*

Nat. Bank v. Baker, 57 N. J. Eq. 231, 40 Atl. 850; *Andrew v. Newcomb*, 32 N. Y. 417; *Fleetham v. Reddick*, 82 Hun. 390 (compare *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570, 37 N. E. 632, 40 Am. St. Rep. 635); *Weil v. Flowers*, 109 N. C. 212, 13 S. E. 761; *Crinkley v. Egerton*, 113 N. C. 142, 18 S. E. 341; *Moore v. Byrum*, 10 S. C. 452, 30 Am. Rep. 58; *Watkins v. Wyatt*, 9 Baxt. 250, 40 Am. Rep. 90.

²⁵ *Redd v. Burrus*, 58 Ga. 574; *Crine v. Tifts*, 65 Ga. 644; *Stowell v. Bair*, 5 Ill. App. 104; *Davis v. Shepherd*, 87 Ill. App. 467; *Hutchinson v. Ford*, 9 Bush, 318, 15 Am. Rep. 711; *Cole v. Kerr*, 19 Neb. 553, 26 N. W. 598; *Brown v. Neilson*, 61 Neb. 765, 86 N. W. 498, 54 L. R. A. 328, 87 Am. St. Rep. 525 (but see Nebraska cases in the preceding note); *Cudworth v. Scott*, 41 N. H. 456; *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570, 37 N. E. 632, 40 Am. St. Rep. 635. And in Wisconsin a mortgage is not good unless the crop has germinated. *Comstock v. Scales*, 7 Wis. 159.

²⁶ See cases in previous note; also *Low v. Pew*, 108 Mass. 347, 349, 11 Am. Rep. 357.

mortgage must be recorded does not avoid the force of these objections, for the purchaser may have no means of knowing where the record is. In buying wheat in Chicago he cannot tell whether the man that raised it mortgaged it before it was grown; and even in buying land it seems a harsh requirement to make a purchaser at his peril examine records of chattel mortgages made by all previous owners of the land, in order to make sure that the crops have not been mortgaged ahead. For these reasons it is probable that the doctrine would not be carried to its logical limit in many jurisdictions. In some states a limitation of time is imposed. Thus in Alabama,²⁷ Arkansas,²⁸ Minnesota,²⁹ South Carolina,³⁰ the statutes prohibit such mortgages made either prior to the 1st of January preceding the planting of the crop, or more than a year before its planting. Even in the absence of such a statute it has been held that an unlimited grant of the future crops from a grantor's land is invalid.³¹ It is not always easy to tell in the decisions upholding mortgages of future crops whether the decision is to be rested upon the legal doctrine of potential possession; or whether the court is relying on the doctrine subsequently to be dealt with³² of equitable rights given by a contract to transfer future goods. As chattel mortgages require record in order to preserve even legal rights, an unrecorded mortgage will be of no value except as between the parties. On the other hand, as an equitable right is good against all parties who are charged with notice of its existence, and as record of an equitable mortgage under many statutes will operate as notice to everybody, any properly recorded mortgage is good against everybody, though the right conveyed be equitable only. Accordingly it is generally unnecessary for a court when dealing with a mortgage to decide whether the

²⁷ Code (1896), § 1064.

²⁸ Dig. of St. (1894), § 5101.

²⁹ Rev. Laws (1905), § 3475.

³⁰ Civil Code (1902), § 3059.

³¹ *Shaw v. Gilmore*, 81 Me. 396, 17 Atl. 314. And see cases cited above to the effect that a grant of an unplanted crop is not valid. In *Shaw v. Gilmore*, the court said: "In the present case, the grant purports to be of the yearly crop of hay for an in-

definite period of time. The controversy is over the fifth crop, sold by the assignor, who was in possession of the same, to a *bona fide* purchaser. Under the rules of the common law, the conveyance must be held inoperative as to the hay in dispute; and, therefore, the plaintiff's title to the same fails."

³² See *infra*, §§ 138-142.

right conferred by it upon the mortgagee was legal or equitable. In some cases, however, the court has clearly expressed the view that the right is equitable only.³³ In the case of sales the objections which exist to the doctrine of potential possession as applied to mortgages are enormously increased. No record is necessary for the validity of a sale, and if the owner of land may sell his future crops, the result may well be hardship upon innocent third persons. The rules of law in regard to delivery or those forbidding retention of possession by the seller do not afford complete protection. It seems, therefore, that the conclusion of the draughtsman of the English Sales of Goods Act is sound, that "There is no rational distinction between one class of future goods and another." The American Sales Act, therefore, makes no exception to the general rule as to future goods in favor of goods of which the seller has potential possession. The buyer of such goods cannot acquire under the provisions of this act more than an equitable right. He will only acquire this, moreover, in jurisdictions which give such right in regard to future goods of other kinds.³⁴ As mortgages, however, are not covered by the Sales Act³⁵ except in a few instances where it is so specially stated, the right to mortgage crops or other future goods is not affected by the act.

§ 136. **American rule — Young of animals.**—The doctrine of potential possession has been applied in this country, occasionally (though far less frequently than to crops), to transfers of the future young of animals. Though the validity as between the parties of such transfers has been generally recognized, and though the courts have relied in their decisions upon the doctrine of potential possession, it may be doubted whether many courts would hold that the transferee acquired a title good against a subsequent purchaser for value in good faith of the young animal.³⁶ The

³³ *Wilkinson v. Ketler*, 69 Ala. 435 (but see *Keyser v. Maas*, 111 Ala. 390, 21 So. 346); *Kelley v. Goodwin*, 95 Me. 538, 50 Atl. 711.

³⁴ A sale of a future crop was held impossible in *Huntington v. Chisholm*, 61 Ga. 270; *Walter v. Hill*, 65 Minn. 273, 68 N. W. 26. See also *Gravity Canal Co. v. Sisk*, Ark., 95 S. W. 724.

³⁵ Section 75.

³⁶ The decisions which go farthest in this direction are *Andrews v. Cox*, 42 Ark. 373, and *McCarty v. Blevins*, 5 Yerg. 195. In *Andrews v. Cox*, the plaintiff sold a mare, then with foal, reserving title to the foal. The vendee resold the mare before birth of the foal to the defendant, an innocent purchaser for value, without notice of the plaintiff's rights. The plaintiff was allowed to main-

criticisms which have been made upon the doctrine of potential possession, as applied to crops, apply with equal force when the doctrine is applied to animals. The Sales Act, as has been previously said, aims to abolish the doctrine altogether from the law of sales, whatever may be the rule in regard to mortgages.

§ 137. **Sale of future property amounts to contract.**—When a seller undertakes to sell property which he has not, even though the buyer knows that the seller is not the owner, the attempted sale implies an obligation on the part of the seller to transfer the title to the buyer thereafter. That is, though the parties purported to make a sale, if their intention cannot be effectuated fully they actually did make a contract.³⁷ This is so provided by subsection 3 of section 5 of the Sales Act.³⁸

tain replevin for the foal. It is to be noticed that at the time of the original sale the foal had been begotten and the court deals with the case as one of existing property. In *McCarty v. Blevins*, a bargain was made that a foal thereafter to be begotten from a certain mare should belong to the plaintiff. After the birth of the foal the owner of the mare sold both mare and foal to the defendant who did not appear to have had notice of the plaintiff's rights. The plaintiff was allowed to recover. On the other hand in *Bates v. Smith*, 83 Mich. 347, 47 N. W. 249; *Battle Creek Bank v. First Bank*, 62 Neb. 825, 88 N. W. 145, 56 L. R. A. 124, the courts seem to have wholly repudiated the doctrine of potential possession or so misunderstood it as to suppose it applicable only to things already in existence, since they held that such a transferee acquired merely a contract right. Generally, at least as between the parties or those who stand in the same position as the parties, the doctrine of potential possession is applied. *Hull v. Hull*, 48 Conn. 250, 40 Am. Rep. 165; *Maize v. Bowman*, 93 Ky. 205, 19 S. W. 589; *Sawyer v. Gerrish*, 70 Me. 254, 35 Am. Rep. 323; *Fonville*

v. Casey, 1 Murph. 389, 4 Am. Dec. 559; *McCarty v. Blevins*, 5 Yerg. 195. The matter was perhaps considered as carefully as anywhere in *Hull v. Hull*. In that case the plaintiff had been promised for her compensation as superintendent of a farm all the colts from a certain mare. Subsequently the owner of the stock farm became bankrupt and the question was as to the title of several colts. It was held that the plaintiff was entitled to them on the ground of the seller's potential possession of the property in question. The court also held that the doctrine as to retention of possession after a sale had no application. "A vendor cannot retain after a sale what does not then exist, nor that which is already in the possession of the vendee." This is quoted with approval in *Wolcott v. Hamilton*, 61 Vt. 79, 17 Atl. 39.

³⁷ Benjamin, *Sale* (5th Eng. ed.); *Lunn v. Thornton*, 1 C. B. 379; *Bates v. Smith*, 83 Mich. 347, 47 N. W. 249; *Battle Creek Bank v. First Bank*, 62 Neb. 825, 88 N. W. 145, 56 L. R. A. 124.

³⁸ This section follows section 5 of the English Sale of Goods Act, but in the American act the words

§ 138. **Equitable effect of contract to sell.—Holroyd v. Marshall.**—When parties contract to buy and sell land, an equitable interest in the land at once passes to the buyer, which equity treats in various ways as if it were a property right. It is sometimes called an equitable title. This right arises from the doctrine of specific performance. The nature and extent of it are beyond the scope of this treatise, but in recent years a somewhat similar doctrine has been applied to some extent to personal property. Here, too, as well as in the cases involving the doctrine of potential possession, the decisions relate chiefly to mortgages. The great case which settled the English law is *Holroyd v. Marshall*, decided by the House of Lords in 1861.³⁹ Though earlier English decisions had gone far in the same direction, and Judge Story in 1843,⁴⁰ relying on these earlier decisions, had anticipated in this country the result finally reached in England, it was not until the judgment in *Holroyd v. Marshall* was rendered that it was clearly established that the mere agreement to mortgage personal property subsequently to be acquired gave the mortgagee a lien upon the property as soon as it was acquired; good against all but purchasers for value. Lord Campbell, sitting alone, had held that some “*novus actus interveniens*” was needed to make good the mortgagee’s right,⁴¹ but the House of Lords reversed his decree and held that from the time when the property was acquired an equitable right attached to it which would prevail over any one except purchasers for value without notice. This doctrine has been frequently applied in more recent years in England.⁴²

§ 139. **Theoretical basis for the doctrine.**—The grounds upon which the doctrine rests are not very clearly stated. It is most

“parties purport” is substituted for “sellers purport.” As the intention of the buyer is as important as that of the seller, the substituted expression is the more accurate.

³⁹ 10 H. L. C. 191.

⁴⁰ *Mitchell v. Winslow*, 2 Story, 630.

⁴¹ 2 De G. F. & J. 596. Lord Campbell relied on Lord Bacon’s maxim, *Licet dispositio de interesse futuro sit inutilis, tamen fieri potest declaratio*.

ratio præcedens quæ sortitur effectum interveniente novo actu.

⁴² *Collyer v. Isaacs*, 19 Ch. D. 342; *Coombe v. Carter*, 36 Ch. D. 348; *Tailby v. Official Receiver*, 13 A. C. 523; *Cumberland Banking Co. v. Maryport Iron Co.*, [1893] 1 Ch. 415; *Governments Stock & Investment Co. v. Manila Ry. Co.*, [1897] A. C. 81; *In re Yorkshire Woolcombers’ Assoc.*, [1903] 2 Ch. 284; *Nelson & Co. v. Faber*, [1903] 2 K. B. 367.

commonly regarded as an application of the principles of specific performance, and it is evident that what is actually done is to enforce the mortgagor's agreement that his future property shall be mortgaged or stand as security. The occasional denial that the case is one of specific performance is due partly to the fact that the mortgagor often uses no words of promise, but purports to transfer presently, and partly to the fact that the court does not order the execution of any mortgage. But the mortgagor promises impliedly, as has been previously shown;^{42a} and the court does not order the execution of a mortgage only because it is unnecessary. It is essential that the mortgagee shall have actually advanced his money. If the contract is wholly executory, the doctrine of *Holroyd v. Marshall* is not applicable.⁴³ Specific performance of an express contract to mortgage existing property has been granted against the promisor, though the cases are not numerous and the reasoning on which they are based is not always conclusive.⁴⁴ The result seems sound, however, because damages are not an adequate remedy for a promise to give security. It must always be problematical what the promisee's pecuniary injury is. The problem depends on the value of the security and the solvency of the debtor at the time when the debt is due. The factors are too indeterminate to make the legal remedy satisfactory.

§. 140. **Extent to which the doctrine is adopted.**—It is beyond the scope of this work to consider at length the possibility of mortgaging future goods.⁴⁵ It may be said, however, that in a majority of the United States the English doctrine is accepted to some extent, and that in most jurisdictions where it has been adopted it is limited more closely than by the general rules applied in regard to equitable rights generally. All equitable rights are held invalid against a *bona fide* purchaser for value of the legal title without notice of the equity, but in this country mortgages of after-acquired property are generally held invalid against creditors who levy upon the goods before the mortgagee.

^{42a} *Supra*, § 137.

⁴³ *Tailby v. Official Receiver*, 13 A. C. 523, 543, 546.

⁴⁴ *Ames, Cās. Eq. Jur.* 61; *Spover*

v. McDermott, 69 Neb. 533, 96 N. W. 232.

⁴⁵ The matter is dealt with in *Jones on Chattel Mortgages*, and in an article, 19 *Harv. L. Rev.* 557.

has taken possession of them.⁴⁶ In England the right of individuals, but not of corporations, to mortgage future goods has been, with some exceptions, prohibited by statute.⁴⁷ The question of attempted pledges of future property is entirely analogous to the question in regard to mortgages.⁴⁸

§ 141. **Reasons for applying the rule to sales.**—It has been assumed that the doctrine that an attempted transfer of future goods would give an equitable property right to the mortgagee is also applicable to agreements to sell.⁴⁹ If an equitable right arises by virtue of an agreement to sell future goods, it may conceivably be based on either of two grounds: (1) The enforcement or specific performance of the contract, resulting in effect in an equitable lien upon the property; (2) the imposition of an equitable lien upon the property — not upon principles of specific performance, but on a broad and somewhat indefinite principle that one who has parted with money or property, expecting a specified return, should be assured, if not that return, then the redelivery of what he parted with. On this ground in England and in some States of this country an equitable lien is given on real estate for the purchase price, both to an unpaid vendor,⁵⁰ and to a vendee who has paid the price or a portion of it in advance.⁵¹

§ 142. **Examination of these reasons.**—So far as the doctrine of specific performance is concerned it seems clear that the analogy between mortgages and sales fails. It is generally recognized that equity will not give specific performance of a contract for the sale of personal property, and while damages may be an inadequate remedy in case of an agreement to mortgage such property because it is impossible to estimate accurately the amount

⁴⁶ The authorities are collected in 19 Harv. L. Rev. 575.

⁴⁷ See 19 Harv. L. Rev. 564-566.

⁴⁸ 19 Harv. L. Rev. 583.

⁴⁹ It is so stated by Benjamin, and the statement is left unchanged in the latest edition (5th Eng. ed. 134), which has been the subject of careful revision by the editors and in which not a few hasty statements of the author have been corrected. See

also Hamilton v. Nat. Loan Bank, 3 Dill. 230; Post v. Corbin, 5 Nat. Bkcy. Reg. 11; Block v. Shaw, 78 Ark. 511, 95 S. W. 806; Godwin v. Murchison Nat. Bank, 145 N. C. 320, 59 S. E. 154; Scammon v. Bowers, 1 Hask. 496.

⁵⁰ Jones, Liens, § 1061 *et seq.*

⁵¹ Jones, Liens, § 1105 *et seq.*; *Re Peasley*, 137 Fed. Rep. 190.

of the damage, this is not true of a contract to sell goods. There seem to be but two English decisions protecting a buyer who has agreed to buy and has paid for future goods.⁵² These two decisions protect the buyer not by enforcing the transfer of the property which was promised him, but by giving him a lien on the property for the restoration of the price. In the first of them the court found apparently that such a lien had been contracted for. These decisions are certainly insufficient basis on which to support a doctrine that consideration paid for specified property may be recovered if the property is not transferred and that the property itself stands as security for the enforcement of the right. It is true that if the promisor becomes bankrupt his estate has both the goods and the price for them, but it would be an extreme doctrine in bankruptcy law to hold that this unjust enrichment of the bankrupt estate justifies specific reparation. Every creditor of a bankrupt estate has parted with his money in return for a promise which has not been kept. All are alike in suffering this injustice, and the fact that what one creditor gave or was to receive is capable of identification seems no reason in natural justice why he should be preferred over others whose money has gone perhaps to swell the estate but who cannot trace what they gave or identify what they were promised in return.

§ 143. **Seller's insolvency should not give equitable jurisdiction.**

— Another reason has been suggested for giving the vendee of future personalty in some cases at least a lien upon the property on the theory of specific performance. In a few cases⁵³ the insolvency of the seller has been stated as a possible ground for enforcing specifically a contract to sell goods of a sort not ordinarily within the jurisdiction of equity, and these suggestions have been adopted in one Illinois decision.⁵⁴ If the seller is insolvent, obviously a

⁵² *Langton v. Waring*, 18 C. B. (N. S.) 315; *Young v. Matthews*, L. R. 2 C. P. 127.

⁵³ *Doloret v. Rothschild*, 1 Sim. & St. 590, 598; *Dowling v. Betjemann*, 2 John. & H. 544; *Dilburn v. Youngblood*, 85 Ala. 449, 451, 5 So. 175; *Treasurer v. Commercial Coal Co.*,

23 Cal. 390, 393; *Williams v. Carpenter*, 14 Colo. 477, 24 Pac. 558; *Ames v. Witbeck*, 179 Ill. 458, 475, 53 N. E. 969; *Allen v. Freeland*, 3 Rand. (Va.) 170, 174; *Avery v. Ryan*, 74 Wis. 591, 600, 43 N. W. 317.

⁵⁴ *Parker v. Garrison*, 61 Ill. 250.

judgment for damages will not adequately protect the buyer, but on the other hand the law regarding delivery and retention of possession, and also the law of bankruptcy, materially qualify if not destroy the right of a court of equity to enforce the promise. As to delivery and retention of possession it is obvious that a promise to sell future goods can surely have no greater effect than an actual sale of existing goods, so that at least it may safely be said that wherever the latter transaction would not be valid without delivery against creditors of the seller or against purchasers from him, the effect of the former transaction must equally be limited.

§ 144. **Effect of the Bankruptcy Law.**— But it is the law of bankruptcy that most clearly shows the error of basing an equitable lien on the insolvency of the vendor. Insolvency is the very circumstance which makes it improper for the seller to carry out his contract. Even against the seller himself, when no attaching creditors or purchasers have complicated the situation, it cannot be permissible for a court of equity to decree specific performance on the ground of his insolvency in this country while a statute like the present Bankruptcy Act is in force. To do so is nothing less than ordering the defendant to commit an act of bankruptcy; for, since insolvency is regarded as a necessary basis of the equity, until insolvency there is but a contractual obligation, and to satisfy such an obligation after insolvency is an act of bankruptcy under the present statute, as under the Bankruptcy Act of 1867. Even more clearly, if the rights of creditors or of a trustee in bankruptcy have in fact attached, a court of equity cannot be justified in attempting, in violation not only of the maxim that equality is equity, but also of the spirit if not the letter of a binding statute, to give property to a specific creditor when the only reason for so doing is insolvency, the very state of affairs which is the foundation for proceedings in bankruptcy and the division of the property among all creditors alike.⁵⁵

§ 145. **Choses in action.**— The doctrines of potential possession and of *Holroyd v. Marshall*⁵⁶ have been applied not only to chat-

⁵⁵ See *Block v. Shaw*, 78 Ark. 511,

⁵⁶ 10 H. L. C. 191.

tels, but to assignments of debts and choses in action.⁵⁷ The analogy between choses in action and chattels is, however, not so perfect as seems to be assumed by the decisions. The legal title to existing chattels of the mortgagee can be presently transferred, but cannot be to chattels subsequently to be acquired without further action of the parties. This rule is what gives a chance for the doctrine of potential existence and gives also the court of equity its opportunity to bring about, so far as it can, the same result that would have been brought about if the chattels had been in existence. The legal right even in existing choses in action, however, cannot be transferred. The practical effect of assignment of such property is produced, whether the parties so state or not, by the authority or power of attorney which the owner of the claim gives to the assignee to collect it and keep the proceeds. It is impossible to suggest a reason why the same principles are not applicable to choses in action subsequently to be acquired. One may make another his attorney to collect a debt which is coming into existence to-morrow as readily as to

⁵⁷ *Tailby v. Official Receiver*, 13 A. C. 523; *Pullan v. Cincinnati, etc., R. R. Co.*, 75 Biss. 237; *Burdon, etc., Sugar Ref'g Co. v. Ferris Sugar Mfg. Co.*, 78 Fed. Rep. 417; s. c., *sub nom.*, *Burdon v. Payne*, 81 Fed. Rep. 663, 167 U. S. 127; *Re Marine Construction Co.*, 14 Am. Bankr. Rep. 466; *Jessup v. Bridge*, 11 Iowa, 572, 79 Am. Dec. 513; *Sandwich Mfg. Co. v. Robinson*, 83 Iowa, 567, 49 N. W. 1031, 14 L. R. A. 126; *Riddle v. Dow*, 98 Iowa, 7, 66 N. W. 1066, 32 L. R. A. 811; *Edwards v. Peterson*, 80 Me. 367, 14 Atl. 936, 6 Am. St. Rep. 207; *Schubert v. Herzberg*, 65 Mo. App. 578; *Williamson v. New Jersey Southern, etc., R. R.*, 26 N. J. Eq. 398; *Clay v. East Tenn. R. R. Co.*, 6 Heisk. 421. But a mortgage of future earnings is generally held not good against creditors until the mortgagee takes possession. *Galveston Railroad v. Cowdrey*, 11 Wall. 459, 20 L. ed. 199; *Gilman v. Ill.*

& Miss. Tel. Co., 91 U. S. 603, 23 L. ed. 405; *Amer. Bridge Co. v. Heidelberg*, 94 U. S. 798, 24 L. ed. 144; *Sage v. Memphis, etc., R. R. Co.*, 125 U. S. 361, 31 L. ed. 694; *U. S. Trust Co. v. Wabash Western Ry. Co.*, 150 U. S. 287, 307, 37 L. ed. 1085; *Mississippi Valley & W. Ry. v. U. S. Express Co.*, 81 Ill. 534; *Ellis v. Boston, etc., R. R. Co.*, 107 Mass. 1; *De Graff v. Thompson*, 24 Minn. 452; *N. Y. Security Co. v. Saratoga Gas Co.*, 159 N. Y. 137, 53 N. E. 758. In some jurisdictions also the right to assign a future claim is denied when the claim is not only not due, but there is no existing contract from which the claim is expected to arise. *Lightbody v. Smith*, 125 Mass. 51; *Eagan v. Luby*, 133 Mass. 543; *Lehigh Co. v. Woodring*, 116 Pa. St. 513, 9 Atl. 58; *O'Neil v. Helmke*, 124 Wis. 234, 102 N. W. 573, 70 L. R. A. 338.

collect one already in existence. There is, therefore, no reason why either law or equity should have treated an assignment of future debts in any different way from an assignment of present debts. The power given the assignee expressly or impliedly should be sufficient to enable him to enforce his rights at law either in the name of the assignor or, under modern statutes, in his own name. The only limits would be fixed by public policy. For, to allow a man to transfer every right he may ever have is perhaps contrary to sound policy.

§ 146. Sale of undivided shares — Provisions of the Sales Act.—

Sec. 6. UNDIVIDED SHARES.—(1.) There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer, by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares.

(2.) In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight or measure of the goods in the mass, and though the number, weight or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight or measure bought bears to the number, weight or measure of the mass. If the mass contains less than the number, weight or measure bought, the buyer becomes the owner of the whole mass and the seller is bound to make good the deficiency from similar goods unless a contrary intent appears.

This section is not analogous to anything in the English Sale of Goods Act. The reason for the insertion of such a section will appear in the following sections.

§ 147. Possibility of sale by owner of undivided share in England.—Doubtless the provisions of the foregoing section of the Sales Act go beyond the English law. It has, however, been settled from a very remote period, not only that personal property might be owned jointly or in common, but that a joint owner or a tenant in common could sell his share.⁵⁸

⁵⁸ “§ 319. Also, as there be tenants in common lands and tenements, &c., as aforesaid, in the same manner there be possessions and prop-

erties of chattels reals and personals.”
“§ 321. In the same manner it is of chattels personals. As if two have jointly by gift or buying, a

§ 148. Sale of specified quantity from a larger mass—In England.—Though an undivided share of personal property may thus be assigned in England, the assignment of a specified quantity of goods from a larger mass will not make the grantee a tenant in common of the goods. If a mass of goods is not all of the same kind, or at least if it is not so treated for the purposes of the bargain, it is obvious that this conclusion is unavoidable. If, for instance, a lot of wood of varying quality is lying in a mass, the sale of ten cords of a specified quality to be taken from the lot will not make a tenancy in common between the buyer and other owner of the wood. That is clearly not the intention of the parties. The buyer desires no interest in the wood, as a whole, nor in any wood except that of a particular quality. In many cases, how-

horse or an ox, &c., and the one grant that to which him belongs (of the same horse or ox) to another, the grantee, and the other which did not grant, shall have and possess such chattels personals in common, &c. And in such cases, where divers persons have chattels real or personal in common, &c., and by divers titles, if the one of them dieth, the others which survive shall not have this as survivor, but the executors of him which dieth shall hold and occupy this with them which survive, as their testator did or ought to have done in his lifetime, &c., because that their titles and rights in this were several, &c." Litt. Tenures (about 1480). "Things personal may belong to their owners, not only in severalty, but also in joint-tenancy and in common, as well as real estates. They cannot, indeed, be vested in coparcenary; because they do not descend from the ancestor to the heir, which is necessary to constitute coparceners. But if a horse or other personal chattel be given to two or more, absolutely, they are joint tenants hereof; and, unless the jointure be severed, the same doctrine of survivorship shall

take place as in estates of lands and tenements. Litt., § 281; 1 Vern. 482. And, in like manner if the jointure be severed, as, by either of them selling his share, the vendee and the remaining part owner shall be tenants in common, without any *jus accrescendi* or survivorship. Litt., § 321. So, also, if 100*l* be given by will to two or more, equally to be divided between them, this makes them tenants in common; 1 Equ. Cas. Abr. 292, as, we have formerly seen, p. 192, the same words would have done in regard to real estates. But, for the encouragement of husbandry and trade, it is held that a stock on a farm, though occupied jointly, and also a stock used in a joint undertaking, by way of partnership in trade, shall always be considered as common and not as joint property, and there shall be no survivorship therein. 1 Vern. 217." 2 Blackstone Comm. 399. It is provided in section 1, both of the English act and of the American that one part owner may sell his share to another part owner, but this it will be observed does not cover a sale to a third person.

ever, the mass of goods is of identical character throughout, as wheat, or oil. Even in such a case the view of the English court is that an agreement to sell a specified quantity of the goods can transfer no property right to the buyer.⁵⁹

§ 149. Reason for the English view and its validity.—The reason for the English rule denying the possibility of transferring title to a specified portion of a mass is based on logic rather than law. In the nature of the case it is impossible to transfer title to something wholly unspecified. Ownership necessarily implies specific property as the subject of ownership. It is, therefore, impossible literally to own ten tons of oil out of forty tons

⁵⁹ Wallace v. Breeds, 13 East, 522, a bargain was made to sell fifty tons of Greenland oil, "allowance for foot dirt and water as customary." An order was given by the sellers to the buyers for delivery of the "fifty tons ex ninety tons." This order was sent to the wharfingers but nothing was done in pursuance of it until after the sellers failed, when the order was countermanded by the sellers. It was held that the property had not passed. The court distinguished Whitehouse v. Frost, 12 East, 614, stated below, on the ground that in Wallace v. Breeds, various acts must be done by the seller in order to put the oil in a deliverable condition. In Busk v. Davis, 2 M. & S. 397, the bargain was for ten tons of flax, "ex Vrow Maria." The seller had about eighteen tons of flax of this shipment lying at the defendant's wharf. It was necessary to weigh and break up the mass in order to separate ten tons. This had not been done and it was held that title had not passed. Cases involving the same principle are: Austen v. Craven, 4 Taunt. 644, White v. Wilks, 5 Taunt. 176; Shepley v. Davis, 5 Taunt. 617; Boswell v. Kilborn, 15 Moo. P. C. 309; Snell v. Heighton, 1 Cab. & Ell. 95. The case of Whitehouse v.

Frost, 12 East, 614, is regarded as overruled by these decisions. In that case the bargain was for the sale of ten tons of oil in a cistern containing forty tons of oil. The seller had himself bought these ten tons while part of a larger mass in the hands of his vendor. The oil remained throughout the transaction stored by the original seller in the same cistern containing forty tons. It was held that title had passed to the second buyer. It is to be noticed in this case that there was clear evidence of an intention to pass title, something which did not exist in most of the decisions previously referred to. In Whitehouse v. Frost, not only had the bailees accepted the order to deliver to the second purchaser, but it was expressly provided in the contract of sale to him that the oil should be at his risk. Moreover, it was the custom to charge the purchaser in proportion to the quantity of oil bought by him with rent for the same until delivered. As the case is regarded as overruled (Benjamin, Sale (5th Eng. ed.), 338, note 4), it is evident that by the English law it is impossible to make a transfer of title under the circumstances suggested in the case, even though the parties so intend.

all contained in one cistern. It must be conceded that this reasoning is sound so far as concerns the ownership of ten tons, as such. If ten tons really were owned by the buyer, it would be fair to inquire which ten tons he owned, an inquiry which could not be answered satisfactorily. If the answer "any ten tons" were made, the answer itself would be an assumption that title had not passed to a specific ten tons and, therefore, that the right was a contractual rather than a property right. The matter may be tested by supposing the destruction of the property. If the buyer actually owns ten tons, that ten tons should be subject to the risk of loss and chance of destruction apart from the oil in the cistern belonging to others; but of course if ten tons of the oil in the cistern were destroyed, neither party would admit that it was his ten tons, and it would be impossible to prove that it was.

§ 150. **Buyer becomes tenant in common with other owners.**—It cannot be assumed, however, that parties making such a bargain as that referred to in the preceding section were doing something absurd on the face of it in providing that the property should pass to the buyer immediately though the subject-matter of the purchase was not separated from other goods. If an intelligible meaning can be given to their agreement, it should be. It is perfectly easy to do this. Though it is impossible to transfer the property in ten tons of oil, as such, when there are forty tons in the cistern, it is perfectly possible to make the buyer tenant in common with the seller of the whole mass, the buyer becoming owner of a fourth share and the seller remaining owner of three-fourths. There can be little doubt that this fairly represents the intention of the parties. They intend that the goods shall be kept together for the present and, nevertheless, that the property shall pass. They recognize that it is impossible to distinguish one part of the mass from another. They presumably recognize that the right of the seller to the thirty tons unsold is as complete as the right of the buyer to the ten tons sold. They can, therefore, hardly fail to recognize that they are both interested in the mass throughout as co-owners, however they may describe this. The failure of the English courts to recognize the possibility of translating an agreement which in terms call for the sale of

a specified quantity into an agreement for a fractional share seems strange.

§ 151. **Consequences of the doctrine of tenancy in common.**—

If the buyer becomes tenant in common with the seller, or other owners of the remainder of the mass, it follows that the whole mass is at the risk of all the parties interested in it, in proportion to their various holdings. It would no doubt be possible for a seller, in agreeing to sell ten tons of oil from a cistern containing forty tons, to guarantee that the buyer should ultimately receive the full amount of ten tons. That, however, would in effect be a contract of insurance. If the property passes, unless his rights are enlarged by contract, the buyer is necessarily confined to a fractional share of the whole. If the whole diminishes, the buyer's share must suffer in proportion to the rest. It seems to be assumed sometimes in such a case, both that the buyer has a property right and that he has an indefeasible right to ten tons, unless, indeed, the whole property is destroyed. This can only be, however, on the ground that there is both a transfer of a property right and an insurance that that property right will remain as great as it was at the time of sale. Such a contract of insurance ought not to be implied against a seller or warehouseman unless the terms of the contract, or custom, clearly warrant it.

§ 152. **Mass of undetermined quantity.**— The leading American case⁶⁰ presented an additional circumstance. In that case the buyer bought 6,000 bushels of wheat from two piles, in fact, aggregating 6,249 bushels, but of which the quantity had not been determined at the time of the bargain. There was clear indication that the parties intended title to pass, since the seller signed a receipt acknowledging that he held 6,000 bushels subject to the order of the buyer, and the buyer paid a portion of the price. But in this case it will be noticed that the amount of the mass was undetermined. Nevertheless, the court held that title passed to the purchaser. The line of reasoning followed by the court was that it was possible for two or more persons

⁶⁰ *Kimberly v. Patchin*, 19 N. Y. ants r. Pendleton, 6 Rand. 473, 18 330, 75 Am. Dec. 334. The earliest Am. Dec. 726. American decision was in 1828, *Pleas-*

to own goods confused in an indistinguishable mass of undetermined amount, and that if such ownership was possible the parties, if they so intended, could by agreement bring it about. The result reached by the court and the reasoning by which it was reached both seem sound. The line of reasoning, somewhat elaborated, will be followed in the ensuing sections.

§ 153. **Confusion of goods.**—Where goods of similar character belonging to two persons are so mingled that separation of the precise goods that belong to one party cannot be made from those belonging to the other party, the common law clearly recognizes that the title of each party is not lost unless, at any rate, the admixture was tortious.⁶¹ The possibility of tenancy in common created by confusion of goods is recognized not only in the older authorities but in modern English cases,⁶² and also by decisions in this

⁶¹In *Lupton v. White*, 15 Ves. 432, 442, Lord Eldon says: "What are the cases in the old law of a mixture of corn or flour? If one man mixes his corn or flour with that of another and they were of equal value, the latter must have the given quantity, but if articles of different values are mixed, producing a third value, the aggregate of both, and through the fault of the person mixing them, the other party cannot tell what was the original value of his property, he must have the whole." The first part of this quotation, which is the part of interest here, indicates that Lord Eldon thought that even if the confusion of similar goods was brought about by a tort, the wrongdoer would not be punished by losing all interest in the mass. Commenting upon this passage. Mr. Justice O. W. Holmes, before his elevation to the bench, wrote: "This seems hardly borne out by the old cases, but would perhaps be followed, as there seems to be no substantial reason for depriving the wrongdoer of his whole property in such a case. *Hesseltine v. Stockwell*, 30 Me. 237, 50 Am.

Dec. 627; *Moore v. Bowman*, 47 N. H. 494, 502; *Story*, Bailm., § 40; *Ryder v. Hathaway*, 21 Pick. 298. But see *Spence v. Union Marine Ins. Co.*, L. R. 3 C. P. 427, 437, bottom. It may be observed also that it is hardly probable that Lord Eldon thought legal proceedings necessary for a partition in this instance." 6 Am. L. Rep. 455. Chancellor Kent lays down the rule that where the goods of two persons are indistinguishably mingled, they become tenants in common if the mingling was by consent, but if made wrongfully by one of the owners, the common law gave the entire property to the other. 2 Kent's Comm. 264, 365.

⁶²*Spence v. Union Marine Ins. Co.*, L. R. 3 C. P. 427. In this case a vessel loaded with cotton was wrecked and part of the cargo lost and the marks on many of the bales of cotton which were saved were obliterated. The court held, for the purpose of apportioning the loss, that the several owners of the cotton shipped had a proportional interest in the cotton which was saved and which could not be identified. The case of *Aldridge v. Johnson*, 7 E. &

country. It is immaterial whether the commingling was brought about by the mistake of the owner,⁶³ or was brought about by the wrongful act of a stranger,⁶⁴ or by consent.⁶⁵

§ 154. **Elevator cases.**—The principles referred to in the preceding sections have received their fullest application in the case of grain elevators. It is the practice to mingle grain as it is brought into the elevator with grain of similar kind and quality, previously delivered by other owners. The authorities cited in the previous section make it clear that there is no reason why the depositor, by consenting to such practice, should lose the property in his grain unless it is so intended. It is the further practice of the elevators, however, to deliver from the mass, as called upon by holders of the warehouseman's receipts for the grain, such quantities as the receipts call for. The deliveries of grain to and by the warehouseman may result in the entire contents of the elevator being changed several times over before a particular depositor reclaims the grain which he deposited, so that we must deal with a situation where not only has the plaintiff's property been mingled with other property so that its identity is confused, but also the whole mass with which it was confused has given place to another mass of goods of the same sort. Even in this case, however, there seems no reason why the intention of the parties cannot be effectuated. That their intention is that the depositor shall retain a property right, there can be little doubt. It is the duty of the warehouseman to keep in his elevator sufficient grain to meet

B. 885, is also worth noticing. In that case a seller, having agreed to sell a certain amount of barley from a specific pile, actually appropriated to the buyer part of the barley by filling sacks which the buyer had sent. The seller becoming bankrupt emptied the grain contained in the sacks upon the pile confusing it with the remaining barley. It was held that the property in the barley contained in the sacks passed to the buyer when the sacks were filled and the buyer was allowed to recover the value of the goods from the assignee in bankruptcy of the seller. Though

this feature of the case is not discussed the decision seems to assume that the buyer did not lose when the sacks were emptied the property which he had previously acquired when they were filled.

⁶³ *Ryder v. Hathaway*, 21 Pick. 298, 305; *Moore v. Bowman*, 47 N. H. 494, 501; *Pratt v. Bryant*, 20 Vt. 333.

⁶⁴ *Bryant v. Ware*, 30 Me. 295.

⁶⁵ *Inglebright v. Hammond*, 19 Ohio. 337, 53 Am. Dec. 430. See also the numerous elevator cases cited below.

all outstanding receipts.⁶⁶ The American cases clearly recognize the validity of the custom in use in regard to grain elevators, and give effect to the intention of the parties that the depositor shall retain title.⁶⁷ The warehouseman is thus a bailee to keep the grain with power to change the bailor's ownership in severalty into a tenancy in common of a larger mass and back again, and with a continuous power of sale, substitution, and resale. At any given moment, however, all the holders of receipts for the grain are tenants in common of the amount in store, the share of ~~such~~ being proportionate to the amount of his receipts as compared with the total number of receipts outstanding.⁶⁸

⁶⁶ This is so provided by statute in some States where the business of grain elevators is a very important one, but the same result is reached without a statute. *Young v. Miles*, 20 Wis. 615, 23 Wis. 643. The practice of charging storage for grain deposited in itself indicates not only that more than a contract right is contemplated, but also that the warehouseman is to keep on hand, if not any specific grain, yet as much grain as the receipts call for; otherwise it would be improper to charge for storing that amount.

⁶⁷ *Rahilly v. Wilson*, 3 Dill. 420; *National Bank of Pontiac v. Langan*, 28 Ill. App. 401; *Woodward v. Seamans*, 125 Ind. 330, 25 N. E. 444, 21 Am. St. Rep. 225; *Arthur v. Chicago, Rock Island & Pac. Ry.*, 61 Iowa, 648, 17 N. W. 24; *Moses v. Teetors*, 64 Kans. 149, 67 Pac. 526, 57 L. R. A. 267; *Ledyard v. Hibbard*, 48 Mich. 421, 12 N. W. 637, 42 Am. Rep. 474; *Hall v. Pillsbury*, 43 Minn. 33, 44 N. W. 673, 7 L. R. A. 529, 19 Am. St. Rep. 209; *James v. Plank*, 48 Ohio St. 255, 26 N. E. 1107; *McBee v. Caesar*, 15 Or. 62; *Savage v. Salem Mills Co.*, 48 Or. 1, 85 Pac. 69; *Millhiser Mfg. Co. v. Gallego Mills Co.*, 101 Va. 579, 44 S. E. 760; *Young v. Miles*, 20 Wis. 615, 23 Wis. 643. See also *Bretz v. Diehl*,

117 Pa. St. 589, 11 Atl. 893, 2 Am. St. Rep. 706. Compare *South Australian Ins. Co. v. Randell*, L. R. 3 P. C. 101. Statutes in Kentucky, Massachusetts, Minnesota, and perhaps other States have given the force of positive enactment to this view so far as public warehouses are concerned. The German Commercial Code has a provision to the same effect. *Handelsgesetzbuch* (1897), 419. In *Rahilly v. Wilson*, 3 Dill. 420, it was held that the property passed to the warehouseman, but he was not obliged to keep an amount on hand equal to outstanding receipts. He might, and frequently did, pay in cash the value of the grain which he had received, instead of returning the grain itself when the receipt was presented. To the same effect is *Lyon v. Lyon*, 106 Ind. 567, 7 N. E. 311; *Savage v. Salem Mills Co.*, 48 Or. 1, 85 Pac. 69. For a full discussion of the principles involved in the storage of grain in elevators, see an article in 6 Am. L. Rep. 450, which, though not signed, is known to have been written by O. W. Holmes, now an associate justice of the Supreme Court of the United States.

⁶⁸ 6 Am. L. Rep. 450; Benjamin, *Sale* (5th Eng. ed.), 340.

§ 155. **Sale of a portion of a mass.**—It has been shown that ownership by several persons may exist in property of undetermined amount, confused in one mass; though the aliquot share of each owner can only be stated by the measurement of the whole mass. Such ownership is in the nature of a tenancy in common. It must follow that this right of the several owners is the subject of sale, for as has been seen,^{68a} one joint owner or tenant in common can sell his share. Indeed the receipts issued by warehousemen for grain in elevators, receipts which indicate ownership of a portion of a mass, are the subject of sales to an enormous amount every day, and other staple products are dealt with in a similar way to a lesser extent. Furthermore, since the law allows ownership in the nature of a tenancy in common in a mass of an undetermined amount, no valid reason in logic and no rule of law can be suggested which would prevent parties from giving rise to a similar situation when the mass of goods belongs wholly to one party at the outset. If A. may pour, with B.'s consent, ten bushels of grain in B.'s bin, which contained an undetermined amount without losing a property right, B. must surely be able to give A. just such a property right if A. had no grain originally and all belonged to B. If A.'s title to ten bushels, when he owned that amount originally, can be, and is translated when he mingles it with B.'s grain into the equivalent of ten bushels, a fraction of the mass, ten being the numerator of the fraction and the undetermined quantity of the whole mass, which may be called x , being the denominator there is no reason why a similar translation may not be made when B. agrees to sell A. ten bushels from a mass belonging to B. and the parties intend that the property shall pass at once.

§ 156. **The weight of American authority supports this view.**—The prevailing American doctrine supports the views which have been expressed.⁶⁹ A limitation of the doctrine, although obvious,

^{68a} *Supra*, § 147.

⁶⁹ *Aderholt v. Embry*, 78 Ala. 185; *Horr v. Barker*, 8 Cal. 603, 11 Cal. 393, 70 Am. Dec. 791; *Smith v. Friend*, 15 Cal. 124 (but see later California decisions in next note but one); *Chapman v. Shepard*, 39 Conn.

413; *Watts v. Hendry*, 13 Fla. 523; *Phillips v. Ocmulgee Mills*, 55 Ga. 633; *Cloke v. Shafroth*, 137 Ill. 393, 27 N. E. 702, 31 Am. St. Rep. 375; *Welch v. Spies*, 103 Iowa, 389, 72 N. W. 548; *Piazzek v. White*, 23 Kans. 621, 33 Am. Rep. 211; *Bailey*

is sometimes lost sight of. Ownership in personal property is not transferred unless the parties so intend. So that the only effect of the decisions just cited is that if the parties intend to pass title, the law will effectuate their intention. In proving this intention, usage is frequently very important. The whole practice in regard to grain elevators, for instance, shows the intention of depositors to retain a property right and of buyers and sellers of receipts for grain to transfer property in the grain by dealing with the receipts, even though the grain referred to therein is mingled in a mass of undetermined and varying quantity.⁷⁰ The effect of usage, however, can be no more than to supply the place of evidence of intent to transfer title. If it were either contrary to the policy of the law or impossible as matter of logic to transfer the property in goods mingled in a mass, usage could not make it

v. Long, 24 Kans. 90; *Waldron v. Chase*, 37 Me. 414, 59 Am. Dec. 56 (this case though not professedly overruled by later cases seems to be at least so qualified as to have little authority); *Carpenter v. Graham*, 42 Mich. 191, 3 N. W. 974; *Merchants' Bank v. Hibbard*, 48 Mich. 118, 11 N. W. 834, 42 Am. Rep. 465; *MacKellar v. Pillsbury*, 48 Minn. 396, 51 N. W. 222; *Kaufmann v. Schilling*, 58 Mo. 218; *Hires v. Hurff*, 39 N. J. L. 4; s. c., *sub nom.*, *Hurff v. Hires*, 40 N. J. L. 581, 29 Am. Rep. 282; *Kimberly v. Patchin*, 19 N. Y. 330, 75 Am. Dec. 334; *Hoyt v. Insurance Co.*, 26 Hun, 416; *O'Keefe v. Leistikow*, 14 N. Dak. 355, 104 N. W. 515, 9 Am. & Eng. Annot. Cas. 25; *Newhall v. Langdon*, 39 Ohio St. 87, 48 Am. Rep. 426; *Brownfield v. Johnson*, 128 Pa. St. 245, 18 Atl. 543, 6 L. R. A. 48; *Pleasants v. Pendleton*, 6 Rand. 473, 18 Am. Dec. 726; *Young v. Miles*, 20 Wis. 615, 23 Wis. 643; *Coffey v. Quebec Bank*, 20 U. C. C. P. 110. The case of *Welch v. Spies*, 103 Iowa, 389, 72 N. W. 548, presents an unusual complication in

that the amount which the buyer was to take was not exactly fixed by the contract. There were 2,300 bushels of corn contained in two cribs. The plaintiff agreed to sell the defendant not less than 1,600 bushels, nor more than 2,300 bushels, at a given price per bushel. The plaintiff reserved the right to retain 200 or 300 bushels if he needed them, and a third person was entitled to fifty bushels. The jury found that there was an intent to transfer title, and the court held that as to 1,600 bushels, at least, the title had passed. There seems no reason to question the correctness of the decision. The fact that the exact amount which the plaintiff was to buy had not been determined was doubtless evidence that title was not intended to pass until the amount was fixed, but it was entirely possible for the parties to agree that title to the minimum amount should pass at once.

⁷⁰ See a discussion of the effect of usage in *Newhall v. Langdon*, 39 Ohio St. 87, 48 Am. Rep. 426; *Savage v. Salem Mills Co.*, 48 Or. 1, 85 Pac. 69.

either legal or possible. Some evidence of intent to transfer title is essential whether the evidence be furnished by usage or otherwise. It is important to bear this in mind in any examination of the decisions which are usually cited as opposed in principle to what has been called the prevailing American doctrine. Many of these decisions, in fact, decide, not that the property could not pass had the parties so intended, but that it did not pass under the circumstances, disclosed by the evidence. Sometimes the courts themselves have not clearly kept in mind the distinction between the possibility of transferring the property and the intention to transfer it.⁷¹ Even if the parties indicate an intention to transfer the property, if the seller is not at the time of the bargain owner of the mass it is obvious that the property cannot pass.⁷²

§ 157. **Incidents of the tenancy in common.**—In *Kimberly v. Patchin*,⁷³ the court expressed a doubt whether the ownership of

⁷¹ *Fry v. Mobile Sav. Bank*, 75 Ala. 473 (in so far as this case decides anything more than that there was no intention to transfer the property, it is overruled by *Aderholt v. Embry*, 78 Ala. 185); *Carpenter v. Glass*, 67 Ark. 135, 53 S. W. 678; *McLaughlin v. Piatti*, 27 Cal. 451 (compare Cal. Civil Code, § 1140, providing for the transfer of title when parties so agree, and the thing itself is identified whether it is separated from other things or not. See also *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199); *Commercial Bank v. Gillette*, 90 Ind. 268, 46 Am. Rep. 222; *Courtright v. Leonard*, 11 Iowa, 32 (in so far as this case decides anything more than that there was no intention to transfer the property it is overruled by *Welch v. Spies*, 103 Iowa, 389, 72 N. W. 548); *Ferguson v. Northern Bank*, 14 Bush, 555, 29 Am. Rep. 418; *Mercer Bank v. Hawkins*, 104 Ky. 171, 46 S. W. 717; *Morrison v. Dingley*, 63 Me. 553; *Lawry v. Ellis*, 85 Me. 500; *Reeder v. Machen*, 57 Md. 56; *Ropes v.*

Lane, 9 Allen, 502; *Scudder v. Worcester*, 11 Cush. 573; *New England Wool Co. v. Standard Worsted Co.*, 165 Mass. 328, 43 N. E. 112, 52 Am. St. Rep. 516 (this case contains an implication that if the buyer was given the right to sever, the property would pass. If so, is it possible for the property to pass though goods are not separated); *Waldo v. Belcher*, 11 Ired. 609 (and see *Blakeley v. Patrick*, 67 N. C. 40, 12 Am. Rep. 600; *Dunkart v. Rineheart*, 89 N. C. 354); *Woods v. McGee*, 7 Ohio, Pt. II, 127, 30 Am. Dec. 202 (barrels of flour); (but usage may modify this rule, *Newhall v. Langdon*, 39 Ohio St. 87, 48 Am. Rep. 426. The later case necessarily decides that it is possible for the parties effectively to agree that title shall pass); *Robbins v. Chipman*, 1 Utah, 335, 2 Utah, 347 (a contract to sell sheep from a flock). (Compare later Utah decisions cited in § 158, note.)

⁷² *Jackson v. Hale*, 14 How. 525; *Foot v. Marsh*, 51 N. Y. 288.

⁷³ 19 N. Y. 330.

the different owners of property confused in a mass was that of tenants in common. The only reason for this doubt, however, was because the court did not think the old rule of the common law forbidding one tenant in common to bring an action for the possession of the common property was applicable to such a case as that with which it had to deal.⁷⁴ In fact the buyer and seller must be tenants in common after the sale and before the property is separated. If title passes there is no separate property of which they can be owners in severalty and no third kind of ownership besides ownership in common and ownership in severalty seems conceivable. There is no difficulty, however, in holding that in regard to a tenancy in common of goods which are fungible or which have been so treated by agreement, there is a right of severance by either party unless the contract provides otherwise. The doctrine of the early common law had reference to indivisible things, such as a horse, and should have no application to the case of property which derives its use by being severed, and in regard to which severance is expected by the parties. Accordingly, not only is severance by either party proper, but severance may be made by an action of replevin brought by the party deprived of the possession of his share. He is not confined to an action for damages.⁷⁵ It necessarily follows from the fact that the property is transferred to the buyer that the risk of his share is upon him. If, therefore, all the goods are destroyed, he must pay the price, and if he has already paid it, he cannot recover it.⁷⁶ If the loss is

"It is unnecessary to decide whether the parties to the original sale became tenants in common. If a tenancy in common arises in such cases, it must be with some peculiar incidents not usually belonging to that species of ownership. I think each party would have the right of severing the tenancy by his own act; that is, the right of taking the portion of the mass which belonged to him, being accountable only if he invaded the quantity which belonged to the other. But assuming that the case is one of strict tenancy in common, the defendant became the owner of 6,000 and the plaintiffs of 249

parts of the whole. As neither could maintain an action against the other for taking possession merely of the whole, more clearly he cannot if the other takes only the quantity which belongs to him."

⁷⁴ *Lyon v. Lenon*, 106 Ind. 567, 7 N. E. 311; *Piazzek v. White*, 23 Kans. 621, 33 Am. Rep. 211; *Pitman v. Baumstark*, 63 Kans. 69; *Hall v. Pillsbury*, 43 Minn. 33, 37, 44 N. W. 673, 7 L. R. A. 529, 530, 533, 19 Am. St. Rep. 209; *Kaufmann v. Schilling*, 58 Mo. 218; *Young v. Miles*, 20 Wis. 615, 23 Wis. 643.

⁷⁶ *Welch v. Spies*, 103 Iowa, 389, 72 N. W. 548.

partial only, the loss must fall upon the several owners in proportion to the shares owned by each.⁷⁷ It has been held in an Indiana

⁷⁷ The question was fully discussed in *Brown v. Northcutt*, 14 Or. 529, 13 Pac. 485. The court in that case said, of the wheat in question: "There was only about two-thirds enough to pay the depositors, including the appellant, the amounts they had respectively stored there; and the wheat not having been kept separate, the deficiency or loss, from whatever circumstances it may have occurred, if not occasioned by the fault of any of them, must fall upon all in the proportion which the amount of wheat each had deposited bore to the whole amount deposited. This rule is based upon a maxim that all courts are bound to observe — the maxim that equality is equity — and it certainly could have no better foundation. The authorities produced at the hearing by the respondents' counsel show that it has been recognized and approved by courts of the highest authority. See *Cushing v. Breed*, 14 Allen, 376, 380, 92 Am. Dec. 777; *Sexton v. Graham*, 53 Iowa, 192, 193; *Dows v. Ekstrone*, 3 Fed. Rep. 19; *United States v. Cask of Gin*, 3 Fed. Rep. 20; *Dole v. Olmstead*, 36 Ill. 150, 85 Am. Dec. 397. In *Cushing v. Breed*, *supra*, the court held that where several parties had stored various parcels of grain in an elevator, and it was put into one mass according to usage, to which they must have been deemed to have assented, they were tenants in common of the grain, and that each was entitled to such a proportion as the quantity placed there by him bore to the whole mass; and in *Dole v. Olmstead*, *supra*, the court held the same doctrine, and held, further, that the grain being thus owned in common, the several owners were

compelled to sustain any loss *pro rata* which might occur by diminution, decay, or otherwise; and that where the holder of a receipt had received the full quantity, or a larger proportion than his ratable share in view of the deficiency, he would be bound to account for such excess received by him according to his proportion of the loss. This is undoubtedly the correct rule, as it is founded upon common justice. The result of the rule is simply this: A. puts wheat in a warehouse for storage; B., C. and others, severally, have wheat there for the same purpose. It is all mingled together, with the presumed consent of all parties. They each necessarily own the several amounts of wheat they have there, but neither can identify his own, but it is in common; and if a loss occurs by casualty, or the warehouseman wrongfully abstracts a part of the general lot, it must necessarily be borne by the depositors *pro rata*. But to render A. liable to contribute to the loss, it must occur after he stored his wheat; he would not be affected by any deficiency which occurred prior to his deposit of his wheat. Former deficiencies would have to be borne by B., C. and others, who had wheat there when it occurred. A.'s amount of wheat would be the proportion it bore to the whole amount actually in store when he placed his there, not to the amount it would be with what B., C. and others had really put there." It further appeared in the case that subsequently to the creation of the deficiency, one of the parties had laid aside for him by the warehouseman the full amount of wheat which he had deposited. When this was

case,⁷⁸ that where depositors of wheat in an elevator knew that it was mingled with wheat purchased by the elevator company and that the company made sales from the mass, they were estopped to assert against a purchaser from the elevator company ownership of the wheat. This doctrine has not been followed elsewhere and is opposed to Minnesota decisions,⁷⁹ but it seems sound in any case where the depositor expressly or impliedly authorizes sales by the warehouseman.

§ 158. **Selection.**—The cases which have been discussed must be carefully distinguished from cases in which the seller is to select a portion of the mass from the remainder and appropriate the selected portion to the buyer. Such a bargain necessarily implies that the contents of the mass are regarded by the parties as differing in value. It would be a direct violation of the terms of such a bargain to say that it was in effect an agreement to create

done the depositor was ignorant that there was any deficiency. The court held that the setting aside of the wheat did not increase the depositor's rights and apparently even had the wheat been delivered to him, he would have had no right to retain it all. See also *O'Neal v. Stone*, 79 Mo. App. 279; *Chase v. Washburn*, 1 Ohio St. 244, 59 Am. Dec. 623; *Savage v. Salem Mills Co.*, 48 Or. 1, 85 Pac. 69, 75; *Spence v. Union Marine Ins. Co.*, L. R. 3 C. P. 427. In Minnesota it has been stated more than once that where the warehouseman deposits his own grain with that of others, he is entitled only to the excess in the elevator over and above the amount called for by his receipts. *Hall v. Pillsbury*, 43 Minn. 33, 7 L. R. A. 529, 533, 44 N. W. 673, 19 Am. St. Rep. 209; *Herrick v. Parnes*, 78 Minn. 475, 479, 81 N. W. 526. In these cases, however, the court did not have in mind the question of accidental destruction, and except in such a case the statement is accurate.

⁷⁸ *Preston v. Witherspoon*, 109

Ind. 457, 9 N. E. 585, 58 Am. Rep. 417.

⁷⁹ *Hall v. Pillsbury*, 43 Minn. 33, 44 N. W. 673, 7 L. R. A. 529, 19 Am. St. Rep. 209; *Jackson v. Severson*, 79 Minn. 275, 278, 82 N. W. 634. In *Hall v. Pillsbury*, the court said: "Much argument has been expended to show the inconvenience to commerce in grain if in such cases the owner of the grain may, notwithstanding a wrongful sale by the warehouseman, follow the grain into the hands of the purchaser. As touching the matter of convenience, the argument has much force. It might tend greatly to facilitate traffic in grain if we had, in respect to it, such a rule as in England pertains to property sold in markets overt. But there is no such rule in this country. The general rule is that an owner of personal property cannot be deprived of his right to it through the unauthorized act of another. That rule applies as well to grain or other property on deposit for the purpose of storing as to property in any other situation."

a tenancy in common in the mass.⁸⁰ If, indeed, the sale relates to all goods of a certain kind in a mass, the property in those specific goods may pass. The case is not then one of unspecified goods. Even in such a case, however, if the seller is to make the separation, under the doctrine that where anything remains to be done by the seller the property is presumed not to pass,⁸¹ it will be presumed here that the property does not pass until the separation is made; but this will be only a presumption of intention, and if a contrary intention is shown it will govern. On the other hand, if all the goods were delivered to the buyer and he was to make the separation, this presumption would not be applicable and the property in those goods in the mass, to which the bargain related, would pass at once to the buyer before separation.⁸² If the terms of the bargain were not sufficient to enable a competent person to determine to what portion of the mass the bargain related, it would seem impossible, however, for the property to pass until the separation was made.⁸³

⁸⁰ Cases of this sort are *McFadden v. Henderson*, 128 Ala. 221, 26 So. 640 (contract for the sale of 1,500 bales of cotton, but nothing below low middlings and bales that were sandy, seedy, or false packed were to be excluded); *Hahn v. Fredericks*, 30 Mich. 223, 18 Am. Rep. 119 (the contract for the sale of twenty cords of hard wood to be taken from a pile containing several hundred cords of mixed hard and soft wood); *Woods v. McGee*, 7 Ohio, Pt. II, 127, 30 Am. Dec. 202 (contract for the sale of 600 barrels from a larger quantity in which the barrels varied in value from twenty-five cents to fifty cents); *Hutchinson v. Hunter*, 7 Pa. St. 140 (contract for sale of 100 barrels of molasses, part of a specified larger stock, but the barrels were of unequal contents and unequal value); *Anderson v. Crisp*, 5 Wash. 178, 31 Pac. 638, 18 L. R. A. 419 (contract to sell 162,000 merchantable brick out of a kiln in which all the brick were not merchantable). See also *Foster v. Lumbermen's Mining Co.*,

68 Mich. 188, 36 N. W. 171; *Cass v. Gunnison*, 68 Mich. 147, 36 N. W. 45; *Warren v. Buckminster*, 24 N. H. 336; *Foot v. Marsh*, 51 N. Y. 288; *Dunkart v. Rineheart*, 89 N. C. 354; *Staubli v. Blaine Bank*, 11 Wash. 426, 39 Pac. 814.

⁸¹ See *infra*, § 265.

⁸² *Lamprey v. Sargent*, 58 N. H. 241. See also *Croze v. St. Mary's Mineral Land Co.*, — Mich. —, 107 N. W. 313; *Barber v. Andrews*, — R. I. —, 69 Atl. 1.

⁸³ In *Lamprey v. Sargent*, 58 N. H. 241, the buyer was to select the hard brick from a quantity of brick of different kinds. If the meaning of this bargain was that the seller could take any brick that he deemed sufficiently hard for his purpose, and could reject any brick that he did not want, it is obvious that no goods were identified at the time of the bargain of which it is possible to predicate ownership. Nor was the buyer tenant in common of all the brick, for it was only the hard brick with which he was concerned.

§ 159. **What are fungible goods?** — The term “fungible goods” has been used in the civil law to define goods of which each particle is identical with every other particle — such as grain, oil, wine. It has been adopted in our law and the doctrine in regard to the sale of a portion of a mass, which has just been considered, applies primarily to goods of this character. It is obvious that if a mass of goods contains articles of varying and differing qualities, that one who contracts for a given number of the objects does not expect and will not be satisfied to have, in lieu of what his contract specifically calls for, a tenancy in common in the whole mass. Such a tenancy in common will not accurately translate the bargain which he made. Nevertheless, the modern American doctrine in regard to sales of a portion of a mass has been frequently applied to goods not strictly fungible in their nature. Indeed, the earliest case in which the doctrine was applied⁸⁴ related to barrels of flour. Though flour of the same grade is fungible in the strictest sense, barrels of flour are not necessarily so. Other cases also have applied the doctrine to barrels.⁸⁵ So it has been applied to bales of cotton,⁸⁶ and even to cattle or sheep.⁸⁷ It is obvious that all cattle are not alike, and that some cattle in a herd

⁸⁴ *Pleasants v. Pendleton*, 6 Rand. 473, 18 Am. Dec. 726.

⁸⁵ *Horr v. Barker*, 8 Cal. 603, 11 Cal. 393, 70 Am. Dec. 791; *Carpenter v. Graham*, 42 Mich. 191, 3 N. W. 974; *Mackellar v. Pillsbury*, 48 Minn. 396, 51 N. W. 222.

⁸⁶ *Aderholt v. Embry*, 78 Ala. 185; *Phillips v. Ocmulgee Mills*, 55 Ga. 633

⁸⁷ *Watts v. Hendry*, 13 Fla. 523. A class of cases suggesting grain elevator cases has arisen in some of the western States, in which cattle or sheep are “leased,” as the term is used by the owner, to another at a rental of so many pounds of wool, and so many of the young every year. It is expressly provided, or at least strongly implied, from the terms used in the lease, that the lessor retains title to the flock or herd. It will be observed, however, that the

identity of the herd is changing and that the wool and young animals are not all to belong to the lessor, but a specified quantity and number are to belong to him. As the rest must belong to the lessee, and as there is no way indicated in which the identity of the animals belonging either to the lessee or to the lessor is to be determined, the parties must necessarily be tenants in common, if their intention is to be effectuated. It has been decided that the lessor retains the ownership in these cases, and that the transaction is a bailment and not a sale. *Robinson v. Haas*, 40 Cal. 474; *Woodward v. Edmunds*, 20 Utah, 118, 57 Pac. 848; *Turnbow v. Beckstead*, 25 Utah, 468, 71 Pac. 1062; *Wetzel v. Bank*, 30 Utah, 62, 83 Pac. 570; *Rich v. Utah Bank*, 30 Utah, 334, 84 Pac. 1105.

are more valuable than others, but in the cases under consideration the parties virtually agreed to act on the assumption that all were alike, and it will be seen that this is the really essential thing. If parties to a bargain proceed on the assumption that all the constituents of the mass or bargain are identical, and are willing to regard all as alike for the purpose of determining their rights, it is an exact translation of their bargain to regard them as tenants in common. The American decisions just referred to are, therefore, justified.

§ 160. Destruction of goods sold — Provisions of Sales Act.—

Sec. 7. DESTRUCTION OF GOODS SOLD.— (1.)

Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have wholly perished at the time when the agreement is made, the agreement is void.

(2.) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have perished in part or have wholly or in a material part so deteriorated in quality as to be substantially changed in character, the buyer may at his option treat the sale—

(a.) As avoided, or

(b.) As transferring the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the sale was indivisible or to pay the agreed price for the goods in which the property passes if the sale was divisible.⁸⁸

§ 161. A sale of specific goods is void if goods not in existence.—

In regard to the correctness of the principle of law stated in the first subsection there can be no doubt. There are not many decisions exactly in point,⁸⁹ but no question has ever been raised in

⁸⁸ Subsection (1) corresponds to section 6 of the English act, except that "the parties purport to sell" has been substituted in the first line for the words "there is a contract for the sale of," and "agreement" is twice substituted in the last line, for "contract." The other provisions of the American section are new.

⁸⁹ *Hastie v. Coutrier*, 9 Ex. 102; *s. c.*, *sub nom.*, 5 H. L. C. 673; *Strick-*

land v. Turner, 7 Ex. 208; *Gibson v. Pelkie*, 37 Mich. 380; *Bates v. Smith*, 83 Mich. 347, 47 N. W. 249. In the case first cited the parties purported to make a sale by means of bills of lading of a cargo of corn. In fact at the time the bargain was made the corn, owing to fermentation, rendering its future preservation impossible, had already been sold at an intermediate port by the

regard to the result, though different reasons have been suggested for treating the sale as void. Sometimes the result is put upon the ground of impossibility, sometimes upon the ground of mistake, and sometimes on the lack of mutual assent owing to the mistake. So far as the existence of a sale is concerned, that is, the actual transfer of title to property, of course there is absolute impossibility. The real question, however, is whether the buyer and seller are excused from all liability. Even though there is no sale the seller may be liable on an obligation of warranty or contract,⁹⁰ and similarly the buyer might be liable on an obligation to pay the price. No such obligation, however, exists on either side. The seller is excused from any such obligation by the doctrines both of impossibility and mistake. As the obligation would relate to a specific thing, the nonexistence of the thing, without his fault, excuses him.⁹¹ Even apart from the doctrine of impossibility the mutual mistake under which the parties labored would excuse the seller from any obligation. On the part of the buyer there is no question of impossibility, it is entirely possible

ship's captain. It was held that the bargain was void and the purchaser not bound for the price. In *Strickland v. Turner*, the parties purported to sell an annuity payable during the life of a third person. At the time the bargain was made the third person had already died, so that no annuity existed. It was held that the buyer could recover the price paid. Similarly in *Gibson v. Pelkie*, the bargain related to a judgment which did not exist. In *Bates v. Smith*, Long, J., said: "If it appears that the subject-matter of a contract was not, and could not have been in existence at the time of such contract, the contract itself is of no effect, and may be disregarded by either party."

⁹⁰ See *supra*, § 137.

⁹¹ *Taylor v. Caldwell*, 3 B. & S. 826. See also *The Tornado*, 108 U. S. 342, 2 S. Ct. 746, 27 L. ed. 747; *Arthur v. Blackman*, 63 Fed.

Rep. 536; *Fresno Milling Co. v. Fresno C. & I. Co.*, 126 Cal. 640, 59 Pac. 140; *School District v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371; *Walker v. Tucker*, 70 Ill. 527; *Price v. Pepper*, 13 Bush, 42; *Pinkham v. Libbey*, 93 Me. 575, 45 Atl. 823, 49 L. R. A. 693; *Wells v. Calnan*, 107 Mass. 514, 9 Am. Rep. 65; *Thomas v. Knowles*, 128 Mass. 22; *Gilbert & Co. v. Butler*, 146 Mass. 82, 15 N. E. 76; *Goldman v. Rosenberg*, 116 N. Y. 78, 22 N. E. 259; *Stewart v. Stone*, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215; *Young v. Leary*, 135 N. Y. 569, 32 N. E. 607; *Dolan v. Rodgers*, 149 N. Y. 489, 44 N. E. 167; *Lovering v. Coal Co.*, 54 Pa. St. 291; *Huguenin v. Courtenay*, 21 S. C. 403, 53 Am. Rep. 688; *McMillan v. Fox*, 90 Wis. 173, 62 N. W. 1052; *Board of Education v. Townsend*, 63 Ohio St. 514, 59 N. E. 223, 52 L. R. A. 868.

for him to pay the price. If the promise, however, was expressly or impliedly conditional upon the transfer of title, which would generally be the case, the nonperformance of this condition, for whatever reason, would necessarily excuse him.⁹² Even though his promise to pay the price was not conditional, the destruction of the goods for which the price was to be paid would be such failure of consideration as to excuse him from paying the price if he had not already paid it, and would justify him in recovering it if he had already paid it.⁹³ The doctrine of mutual mistake would also excuse the buyer as well as the seller. It is not accurate, however, to say that there is no mutual assent;⁹⁴ the parties do, in fact, assent to the same thing. The mistake which they make is ground for excusing them from the bargain they made. It is not a ground for saying they never made a bargain.⁹⁵

§ 162. **Deterioration or partial destruction of the goods prior to the sale.**—The English act makes no provision in regard to the case of deterioration or partial destruction of the goods unknown to the parties at the time they entered into a sale. The principles which govern the case are, moreover, not so simple as those which relate to total destruction. Several cases may be supposed, the simplest of which is that a portion of the goods is destroyed. In such a case it is impossible for the buyer to fulfill his whole bargain; and impossibility, without his fault, should excuse him, as in case of total destruction. The buyer also should be excused from liability to pay the price for the same reasons as those given in the preceding section. It may be, however, that the buyer wishes to take the goods that remain, in spite of the destruction of the remainder; he certainly is entitled to do so. Impossibility can excuse the seller no further than the impossibility in fact exists. The only doubt is, upon what terms the buyer may proceed. If a separate price was originally agreed upon for the goods which now remain, there seems no reason why the buyer should not be entitled to them upon paying this price, and so the Sales Act provides. To be sure the seller never agreed to sell those goods separately, though he agreed on a divisible

⁹² See *infra*, § 164.

⁹³ *Strickland v. Turner*, 7 Ex. 208.

⁹⁴ This view is suggested by Benjamin, *Sale* (5th Eng. ed.), 139.

⁹⁵ See *supra*, § 5.

price, but as the remaining goods which were the subject of the bargain are destroyed, the seller cannot well be put in a worse position than contemplated by the bargain if he is obliged to give up the remainder; he is not left with goods on his hands undisposed of. The buyer, however, even though the contract was divisible is not bound to take the goods unless he wishes. A part of the goods may not serve his purpose. Therefore, he has an option to take the goods or reject them. If the price for the goods which remain is not fixed by the contract, while the buyer may also claim the goods, he can only claim them according to the terms of the contract. The French Civil Code allows him to take them at a valuation,⁹⁶ but this seems to force upon the seller a bargain which he did not make.

A more troublesome case arises where none of the goods are totally destroyed but all, or a material part of them, are inferior in condition to what the parties supposed when the bargain was made. In regard to such a case it has been said that "the only question is whether the article has been so far destroyed as no longer to answer to the description of it given by the contract,"⁹⁷ and this statement is warranted by the language of the leading English case.⁹⁸ This language, however, was used at a

⁹⁶ Code Civil, Art. 1601.

⁹⁷ Chalmers, Sale of Goods Act (5th ed.), 20.

⁹⁸ *Barr v. Gibson*, 3 M. & W. 390. In this case the defendant sold to the plaintiff, in England, by deed poll, a vessel, and covenanted that it had then "good right, full power, and lawful authority" to sell the same. At the time the transaction took place the ship was aground on the coast of the Prince of Wales island, and had been left by the crew. She was five feet above water on one side and with her masts standing. Her bulk ends were strained. If there had been facilities at hand, and it had been a different season of the year, she might have been got off and repaired. The captain, in fact, sold the ship as she

lay for £10 three days after the sale to the plaintiff. The plaintiff sued the defendant in an action of covenant for breach of the covenant quoted above. The court held that the question was whether the subject of the transfer bore the character of a ship and held that "the ship did continue to be capable of being transferred as such at the time of the conveyance though she might be totally lost within the meaning of a contract of insurance * * * The covenant, however, of the defendant that he had power to transfer her as a ship at the time of executing the deed was not broken." This decision may be supported. The action was upon a covenant and the decision depended simply on the question whether the

time when the doctrines of implied warranty had not been developed. More than ten years later the same eminent judge was unwilling to lay down broadly as a general rule of law that a seller impliedly warranted title to the goods sold,⁹⁹ and it was not until 1868 that the English court clearly stated the modern law of implied warranty of quality.¹ The ground of implying a warranty of quality must be that the buyer is justified in supposing that the goods to which the bargain relates are merchantable. At the present time, therefore, it seems clear that the test of whether an article answers the description of it given by the contract is not adequate. If the parties justifiably suppose that they are dealing with goods in ordinary merchantable condition, and the goods are not in such condition, there is a mutual mistake of a material fact, which should justify the buyer in rescinding the transaction. It may well be that even under the English statute nearly this result would be reached by treating goods as having "perished" within the meaning of the Sale of Goods Act, "not only if they were physically destroyed, but also if they had ceased to exist in a commercial sense; that is, if their merchantable character as such has been lost."² It seems better, how-

defendant had broken that covenant. No question of mistake or failure of consideration could enter into the case. The language of Parke, B., however, goes farther than the case required. He said: "In the bargain and sale of an existing chattel, by which the property passes, the law does not (in the absence of fraud) imply any warranty of the good quality or condition of the chattel so sold. *Parkinson v. Lee*, 2 East, 314; *Keilw.* 91; 1 Rolle's Abr., Action sur case (P.), pl. 4, p. 90. The simple bargain and sale, therefore, of the ship does not imply any contract that it is then seaworthy or in serviceable condition." At the present day it is clear that there would be a warranty of quality if the buyer had no opportunity of inspection, as was the case here. It seems also clear that the fact that the ship was aground at

the time of the bargain was so material that the buyer could have rescinded the transaction on account of mistake.

⁹⁹ *Morley v. Attenborough*, 3 Ex. 500. The case related to a sale by a pawnbroker and Parke, B., distinguished it from the case of an ordinary shopkeeper selling goods.

¹ *Jones v. Just*, L. R. 3 Q. B. 197.

² This suggestion is made in Benjamin, *Sale* (5th Eng. ed.), 140, citing several cases where freight was held not payable under a charter party requiring delivery of the goods as a condition when the goods were so deteriorated as to be unfit for the purposes for which such goods are ordinarily used. *Duthie v. Hilton*, L. R. 4 C. P. 138; *Asfar v. Blundell*, [1896] 1 Q. B. 123. See also *Nickoll v. Ashton*, [1901] 2 K. B. 126.

ever, to reach the desired result directly than by putting an artificial meaning upon such words as "perished" or "destroyed." If the seller knows of the destruction or deterioration of the goods the case would not fall within the terms of section 7, but the seller would then be liable if not in deceit at least on an implied warranty, and the buyer would thus be fully protected.

§ 163. **Provision of Sales Act as to destruction of goods contracted to be sold.**—The Sales Act provides in regard to this as follows:

Sec. 8. DESTRUCTION OF GOODS CONTRACTED TO BE SOLD.—(1.) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault on the part of the seller or the buyer, the goods wholly perish, the contract is thereby avoided.

(2.) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault of the seller or the buyer, part of the goods perish or the whole or a material part of the goods so deteriorate in quality as to be substantially changed in character, the buyer may at his option treat the contract—

(a.) As avoided, or

(b.) As binding the seller to transfer the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the contract was indivisible, or to pay the agreed price for so much of the goods as the seller, by the buyer's option, is bound to transfer if the contract was divisible.³

§ 164. **A contract may be avoided if the goods are destroyed or injured.**—The principle covered by this section of the Sales Act is not peculiar to the law of sales. It applies to the law of contracts generally. Where one party to a contract cannot perform what he has agreed, even though the reason he cannot perform it is

³ Subsection (1) corresponds to section 7 of the English act, except that "contract" has in two places been substituted for "agreement," the word "wholly" inserted before "perish," and a slight transposition

in the order of clauses made which does not affect the meaning. The rest of the section is new and corresponds with the additions to the previous section.

impossibility, not due to his own fault, he cannot claim the performance of the other party.⁴ Applying this principle of the law of sales, if the property is destroyed or injured before the time when it was agreed that title should pass, the buyer cannot be compelled to pay the price,⁵ and if he has paid the price in advance it may be recovered.⁶ From the seller's standpoint, on the other hand, impossibility of performance due to the nonexistence of the subject-matter of the contract excuses from liability.⁷ Subsection (2) (b) is merely an application of the general doctrine of waiver to the law of sales; though the buyer may refuse to take any of the goods if some are destroyed or injured, he may take them if he wishes to do so. He cannot, however, change his own liability in such a case from that provided for by the contract. He must pay the agreed price for what he receives, even though he is not receiving all which the contract required.

§ 165. **Rules of the Civil Law.**—The question of the destruction of the subject-matter of the sale has been much discussed in the civil law, and the rules of the Roman Law have been thus summarized:

“If the thing which it has been agreed to buy and sell has, unknown to both parties, ceased to exist at the time at which the

⁴ *Poussard v. Spiers*, 1 Q. B. D. 410; *Johnson v. Walker*, 155 Mass. 253, 29 N. E. 522, 31 Am. St. Rep. 550.

⁵ *Calcutta Co. v. De Mattos*, 32 L. J. Q. B. 322, 335; *Tillson v. United States*, 129 U. S. 101, 32 L. ed. 636; *Hays v. Pittsburg Co.*, 33 Fed. Rep. 552; *Peace River Phosphate Co. v. Grafflin*, 58 Fed. Rep. 550; *Jones v. Pearce*, 25 Ark. 515; *Crawford v. Smith*, 7 Dana, 59; *Brown v. Childs*, 2 Duv. 314; *Phillips v. Moor*, 71 Me. 78, 80; *Lingham v. Eggleston*, 27 Mich. 324; *Hahn v. Fredericks*, 30 Mich. 223, 18 Am. Rep. 119; *Wilkinson v. Holiday*, 33 Mich. 386; *Slade v. Lee*, 94 Mich. 127, 53 N. W. 929; *Drews v. Ann River Logging Co.*, 53 Minn. 199, 54 N. W. 1110; *Fairbanks v. Richardson Drug Co.*, 42 Mo. App.

262; *Towne v. Davis*, 66 N. H. 396, 22 Atl. 450; *Terry v. Wheeler*, 25 N. Y. 520; *Kein v. Tupper*, 52 N. Y. 550.

⁶ *Logan v. Le Mesurier*, 6 Moo. P. C. 116; *Stone v. Waite*, 88 Ala. 599, 7 So. 117; *Joyce v. Adams*, 8 N. Y. 291; *Williams v. Allen*, 10 Humph. 337, 51 Am. Dec. 709; *Kelly v. Bliss*, 54 Wis. 187, 11 N. W. 488; *Wong Ko v. Hawaiian Government*, 7 Hawaii, 690.

⁷ *Howell v. Coupland*, 1 Q. B. D. 258; *Browne v. United States*, 30 Ct. Cl. 124; *Ontario Fruit Assoc. v. Cutting Packing Co.*, 134 Cal. 21, 66 Pac. 28, 53 L. R. A. 681, 86 Am. St. Rep. 231; *Losecco v. Gregory*, 108 La. 648, 32 So. 985; *McMillan v. Fox*, 90 Wis. 173, 62 N. W. 1052.

contract is made, the contract is void. The vendor must return the purchase money, if he has been paid; and if he alone knew that the property no longer existed he is further liable to compensate the purchaser in damages for any loss which he may sustain through nonperformance, whereas if the purchaser alone knew it, he is bound to pay the purchase money, and has no rights himself against the vendor. If both were aware that the property no longer existed, the contract is void. Where the thing has ceased to exist only in part, the contract is void, and the purchaser can recover any purchase money which he has paid, only where less than half of it is left, or where the portion wanting is the portion for which mainly the purchaser can show that he bought it. Otherwise the contract stands, the purchase money being proportionately abated. On the same principle a sale of the inheritance of a living third person, or of a person who does not and never has existed, is void, though Justinian legalized sales of the inheritance of a living person to which the vendor hoped to succeed, provided that person assented, though he was not thereby bound to leave it to the vendor at all.”⁸ It may be assumed that the modern civil law would follow the same principles except in so far as express Code provisions may modify them. In France the Civil Code provides: “If at the moment of the sale the thing sold had wholly perished, the sale shall be void. If a part only of the thing has perished it is at the option of the buyer to abandon the sale or to demand the remaining part, having the price determined by valuation.”⁹ The German Code contains no specific provision in regard to the matter, but it is covered by the general provisions in regard to impossibility, and dependency of the obligations in bilateral contracts.¹⁰ The Code of Louisiana contains the following provision: “When the certain and determinate substance, which was the object of the obligation, is destroyed, is rendered unsaleable, or is lost, so that it is absolutely known not to exist, the obligation is extinguished, if the thing has been destroyed or lost, without the fault of the debtor, and before he was in default. Even when the debtor is in default, if he has not taken upon himself fortuitous

⁸ Moyle, Contract of Sale in the Civil Law, 21.

⁹ Art. 1601.

¹⁰ See §§ 306, 320, 323.

accidents, the obligation is extinguished, in case the thing might have equally been destroyed in the possession of the creditor, if it had been delivered to him. The debtor is bound to prove the fortuitous accident he alleges. In whatever manner a thing stolen may have been destroyed or lost, its loss does not discharge the person who carried it off, from the obligation of restoring its value.”¹¹

¹¹ Art. 2219.

CHAPTER V.

THE PRICE.

SECTION 166. Definition of price in the Sales Act.

167. Fixing the price — Executed sales.

168. Fixing the price — Contracts to sell.

169. Fixing of the price in the alternative.

170. The price may be payable in any personal property.

171. A reasonable price is payable where the price is not fixed.

172. What is a reasonable price?

173. Provision of the Sales Act for determining the price by valuation.

174. Effect of a condition requiring valuation — Transfer of property.

175. Failure of valuation without fault of either party.

176. Failure of valuation owing to the fault of either party.

177. How far the valuation is conclusive upon the parties.

§ 166. Definition of price in the Sales Act.—The Sales Act provides as follows, in regard to the price:

Sec. 9. DEFINITION AND ASCERTAINMENT OF PRICE.—(1.) The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties.

(2.) The price may be made payable in any personal property.

(3.) Where transferring or promising to transfer any interest in real estate constitutes the whole or part of the consideration for transferring or for promising to transfer the property in goods, this act shall not apply.

(4.) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.¹

Subsection (2) brings exchanges and contracts to exchange within the act.²

¹ This is based on section 8 of the English act. Subsection (4) of the Sales Act is identical with subsection (2) of the English act. Subsection (1) is changed only by substituting "in such manner as may

be agreed" for "in manner thereby agreed," for the reason that the manner need not be fixed "thereby;" *i. e.*, by the contract. See § 167. Subsections (2) and (3) are new.

² See § 170.

§ 167. **Fixing the price — Executed sales.**— Ordinarily, the price either in an executed sale or in a contract to sell is fixed by the parties at the time the bargain is made. It need not be stated in words, however. If the parties have by any course of dealing made it possible for a reasonable man in their position, to understand their intention as to the price, it will be fixed by this understanding based on previous course of dealing as effectually as if stated in words. Likewise, either in an executory contract to sell or in a sale, the parties may provide for some means of determining the price later by outside circumstances.³ If, however, they provide that the price shall be what they between themselves may thereafter agree a difficulty based on the fundamental principles governing the formation of contracts may arise. If the parties agree upon a sale, the price to be thus fixed, the property would indeed pass.⁴ The assent to transfer it would be

* Illustrations of such bargains may be found in the following cases: *Daniel v. Hannah*, 106 Ga. 91, 31 S. E. 734, a sale of cotton at "its highest market price in Thomaston for the cotton on November 10, 1896." *Beardsley v. Smith*, 61 Ill. App. 340, an agreement to sell at the "lowest jobbing prices." *Lund v. McCutchen*, 83 Iowa, 755, 49 N. W. 998, a contract to sell some goods for the price which similar goods should be sold for by the manufacturers during 1889, price to be fixed on or about Feb. 1, 1889, and other goods at 8 per cent. more than the net cost to the seller. *Shaw v. Smith*, 45 Kans. 334, 25 Pac. 886, 11 L. R. A. 681, a contract to sell flax seed for "thirty-five cents less than St. Louis market price on day of delivery." *Hagins v. Combs*, 102 Ky. 165, 43 S. W. 222, a contract to take logs in exchange for goods and allow for the logs the most that the seller "could get offered in money for them, delivered at Jackson, when measured." *Ashcroft v. Butterworth*, 136 Mass. 511,

an agreement to sell at the rate the seller gives to another. *Phifer v. Erwin*, 100 N. C. 59, 6 S. E. 672, an agreement to sell at the market price on a specified day. *Cunningham v. Brown*, 44 Wis. 72, a contract to sell a lot of land for the same price at which other lots in the vicinity should first be sold. *McConnell v. Hughes*, 29 Wis. 537, an agreement to sell at ten cents less than the market price on a day to be named by the vendor. in the future. *McBride v. Silverthorne*, 11 U. C. Q. B. 545, an agreement to sell at the market price on the day when the seller should make demand.

⁴ *Valpy v. Gibson*, 4 C. B. 837, 864; *Shealy v. Edwards*, 73 Ala. 175, 49 Am. Rep. 43; *Greene v. Lewis*, 85 Ala. 221, 4 So. 740, 7 Am. St. Rep. 42; *Leist v. Dierssen*, Cal. App. , 88 Pac. 812; *McEwen v. Morey*, 60 Ill. 32; *Stout v. Carruthersville Hardware Co.* (Mo. App.), 110 S. W. 619. In *Valpy v. Gibson*, the court said: "The omission of the particular mode or time of payment, or even of the price itself, does not neces-

effectual irrespective of the validity of the consideration furnished by the buyer's promise to pay. An executed transfer of property, while voidable for mistake or fraud, is not invalid for lack of consideration. In the case supposed the seller has received exactly the promise on the part of the buyer which he expected to receive, and it is immaterial whether this promise is illusory in that, by its very terms, the obligation to perform is dependent on the

sarily invalidate a contract of sale. Goods may be sold, and frequently are sold, when it is the intention of the parties to bind themselves by a contract which does not specify the price or mode of payment, leaving them to be settled by some future agreement, or to be determined by what is reasonable under the circumstances. And we think the evidence in this case shows that the parties intended to bind themselves by a contract of sale at the specified prices, leaving the mode of payment unexpressed and to be determined by what was reasonable or what should be agreed between them; so that, if the mode of payment had not been agreed on, the agreement of sale would be binding and complete." Obvious as the point is there are decisions of contrary effect. *Foster v. Lumbermen's Mining Co.*, 68 Mich. 188, 36 N. W. 171; *Wittkowsky v. Wasson*, 71 N. C. 451. See also *Albemarle Lumber Co. v. Wilcox*, 105 N. C. 34, 10 S. E. 871. In the first of these cases the court said: "The price to be paid by the purchaser should be fixed, and, if the sale is not to be for cash, the terms of payment must be stated and the time given within which the price fixed must be paid. *Williamson v. Berry*, 8 How. 495, 544, 12 L. ed. 669. Unless this is done the title to the property will not pass, without a clause in the contract whereby they are waived, and nothing of that kind

appears in the agreement relied upon in this case." In *Wittkowsky v. Wasson*, the court said: "There cannot be an executed sale so as to pass the property where the price is to be fixed by agreement between the parties afterward and the parties do not afterward agree. One element of a sale is wanting, just as a different element would be if the thing were not ascertained. If in such case the thing was actually delivered and consumed, the vendee would be liable, not upon the special imperfect contract, but on an implied contract to pay a reasonable price." It may be observed that in *Lovejoy v. Michels*, 88 Mich. 15, 26, 49 N. W. 901, 13 L. R. A. 770, *Champlin, C. J.*, expressly deals with executed contracts of sale where the price is not agreed upon at the time of the sale. The error of the statements in the earlier Michigan and the North Carolina case is probably due to confusion introduced in our law from the Roman Law. In that law it was a question having important consequences whether a bargain was in strictness a contract of sale. In our law in order to determine whether title to goods passes nothing is material other than whether the owner intended to pass title and the grantee intended to receive it. Whether the appropriate name of the transaction is gift, exchange, or sale is merely a question of nomenclature.

buyer's own choice. That such is the nature of the promise is evident. The subsequent agreement on the price by the buyer is something, which, in the nature of the case, is within his power as well as the seller's to make or refrain from making. It amounts to no more than a promise by the buyer to pay such price as he chooses, for he need agree to nothing which he does not choose.⁵ No doubt if the parties do subsequently agree on a price, the contract then acquires the same efficacy as if the bargain had originally been made for the price subsequently fixed.⁶ If, however, no agreement is come to in regard to the price and, nevertheless, the buyer keeps the goods, the seller is not without remedy, for the law, as is provided in the subdivision (4) of section 9 of the Sales Act, above quoted, would require the ~~seller~~ to pay a reasonable price.⁷ This obligation, however, is *quasi-contractual*

⁵ In *Speirs v. Union Drop Forge Co.*, 180 Mass. 87, 94, 61 N. E. 825, Knowlton, C. J., said, referring to such a promise: "It is an elementary principle of the law of contracts that so long as an essential element entering into the proposed obligation of either of the parties remains to be determined by an agreement which they are to try to make, the contract is incomplete and unenforceable. *Non constat* in such a case that they will ever be able to agree. *Sibley v. Felton*, 156 Mass. 273, 31 N. E. 10; *Lyman v. Robinson*, 14 Allen, 242, 252; *May v. Ward*, 134 Mass. 127; *Ashcroft v. Butterworth*, 136 Mass. 511; *Freeland v. Ritz*, 154 Mass. 257, 28 N. E. 226, 12 L. R. A. 561, 26 Am. St. Rep. 244; *Appleby v. Johnson*, L. R. 9 C. P. 158; *Honeyman v. Marryatt*, 6 H. L. C. 112; *Ridgway v. Wharton*, 6 H. L. C. 238. I deem it too plain for discussion that when the first agreement was signed, and so long as there was no agreement upon the price to be paid for any of the work, there was no contract that bound the plaintiff to do anything or that

bound the defendant to pay anything." This extract is taken from a dissenting opinion, but the difference of opinion in the court did not concern the question to which the extract relates.

⁶ *Speirs v. Union Drop Forge Co.*, 174 Mass. 175, 54 N. E. 497, 180 Mass. 87, 61 N. E. 825. See also cases cited in previous notes in this section.

⁷ See *Valpy v. Gibson*, 4 C. B. 837; *Shealy v. Edwards*, 73 Ala. 175, 49 Am. Rep. 43; *Greene v. Lewis*, 85 Ala. 221, 4 So. 740, 7 Am. St. Rep. 42; *Macomber v. Parker*, 13 Pick. 175; *Boswell v. Green*, 1 Dutch. 390, 396. In *Shealy v. Edwards*, the court said of such contracts: "Where the seller, whether by actual delivery or other like unequivocal act, intentionally passes the property in specific goods to the purchaser without fixing the price, the law leaves the price to be adjusted by the agreement of the parties, or, if they fail to agree, by the verdict of a jury. If such price is left open for future adjustment by consent, the property being delivered with the

rather than contractual. The law imposes it on the grounds of justice rather than because the parties, in fact, agreed to it. It would seem possible that the buyer would have the option of returning the goods promptly, if the parties were unable to agree upon the price, and if he could return them uninjured.

§ 168. **Fixing the price — Contracts to sell.**— In the case of an agreement executory on the part of the seller, as well as of the buyer, an additional principle is involved. As the agreement is bilateral it is essential that the promise of each party be supported by good consideration, and if either promise is not sufficient consideration to support the counter-promise, the whole agreement is *nudum pactum*. Such is the situation where the buyer's promise is to pay a sum to be thereafter agreed.⁸ Not only may the buyer's promise to pay the price be insufficient consideration to support a seller's promise to transfer title if the amount of the price is to

expressed intention to complete the sale, the price to be agreed on is implied to be one that is fair and reasonable, and this is always the rule of recovery on a *quantum meruit* or *quantum valebat*.⁹

⁸There are many decisions involving facts identical in principal with those referred to in the text. A contract namely, where the buyer agrees to buy such a quantity of goods as he may desire. A typical illustration of such a contract is *Great Northern R. R. Co. v. Witham*, L. R. 9 C. P. 16. In this case the defendant, in answering to an advertisement for tenders, wrote to the plaintiff as follows: "I, the undersigned hereby undertake to supply the G. N. Ry. Co. for twelve months from the 1st of November, 1871, to 31st of October, 1872, with such quantities of each or any of the several articles named in the attached specification, as the company's storekeeper may order, from time to time, at the price set opposite each article respectively, and agree to abide by the conditions

stated on the other side. (Signed) Samuel Witham." The plaintiff's officer replied: "Mr. S. Witham — Sir: I am instructed to inform you that my directors have accepted your tender, dated, etc., to supply this company, at Doncaster station, any quantity they may order during the period ending 31st of October, 1872, of the description of iron mentioned on the inclosed list, at the prices specified therein. The terms of the contract must be strictly adhered to. Requesting acknowledgment of the receipt of this letter. Signed) S. Fitch, Assistant Secretary." The defendant replied, acknowledging receipt. The acceptance here seems a clear example of what Sir Frederick Pollock in his treatise on Contracts (7th ed.), p. 46, calls an illusory promise. It is evident that the terms of this promise required nothing of the railway company so as to furnish a consideration for the defendant's promise. If the plaintiff had agreed to take of the defendant all such articles named in the specification as

be determined in a way that gives the buyer complete power over the result, but also where the promise is so indefinite that it cannot

they might require for their road during the period named, this would have connoted a promise by the plaintiff during that time not to purchase any such articles from any one but the defendant, which would have been a good consideration. *Hartley v. Cummings*, 5 C. B. 247; *Church v. Proctor*, 66 Fed. Rep. 240, 33 U. S. App. 1, 13 C. C. A. 426; *Loudenback Fertilizer Co. v. Tennessee Phosphate Co.*, 121 Fed. Rep. 298, 58 C. C. A. 220, 61 L. R. A. 402; *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427; *Minnesota Lumber Co. v. Whitebreast Coal Co.*, 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529; *Warden Coal Washing Co. v. Meyer*, 98 Ill. App. 640; *Smith v. Morse*, 20 La. Ann. 220; *Burgess Fibre Co. v. Broomfield*, 180 Mass. 283, 62 N. E. Rep. 367; *Cooper v. Lansing Wheel Co.*, 94 Mich. 272, 54 N. W. 39, 34 Am. St. Rep. 341; *Hickey v. O'Brien*, 123 Mich. 611, 82 N. W. 241, 49 L. R. A. 594, 81 Am. St. Rep. 227; *Dailey Co. v. Clark Can. Co.*, 126 Mich. 591, 87 N. W. Rep. 761; *Ames-Brooks Co. v. Aetna Ins. Co.*, 83 Minn. 346, 86 N. W. 344; *East v. Cayuga Lake Ice Co.*, 21 N. Y. Suppl. 887; *Miller v. Leo*, 35 N. Y. App. Div. 589, 165 N. Y. 619, 59 N. E. 1126. Compare *Berk v. International Explosives Co.*, 7 Comm. Cas. 20. Even such an agreement had been, but, it is submitted, erroneously held to be without consideration. *Bailey v. Austrian*, 19 Minn. 535; *Cool v. Cunningham*, 25 S. C. 136; *Woodward v. Smith*, 109 Wis. 607, 85 N. W. 424. See also *Burton v. Great Northern Ry. Co.*, 9 Ex. 507; *American Cotton Oil Co. v. Kirk*, 68 Fed. Rep. 791, 34 U. S. App. 60, 15 C. C. A. 540; *Colum-*

bia Wire Co. v. Freeman Wire Co., 71 Fed. Rep. 302; *Crane v. Crane*, 105 Fed. Rep. 869, 45 C. C. A. 96; *Cold Blast Transportation Co. v. Kansas City Bolt Co.*, 114 Fed. Rep. 77 (C. C. A.), 57 L. R. A. 696, 52 C. C. A. 25; *Morrow v. Southern Ex. Co.*, 101 Ga. 810, 28 S. E. 998; *Savannah Ice Co. v. American Refrigerator Co.*, 110 Ga. 142, 35 S. E. 280; *Vogel v. Pekoc*, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491; *W. H. Purcell Co. v. Sage*, 90 Ill. App. 160; s. c., *sub nom.*, 189 Ill. 79, 59 N. E. 541; *American Refrigerator Co. v. Chilton*, 94 Ill. App. 6; *Jordan v. Indianapolis Co.* (Ind. App.), 61 N. E. 12; *Benjamin v. Bruce*, 87 Md. 240, 39 Atl. 810; *Michigan Bolt Works v. Steel*, 111 Mich. 153, 69 N. W. 241; *Tarbox v. Gotzian*, 20 Minn. 139; *Beyerstedt v. Winona Mill Co.*, 49 Minn. 1, 51 N. W. 619; *Rafolovitz v. American Tobacco Co.*, 29 Abb. N. C. 406; *Gulf, etc., Ry. Co. v. Winton*, 7 Tex. Civ. App. 57, 26 S. W. 770; *Hoffman v. Maffoli*, 104 Wis. 630, 80 N. W. 1032, 47 L. R. A. 427; *Teipel v. Meyer*, 106 Wis. 41, 81 N. W. 982. Further illustrations of illusory promises may be readily found. Thus: An agreement between parties "that they will in the future make such contract as they may then agree upon amounts to nothing." *Shepard v. Carpenter*, 54 Minn. 153, 55 N. W. 906. An agreement to give a lease of premises to be first altered according to plans "to be mutually agreed upon" is unenforceable. *Mayer v. McCreery*, 119 N. Y. 434, 23 N. E. 1045. See also *Wald's Pollock, Contracts* (3d ed.), p. 49.

be enforced.⁹ This principle is not peculiar to the law of sales, but finds illustration throughout the law of contracts.¹⁰

§ 169. **Fixing of the price in the alternative.**—The parties sometimes agree that the amount of the price shall vary according to the happening, or failure to happen, of a future event. Such an agreement contains all the necessary requisites of a contract, but may be used as a means of making a wager. In such a case the agreement would be contrary to public policy. The determining question seems to be — Did the event, upon which the raising or lowering of the price was to depend, so affect the value of the property as to justify the supposition that the variation in price followed a real or supposed variation in value? If so, the contract is lawful.¹¹ If, however, the event had no real or supposed relation to the value of the property, the transaction is a wager. And, likewise, even though the event had a relation to the value of the property, if the difference in price according to the happening

⁹ Illustrations of such promises are: *Guthing v. Lynn*, 2 B. & Ad. 232, an agreement by the buyer of a horse to give £5 more or the buying of another horse, if the horse proved lucky. *Gelston v. Sigmund*, 27 Md. 334, an agreement to pay the same rent the lessor "might be able to obtain from other parties." The suit here was for specific performance. *Buckmaster v. Consumers' Ice Co.*, 5 Daly, 313, an agreement to sell ice at such price as would give the seller a net profit "not to exceed \$1 per ton."

¹⁰ *Wald's Pollock, Contracts* (3d ed.), 48.

¹¹ Thus in *Ferguson v. Coleman*, 3 Rich. L. 99, the buyer of land promised to pay as the price \$902.58 if cotton should rise to eight cents by November 1st, and, if not, to pay \$500. The contract related to a purchase of real estate, but for the question here under consideration this is immaterial. The court held the plaintiff entitled to recover the larger sum on proof that cotton had risen by November 1st to over eight cents,

saying: "The objection to the agreement that it is a wager is plainly inapplicable, for the parties had an interest in the contingency. The defendant purchased the land at the lowest price unconditional, but contracted to pay a larger sum if the value should be enhanced by the increased value of the product." Decisions involving the same point are: *Newell v. Smith*, 53 Conn. 72, 3 Atl. 674; *Plumb v. Campbell*, 129 Ill. 101, 18 N. E. 790; *Wolf v. National Bank*, 178 Ill. 85, 52 N. E. 896; *Phillips v. Gifford*, 104 Iowa, 458, 73 N. W. 1033; *Deyo v. Hammond*, 102 Mich. 122, 60 N. W. 455, 25 L. R. A. 719; *Kirkpatrick v. Bonsall*, 72 Pa. St. 155. See also *United States v. Olney*, 1 Abb. (U. S.) 275; *Lynch v. Rosenthal*, 144 Ind. 86, 42 N. E. 1103, 31 L. R. A. 835, 55 Am. St. Rep. 168; *Dion v. St. John Baptiste Soc.*, 82 Me. 319, 19 Atl. 825; *Miller v. Eagle, etc., Ins. Co.*, 2 E. D. Smith, 268; *Dunham v. St. Croix Mfg. Co.*, 34 N. Bruns. 243.

or failure to happen of the contingency is wholly out of proportion to any possible difference in value of the goods.¹² It may be noticed that the same principle applies where the value of the goods is to be increased or diminished according to chance.¹³

§ 170. **The price may be payable in any personal property.**—The provision of the Sales Act providing that the price may be paid in any personal property instead of limiting the possibility to money may seem at first sight a noticeable change in the law. It has doubtless been universally said that the price must be payable in money. This statement seems to have been copied from the Roman Law without observation of essential differences between that law and the common law. The Roman Law allowed certain contracts to be made with a freedom from formality not permitted in other kinds of contracts. Among the favored contracts was the contract of sale. Since peculiar rules were applicable to such a contract it was necessary to determine sharply its boundary lines, and a contract of exchange was held to be not included in the designation of a contract of sale. In our law, however, there is no different rule applicable to a contract of sale from that which is applicable to a contract of exchange. It would seem unfortunate in codifying the law of sales to exclude contracts of exchange which turn on precisely the same principles and which differ, if at all, only in name. The only doubtful point indeed, in regard

¹² *Brogden v. Marriott*, 3 Bing. N. C. 473; *Rourke v. Short*, 5 E. & B. 904. In the former case the defendant sold the plaintiff a horse on the terms that the price should be £200, if within one month after the date of the agreement it trotted eighteen miles in an hour, but one shilling if it failed to do so. This was held to be a wager. It will be noticed that in this case the determining event affected the value of the horse, but the disproportion between £200 and one shilling is so great as to preclude the supposition that one shilling was fixed as the real value of the horse in case it could not trot eighteen miles in an hour. Compare *Newell v. Smith*, 53 Conn. 72, 3 Atl. 674; *Deyo*

v. Hammond, 102 Mich. 122, 60 N. W. 455, 25 L. R. A. 719.

¹³ Thus in *Taylor v. Smetten*, 11 Q. B. D. 207, a sale at a fixed price of packets containing a pound of tea and a coupon entitling the purchaser to a prize, the amount of which was not determined until after the sale, was a lottery within the meaning of an English statute. On the other hand in *Carlill v. Carbolic Smoke Ball Co.*, [1892] 2 Q. B. 484, [1893] 1 Q. B. 256, a sale of a smokeball coupled with a promise to pay £100 if the smokeball properly used failed to effect a cure, was held to create a valid contract to pay this sum on the happening of the condition.

to exchanges, is whether they differ even in that respect. An exchange has been held in this country, universally, to be within the section of the Statute of Frauds relating to the sale of goods.¹⁴ So in the construction of other statutes the word "sale" has been held to include transactions for other than a money price.¹⁵ It is true that the count for goods sold and delivered could not be maintained by proof of an exchange,¹⁶ and probably the same doctrine applies to a count for goods bargained and sold. The reason for this, however, is probably not so much because the counts make use of the word "sold," as because the common counts were based on the fiction of an implied promise arising from a money debt. There seems no warrant for supposing that *indebitatus assumpsit* would lie in any case for failure to deliver goods, although the action of debt for breach of a promise to deliver specific goods was known to the common law.¹⁷ The price, though it need not, therefore, be payable in money, must be payable in personal property. Our law has special doctrines distinguishing contracts in regard to land from contracts in regard to personalty; so that if the bargain on either side relates to land, the transaction is not within the terms of the Sales Act, or within the scope of this book.

§ 171. A reasonable price is payable where the price is not fixed.

— Whether the parties make an executed sale or an executory

¹⁴ *Supra*, § 56.

¹⁵ *Gallus v. Elmer*, 193 Mass. 106.

In this case a transfer by a dealer of his whole stock of merchandise outside his usual course of business in satisfaction of a pre-existing debt, was held a sale in bulk within the meaning of the Massachusetts Statute 1903, c. 414, making such a sale void as against creditors of the seller unless the requirements of the statute are complied with. The court said: "While it is true that in its strictest sense a sale is a transfer of personal property in consideration of money paid or to be paid, still in the interpretation of statutes it is often held to include barter, and any transfer of personal property for a valuable consideration." "In a general and

popular sense, the sale of an article signifies the transfer of property from one person to another for a consideration of value, without reference to the particular mode in which the consideration is paid." *Bigelow, C. J.*, in *Howard v. Harris*, 8 Allen, 297, 299. And accordingly it was held in that case that where the consideration for the transfer of the ownership of a horse consisted of intoxicating liquors which the buyer of the horse was not legally authorized to sell, the transaction was a sale within the meaning of a statute prohibiting the sale of intoxicating liquors.

¹⁶ *Harrison v. Luke*, 14 M. & W. 139.

¹⁷ *Chitty, Pleading*, *109.

contract to sell, the buyer must pay a reasonable price, if no price is agreed upon. This obligation of the buyer is sometimes contractual and sometimes *quasi-contractual*. If a buyer orders a barrel of flour from his grocer, it is the actual intent and understanding of the parties that the buyer will pay a reasonable price. So in the case of a contract to sell; if a buyer order a carriage made to order and the carriage builder agrees to build it, nothing being said as to the price, the parties intend and understand that a reasonable price shall be paid. The law enforces their intention in this respect as in other respects.¹⁸ The obligation of the buyer to pay a reasonable price may, however, be based on an obligation imposed by the law as distinguished from a contractual obligation. If goods are transferred with the expectation on both sides that they are to be paid for, the supposition of a gift being, therefore, excluded, the buyer will not be allowed to keep them and refuse to pay for them. This situation will generally arise where the means which the parties contemplated for fixing the price have, for any reason, proved ineffectual. One instance of this sort is provided for expressly in section 10 of the Sales Act.¹⁹

§ 172. **What is a reasonable price?**—The reasonable price or value of goods is generally the market price at the time and place

¹⁸ *Acebal v. Levy*, 10 Bing. 376; *Hoadly v. McLaine*, 10 Bing. 482; *Valpy v. Gibson*, 4 C. B. 837, 864; *Shealy v. Edwards*, 73 Ala. 175, 49 Am. Rep. 43; *Greene v. Lewis*, 85 Ala. 221, 4 So. 740, 7 Am. St. Rep. 42; *McEwen v. Morey*, 60 Ill. 32; *Jenkins v. Richardson*, 6 J. J. Marsh. 441, 22 Am. Dec. 82; *Taft v. Travis*, 136 Mass. 95; *Lovejoy v. Michels*, 88 Mich. 15, 40 N. W. 901, 13 L. R. A. 770; *Stout v. Carruthersville Hardware Co.*, Mo. App. , 110 S. W. 619; *Livingston v. Wagner*, 23 Nev. 53, 42 Pac. 290.

¹⁹ Another illustration may be found in *Bradley v. Rea*, 14 Allen, 20, 103 Mass. 188, 4 Am. Rep. 524. In this case the agreement for a fixed price was made on Sunday and was consequently invalid. The sale itself,

however, was not avoided. The case of a sale of necessities to an infant furnishes still another illustration. The infant is bound to pay a reasonable price, not that which he agreed to pay. See *supra*, § 21. Similarly in the case of a lunatic. See *supra*, § 34. Again, if goods are furnished to a married woman, on the credit of her husband under circumstances which bind the husband to pay, the same consequences follow. See *supra*, § 48. So where a contract calls for dry wood and green wood was furnished and accepted by the buyer, but not as performance of the contract, it was held the seller could not recover the contract price, but only a reasonable price. *Duvall v. Ferwerda*, 146 Mich. 13, 108 N. W. 1115.

fixed by the contract or by law for the delivery of the goods.²⁰ Under special circumstances of unnatural conditions in the market, the market price does not furnish the only test. In the leading case upon this point,²¹ the court said: A reasonable price "may or may not agree with the current price of the commodity at the port of shipment at the precise time when such shipment is made. The current price of the day may be highly unreasonable from accidental circumstances, as on account of the commodity having been purposely kept back by the vendor himself, or with reference to the price at other ports in the immediate vicinity, or from various other causes." This doctrine has been applied in cases where the market has been monopolized.²²

§ 173. Fixing price by valuation—Provisions of Sales Act.—

Sec. 10. SALE AT A VALUATION.—(1.) Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person, without fault of the seller or the buyer, cannot or does not fix the price or terms, the contract or the sale is thereby avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2.) Where such third person is prevented from fixing the price or terms by fault of the seller or the buyer, the party not in fault

²⁰ *Henckley v. Hendrickson*, 5 McLean, 170; *Taft v. Travis*, 136 Mass. 95; *Deutsch v. Pratt*, 149 Mass. 415, 21 N. E. 1072; *Deck v. Feld*, 38 Mo. App. 674; *Althouse v. Alvord*, 28 Wis. 577. In *Greene v. Bateman*, 2 Woodb. & M. 359, shingles were sold and delivered "at \$3.25," but there was a misunderstanding as to whether this price was for a bunch of shingles or for 1,000 shingles. After the dispute arose the buyer offered to return the shingles or pay for them by the thousand, but the seller refused to accept them and insisted upon being paid \$3.25 a bunch. The buyer, thereupon, kept and sold the

shingles. The court held that had the buyer returned the shingles or set them apart and given notice that he would not keep them and never afterward intermeddled with them, he would not have been liable, but as he resold them, he was liable for "the price received for them, deducting the usual charges and commission."

²¹ *Acebal v. Levy*, 10 Bing. 376.

²² *Lovejoy v. Michels*, 88 Mich. 15, 49 N. W. 901, 13 L. R. A. 770; *Kountz v. Kirkpatrick*, 72 Pa. St. 376, 13 Am. Rep. 687. See also *Smith v. Griffith*, 3 Hill, 333, 38 Am. Dec. 639.

may have such remedies against the party in fault as are allowed by Parts IV and V of this act.²³

§ 174. **Effect of a condition requiring valuation — Transfer of property.**—The question provided for in this section of the statute depends on principles not peculiar to the law of sales, but involved in many forms of contract. The requirement of valuation is in such a case an express condition, or a condition implied in fact, qualifying the obligation of the buyer to pay the price. Instead of promising to pay a specified price or a reasonable price, he promises to pay such price only as the valuers shall fix. In the nature of the case this promise cannot be performed unless the valuation first takes place. Such a condition has sometimes been called a necessary condition, or an inherent condition.²⁴ The valuation may also be a condition precedent to the transfer of the property in the goods. This, however, is not necessarily the case, as previously shown.²⁵ A seller may transfer the property though the price has not yet been fixed by the valuers. The question is one of intention.²⁶ If an immediate transfer of the property was

²³ The wording of this section is slightly varied from section 9 of the English statute. That section of the English act makes no reference to terms other than the price. The section in the American draft by including the word "terms" applies the same rule which is applicable in case of a price to be fixed by valuation to other terms of the contract to be fixed by a third person. Subsection (1) of the English statute also does not contain the words "without fault of the seller or the buyer." Subsection (2) would doubtless be held in England, however, to have the effect of limiting subsection (1) to the case where neither party was in fault. Subsection (2) of the English act gives the injured party, where the prevention has been caused by either seller or buyer, an action for damages against the party in fault. There seems no reason, however, why the injured party should not have

any appropriate remedy given to the buyer or seller where the contract has been broken by the other party. Thus: If title to the goods has passed the injured party should have the right of rescission.

²⁴ James, L. J., in *Ex parte Collins*, L. R. 10 Ch. 367, 372.

²⁵ *Supra*, § 167.

²⁶ There are, indeed, a few expressions in the cases which are at variance with the statement in the text that the property may pass. See *Elberton Hardware Co. v. Hawes*, 122 Ga. 858, 50 S. E. 964, and cases cited. These are based upon a misunderstanding of the Roman Law. In that law it was held that until the price was fixed by valuation the sale was null. This doctrine, however, is based on two rules of the Roman Law. In the first place, as previously stated, *supra*, § 170. for reasons peculiar to Roman jurisprudence, there could be no sale without a fixed price. In

agreed upon, the buyer being credited for the price, the property will, therefore, pass. If, however, the seller's promise was executory, it will generally be subject to a condition that the price be paid simultaneously with the transfer of the property. If such a condition exists, whether expressed or implied, it is obvious that no liability on the part of the seller can arise until the price is not only fixed by the valuation, but is also tendered. One may suppose a case, however, where the promise of the seller though executory is not subject to such a condition. For instance, if the seller agreed to deliver on a fixed date, the buyer to have thirty days' credit for the price, which should be determined by valuation. Even in such a case if it became evident before the time for the delivery of the goods that the valuation was not going to take place for any reason, the seller would be excused from performing his promise.²⁷ Frequently it will not be apparent from the terms of the bargain at what moment the parties intended the property to pass, and for this reason resort must be had to rules of presumption. In England it is a rule of presumption that where the seller is bound to do some act in reference to the goods for the purpose of ascertaining the price, the property does not pass until such thing be done.²⁸ This rule prevails in substance in many of the United States,²⁹ and where it prevails it seems that the conclusion is justified that "strong proof would no doubt be required to show that an immediate sale was intended, for the transaction should be considered *prima facie* as an agreement to sell by analogy to that rule."³⁰ This rule of presumption, however, has been abolished in some of the United States,³¹ and has not been included in the American Sales Act. Accordingly in jurisdictions where the rule is not enforced, either because of

the second place, no sale under the Roman Law transferred title to the property. Not only delivery but actual payment of the price was essential. Consequently, a sale in the Roman Law meant an executory contract, not a transfer of the property; and when the Roman lawyers say that the sale is null where no valuation has been made, they are not referring to the question of transfer

of the property at all, but to the question of whether a valid contract to sell exists.

²⁷ See *infra*, §§ 576-578.

²⁸ English Sale of Goods Act, § 18, rule 3. See *infra*, § 266.

²⁹ See *infra*, § 269.

³⁰ Benjamin, Sale (5th Eng. ed.), 145.

³¹ See *infra*, § 269.

the passage of the Sales Act or otherwise, the broad general presumption would be applicable that where there is an unconditional contract to sell specific goods in a deliverable state, the property in the goods presumably passes to the buyer when the contract is made.³² It may be argued that this is not an unconditional contract until the valuation is made, but the condition of valuation seems properly attached to the obligation to pay the price rather than to the contract to sell the goods. The qualification of the seller's promise is simply that dependency which habitually exists in a contract to sell, namely, that failure of the buyer, actual or prospective, to fulfill his obligation will excuse the seller from his obligation.³³

§ 175. **Failure of valuation without fault of either party.**—If the valuation fails without fault of either party, it must naturally follow that an obligation conditional upon such valuation cannot be enforced. That is, the promise of the buyer to pay the price is necessarily discharged. A question may indeed be raised as to the meaning of the condition, and this has been suggested in the civil law, namely, whether the contract in naming a particular valuer fairly means more than to designate a "reasonable man" and, therefore, whether it is not within the terms of the contract to substitute another reasonable man for the one specially designated. Both the Roman Law³⁴ and our law have answered this question in the negative, and with reason. It must be assumed that the parties laid weight on the particular individuality of the valuer. Accordingly if the valuer either dies,³⁵ or refuses to act,³⁶ the buyer cannot be compelled to pay the price because of the condition in his obligation, and the seller, similarly, if he has not already transferred the property, cannot be compelled to do so either because his promise to transfer is itself expressly con-

³² Sales Act, § 19, rule 1. See *infra*, § 264.

³³ See *infra*, §§ 576-578.

³⁴ Justinian's Institutes, 3, 24, 1; Code, 4, 38, 15. See Moyle, Contract of Sale, 70. So Pothier, Contract of Sale, § 24, and the French Civil Code, Art. 1592.

³⁵ Firth v. Midland R. R. Co., L. R. 20 Eq. 100.

³⁶ Thurnell v. Balbirnie, 2 M. & W. 786; Elberton Hardware Co. v. Hawes, 122 Ga. 858, 865, 50 S. E. 964. See also Cooper v. Shuttleworth, 25 L. J. Ex. 114; Vickers v. Vickers, L. R. 4 Eq. 529; Milnes v. Gery, 14 Ves. Jr. 400; Wilks v. Davis, 3 Mer. 507; Hutton v. Moore, 26 Ark. 382; Fuller v. Bean, 34 N. H. 290.

ditional, or because the present or prospective failure on the part of the buyer to pay the price excuses the counter-obligation to transfer the property in the goods. If already transferred to the buyer before it appears that the valuation cannot be made, either party to the bargain should have the right to rescind it if the other party can be put in the same position which he was in before the bargain was made.³⁷ It may, however, happen that the buyer has made use of the goods or otherwise has become unable to restore them. In such a case the seller is entitled on principles of *quasi*-contract to recover the fair value of the goods.³⁸

§ 176. **Failure of valuation owing to the fault of either party.—**

In any case where from its nature a contract requires some action by one party or the other, or the co-operation of both, there is an implied promise to perform the act or to give the co-operation even though the promise is not expressed. Accordingly if either party was to select a valuer or notify a man selected for a valuer, or submit property to valuation and fails to do so, he has broken his contract. He is, therefore, liable in damages. Specific performance will not, however, be given of such a contract.³⁹ This is in accordance with the general principle of equity denying specific performance of all kinds of agreements for arbitration.⁴⁰ The case may be further supposed, however, that possession without

³⁷ Benjamin, Sale (5th Eng. ed.), 145.

³⁸ Clarke v. Westrope, 18 C. B. 765; Elberton Hardware Co. v. Hawes, 122 Ga. 858, 865, 50 S. E. 964. See also Deyo v. Hammond, 102 Mich. 122, 60 N. W. 455, 25 L. R. A. 719. In that case plaintiff sold the defendant a horse for \$800 cash, and an agreement by the defendant to pay an additional \$100 if the horse could trot as fast as one owned by the defendant within ninety days; the test to be made by one M. The trial did not take place owing to the sickness of the horses. It was held, nevertheless, that the defendant was liable to pay the additional \$100, it appearing from the evidence that the horse sold could trot faster than the other one,

although no test had been made by M. or any one else since the sale. In this case it is to be observed that the defendant kept the horse beyond the period of ninety days, and also that the agreement itself showed the parties considered an additional \$100 a reasonable amount if the horse had the speed which the evidence showed it to possess. The decisions in this note make it evident that there is no difficulty in title being transferred though the valuation does not and cannot take place.

³⁹ Vickers v. Vickers; L. R. 4 Eq. 529.

⁴⁰ The cases are collected in Ames, Cases Equity Jurisdiction, p. 68, note.

title or that title without possession has passed to the buyer, and that subsequently he wrongfully fails to perform, or prevents performance, so that the valuation cannot take place. In such a case the seller could not only maintain an action for damages, but would be entitled to any other appropriate remedies allowed to an unpaid seller.⁴¹ If neither the property nor possession had passed to the buyer, the seller could only maintain an action for damages, with a possible exception that if the goods could not readily be resold for a reasonable price, the seller might be allowed to treat the goods as the buyer's and sue for a reasonable price.⁴² In insurance policies an appraisement or valuation of the injury is frequently made a condition precedent to any right of action. This condition may, however, be excused by the misconduct of the company or its appraiser.⁴³ It will be noticed that the situation in such a case is analogous to that in a sale where title to the goods has passed and they have been used by the buyer. The insurance contract has become binding by the performance of the consideration on the part of the insured; that is, by the payment of the premium, and the loss having taken place, it is impossible to remit the parties to their original position. The plaintiff is, therefore, entitled to recover the amount of his loss as estimated by a jury.

§ 177. **How far the valuation is conclusive upon the parties.**—In the absence of fraud or mistake, the price fixed by agreed valuers is conclusive upon the parties.⁴⁴ The analogy is strong between this question and that presented where the certificate of

⁴¹ As to the nature of these remedies, see *infra*, §§ 501–593.

⁴² See Sales Act, § 63 (3), and *infra*, §§ 560, 562–574.

⁴³ In *Brock v. The Dwelling-House Ins. Co.*, 102 Mich. 583, 61 N. W. 67, 26 L. R. A. 623, it was held this condition was excused by the unreasonable action of the appraiser appointed by the company. The court say (p. 593): "It is well settled that where the conduct of the company's appraiser in refusing to agree on an umpire is inexcusable, and virtually amounts to a refusal to proceed with the appraisement, the

fact that the appraisement was not concluded before suit brought will not bar an action on the policy." *McCullough v. Insurance Co.*, 113 Mo. 606, 21 S. W. 207; *Bishop v. Insurance Co.*, 130 N. Y. 488, 29 N. E. 844; *Uhrig v. Insurance Co.*, 101 N. Y. 362, 4 N. E. 745; *Bradshaw v. Insurance Co.*, 137 N. Y. 137, 32 N. E. 1055. Compare *Cooper v. Shuttleworth*, 25 L. J. Ex. 114.

⁴⁴ *Norton v. Gale*, 95 Ill. 533, 35 Am. Rep. 173; *New England Trust Co. v. Abbott*, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271; *Wilcox v. Young*, 66 Mich. 687, 33 N. W. 765.

an architect or engineer is made a condition precedent for any liability for the price. In such a case the general rule is that the certificate or refusal of it is conclusive in the absence of fraud or such mistake, as either implies bad faith or a failure to exercise an honest judgment upon the real question involved.⁴⁵ In New York and a few other States, however, the court apparently exercises a more liberal right to revise the conclusion of the architect or engineer. If his action was unreasonable the condition seems disregarded.⁴⁶ In England the court goes to the other extreme. The fraudulent collusion of the architect or engineer, or similar official, with one of the parties, will invalidate the decision so far as the other party is concerned⁴⁷ there, as well as in this country.⁴⁸ It has been further held, however, in England

In the civil law "if the valuer named fixed an outrageously unfair price, it is very generally held that it could be rectified by recourse to an action." Moyle, *Sale in the Civil Law*, 70. So Pothier, *Contract of Sale*, § 24. But Bechman, *Der Kauf*, II, § 217, holds otherwise.

⁴⁵ *Chicago, etc., R. R. Co. v. Price*, 138 U. S. 185, 11 S. Ct. 290, 34 L. ed. 917; *Kennedy v. United States*, 24 Ct. Cl. 122; *Cook v. Foley*, 154 Fed. Rep. 41, 81 C. C. A. 237; *Carlisle v. Corrigan*, 83 Ark. 136, 103 S. W. 620; *Dingley v. Greene*, 54 Cal. 333; *Fowler v. Deakman*, 84 Ill. 130; *Gilmore v. Courtney*, 158 Ill. 432, 41 N. E. 1023; *Merrill v. Gore*, 29 Me. 346; *Baltimore & Ohio R. R. Co. v. Brydon*, 65 Md. 198, 611, 3 Atl. 306, 9 Atl. 126, 57 Am. Rep. 318; *Palmer v. Clark*, 106 Mass. 373; *Beharrell v. Quimby*, 162 Mass. 571, 39 N. E. 407; *White v. Abbott*, 188 Mass. 99, 74 N. E. 305; *Shaw v. First Baptist Church*, 44 Minn. 22, 46 N. W. 146; *Standard Construction Co. v. Brantley Granite Co.*, 90 Miss. 16, 43 So. 300; *McGregor v. J. A. Ware Const. Co.*, 188 Mo. 611, 87 S. W. 981; *Sheyer v. Pinkerton Const. Co.* (N. J.), 59 Atl. 462; *Chism v. Schipper*, 51 N. J. L. 1,

16 Atl. 316, 2 L. R. A. 544, 14 Am. St. Rep. 668.

⁴⁶ *Anderson v. Imhoff*, 34 Neb. 335, 51 N. W. 854; *Van Keuren v. Miller*, 71 Hun, 68; *Nolan v. Whitney*, 88 N. Y. 648; *Vought v. Williams*, 120 N. Y. 253, 24 N. E. 195, 8 L. R. A. 591, 17 Am. St. Rep. 634; *Thomas v. Stewart*, 132 N. Y. 580, 586, 30 N. E. 577; *Macknight Flintic Stone Co. v. City of New York*, 160 N. Y. 72, 86, 54 N. E. 661; *Whelen v. Boyd*, 114 Pa. St. 228, 6 Atl. 384; *Sullivan v. Byrne*, 10 S. C. 122; *Norfolk, etc., Ry. Co. v. Mills*, 91 Va. 613, 22 S. E. 556; *Washington Bridge Co. v. Land & River Improvement Co.*, 12 Wash. 272, 40 Pac. 982; *Bentley v. Davidson*, 74 Wis. 420, 43 N. W. 139; *Wendt v. Vogel*, 87 Wis. 462, 58 N. W. 764.

⁴⁷ *Batterbury v. Vyse*, 2 H. & C. 42.

⁴⁸ *St. Louis, etc., R. R. Co. v. Kerr*, 153 Ill. 182, 38 N. E. 638; *Crawford v. Wolf*, 29 Iowa, 567; *Smith v. White*, 5 Neb. 405; *Whelen v. Boyd*, 114 Pa. St. 228, 6 Atl. 384; *Mills v. Paul* (Tex. Civ. App.), 30 S. W. 558. See also *Linch v. Paris Lumber Co.*, 80 Tex. 23, 15 S. W. 208; *Markey v. Milwaukee*, 76 Wis. 349, 45 N. W. 28.

that a provision in the contract that an architect's decision should be final and should not be set aside or attempted to be set aside "for any pretense, suggestion, charge, or insinuation of fraud, collusion, or confederacy" debarred a party from attacking the architect's decision on the ground of fraud.⁴⁹ It may be doubted whether this decision would be followed in this country, where it is generally held that fraud or refusal to exercise an honest judgment, though without collusion with the defendant, excuses the plaintiff from performance of a condition requiring a certificate.⁵⁰

⁴⁹ *Tullis v. Jacson*, [1892] 3 Ch. 441. Compare *Redmond v. Wynne*, 13 N. S. Wales (Law), 39.

⁵⁰ *North American Ry. Const. Co. v. R. E. McMath Surveying Co.*, 116 Fed. Rep. 169, 54 C. C. A. 27; *Michaels v. Wolf*, 136 Ill. 68, 26 N. E. 384; *McDonald v. Patterson*, 186 Ill. 381, 57 N. E. 1027; *Foster v. McKeown*, 192 Ill. 339, 61 N. E.

514; *Eldridge v. Fuhr*, 59 Mo. App. 44; *Chism v. Schipper*, 51 N. J. L. 1, 16 Atl. 316, 2 L. R. A. 544, 14 Am. St. Rep. 668; *Bradner v. Roffsell*, 57 N. J. L. 32, 29 Atl. 317. See also *Arnold v. Bournique*, 144 Ill. 132, 33 N. E. 530, 20 L. R. A. 493, 36 Am. St. Rep. 419; *Bean v. Miller*, 69 Mo. 384; *Justice v. Elwert*, 28 Or. 460, 43 Pac. 649.

CHAPTER VI.

CONDITIONS AND WARRANTIES.

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§ 178. Conditions and their effect—Provisions of Sales Act.—The Sales Act provides in regard to conditions in contracts to sell or sales, as follows:

Sec. 11. EFFECT OF CONDITIONS.—(1.) Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to

proceed with the contract or sale or he may waive performance of the condition. If the other party has promised that the condition should happen or be performed, such first-mentioned party may also treat the non-performance of the condition as a breach of warranty.

(2.) Where the property in the goods has not passed, the buyer may treat the fulfillment by the seller of his obligation to furnish goods as described and as warranted expressly or by implication in the contract to sell as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods.

The Sales Act adopts a different terminology from that used in the Sale of Goods Act, and a few words must be given in explanation of the terminology used here and elsewhere in regard to the same subject, for much of the confusion in this difficult subject is traceable to terminology, which is either incorrect or ambiguous.

§ 179. **Meaning of "condition."**—The term "condition" is said, probably with truth, to have been imported into the law of contracts from the law of conveyancing.¹ But in England inaccurate use of the term has become common and American courts have too often been content to follow the expressions of the English courts in regard to the matter.² Conditions in contracts have been divided according to the period of time at which they come into operation, into precedent conditions, concurrent conditions, and subsequent conditions. It is only the first of these which is material here in connection with the subject of warranty, and when the word "condition" is used alone, it is generally a condition precedent which is meant. Condition precedent is, however, a relative term. It invites the inquiry, precedent to what? It may be either precedent to liability on an obligation of one party or the other, or it may be precedent to the existence of a con-

¹ Chalmers, Sale of Goods Act (5th ed.), 174.

² In Chalmers, Sale of Goods Act (5th ed), 174, the author says: "In conveyancing a distinction was drawn between 'conditions' and 'covenants' which in contracts has now become obliterated." This statement certainly goes beyond what the facts

warrant; though the distinction is frequently not observed, it has not been entirely lost sight of; it would be most unfortunate if it should be. The respective meanings of condition on the one hand and promise, or covenant, on the other, are very distinct, and a distinct word should be reserved for each meaning.

tract or precedent to the transfer of the property. Conditions are also divided into express conditions and implied conditions, according to the method of construction needed to establish them.³

§ 180. **Illustrations.**—The meaning of condition is well understood and the word is used in one and the same sense by courts and lawyers in all jurisdictions in most classes of cases. It is only in the law of sales that a difference of usage prevails. Where goods are described in a contract of sale the seller's promise to furnish the goods is often called a condition. The authority most often cited for this modern use of the word "condition" is a passage from an opinion from Lord Abinger: "Two things have been confounded together. A warranty is an express or implied statement of something which the party undertakes shall be part of a contract; and, though part of the contract, yet collateral to the express object of it. But in many of the cases, some of which have been referred to, the circumstance of a party selling a particular thing by its proper description has been called a warranty, and a breach of such contract a breach of warranty; but it would be better to distinguish such cases as a noncompliance with a contract which a party has engaged to fulfill; as, if a man offers to buy peas of another, and he sends him beans, he does not perform his contract; but that is not a warranty; there is no warranty that he should sell him peas; the contract is to sell peas, and if he sell him anything else in their stead it is a nonperformance of it. So, if a man were to order copper for sheathing ships—that is, a particular copper, prepared in a particular manner—if the seller send him a different sort, in that case he does not comply with the contract; and though this may have been considered a warranty, and may have been ranged under the class of cases relating to warranties, yet it is not properly so."⁴ It will be noticed that Lord Abinger does not make use of the word "condition," he is concerned in defining warranty, and endeavoring to bring out the point that a warranty is collateral to the express object of the contract in modern parlance. The obligation of the seller in such a case as that which is put by Lord

³ Express conditions are considered, *infra*, § 186, and implied conditions, *infra*, § 187.

⁴ *Chanter v. Hopkins*, 4 M. & W. 399.

Abinger is now, however, frequently called a condition, and this terminology is made use of in the Sale of Goods Act. It is obvious in the case supposed of a contract to buy and sell peas, if the buyer authorizes the seller to appropriate peas to the bargain, and thereby transfer the property in them, it is a condition precedent to the transfer of title that the goods which the seller attempts to appropriate to the bargain shall be peas, in the same sense that it is a condition precedent to the formation of a simple contract that the parties assent to the same thing; or in the same sense that it is a condition precedent to the liability of a principal that an agent act within the scope of his authority. It is not, however, properly a condition of the buyer's obligation to accept peas or to pay the price; beans are simply not within the terms of the buyer's contract, as Lord Abinger says. Still less is the obligation of the seller either a condition or subject to a condition. He has promised to sell peas and the failure to perform that promise, whether accompanied with an offer to furnish beans or any other vegetable, is a breach of his promise. It is unnecessary to argue at this point whether this promise of the seller is properly called a warranty. The essential thing to bring out is that it is a promise. The buyer's promise is indeed impliedly conditional on the performance by the seller of his promise, and this is so provided in subsection (2) of the section of the Sales Act under consideration,⁵ but this is the general rule in the law of sales, and to call the seller's obligation in this kind of case a condition merely because of the mutual dependency of the buyer's and seller's promises is wholly to confuse legal terminology. In the Sales Act, therefore, and in this book, the word condition is never used in the sense of promise.⁶

⁵ In his annotation of the Sale of Goods Act, Judge Chalmers describes with perfect accuracy the nature of the seller's obligation when he says (5th ed., p. 28): "As used in the act, 'condition' is the equivalent of the old term 'dependent covenant.'" The old terminology is accurate and should be retained. The new terminology suggested is inaccurate and misleading.

⁶ The use of condition which is here deprecated, it must be admitted, has the sanction of eminent judges. *Varley v. Whipp*, [1900] 1 Q. B. 513; *Pope v. Allis*, 115 U. S. 363, 6 S. Ct. 69, 29 L. ed. 393; *Fogg v. Rodgers*, 84 Ky. 558, 2 S. W. 248; *Columbian Iron Works v. Douglas*, 84 Md. 44, 34 Atl. 1118, 33 L. R. A. 103, 57 Am. St. Rep. 362; *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438, 38

§ 181, **Definition of warranty.**—There is no more troublesome word in the law than the word “warranty.” It is constantly used in different senses. It is a common term in the law of insurance, the law of charter parties, and the law of sales. In an insurance policy, the insured can hardly be regarded as making any promises, yet certain provisions in insurance policies are commonly denominated warranties. The effect of calling a provision in an insurance policy a warranty is not that the insured can be sued for breaking a promise, but that the insurer is excused from the performance of his promise; that is, the so-called warranty is in fact a condition qualifying the liability of the insured.⁷ In the law of charter parties, warranty has a wider sense. If a vessel is warranted seaworthy or warranted to be at a certain place, and the vessel is not seaworthy or is not at that place, the effect is two-fold. The charterer may sue the owner of the vessel for breach of a promise⁸ and, furthermore, the charterer is himself excused from performing his promise;⁹ that is, warranty means not only a promise but also that the promise is so essential that performance of it is a condition precedent to the obligation of the other party. Where the word is used in mercantile contracts other than contracts to sell or sales, this is the meaning ordinarily given to it.¹⁰ In the law of sales in England a

N. J. L. 496, 20 Am. Rep. 425; *Fogel v. Brubaker*, 122 Pa. St. 7, 15 Atl. 692; *Jones v. George*, 56 Tex. 149, 42 Am. Rep. 689, 61 Tex. 345, 48 Am. Rep. 280. Contrary usage, however, is equally common.

⁷ May, *Insurance*, § 151.

⁸ *Corkling v. Massey*, L. R. 8 C. P. 395.

⁹ *Olive v. Booker*, 1 Ex. 416; *Bentzen v. Taylor*, [1893] 2 Q. B. 274; *Lowber v. Bangs*, 2 Wall. 728, 17 L. ed. 768; *Davison v. Von Lingen*, 113 U. S. 40, 28 L. ed. 885.

¹⁰ Thus in *Norrington v. Wright*, 115 U. S. 188, 6 S. Ct. 12, 29 L. ed. 366, Mr. Justice Gray said of such a contract that “‘A statement,’ in a mercantile contract, descriptive of the subject-matter, or of some material

incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense which that term is used in insurance and maritime law—that is to say, a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract.” So *Williams, J.*, in *Behn v. Burness*, 32 L. J. Q. B. 204, 206, says: “But with respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine established by principle, as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract it is to be regarded as a warranty,

third meaning is given to warranty; namely, a promise "with reference to goods which are the subject of a contract of sale but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated." That is the warranty is a promise, but performance of the promise is not a condition. This variety of meaning attached to the word "warranty" is a source of confusion, and it is obviously a service to the law to limit the word to one meaning. Accordingly in the Sales Act the word is limited to what is probably its essential meaning — a material promise. It makes no difference under the Sales Act whether this promise is or is not collateral, and as provided in a later portion of the Sales Act, a breach of warranty in a contract to sell or a sale is followed by the same consequences as the breach of a material promise in other contracts; namely, the innocent party has a right to rescind or repudiate the transaction. What promises may be called collateral is indeed so difficult a question that the results reached under the English law cannot always be reconciled with the general statements of the rules of that law. It is believed that no greater simplification can be made in the law of sales than to make it of no importance whether an obligation which forms part of a bargain is collateral or not; and that this simplification is obtained without danger of injustice.

§ 182. **Requirements of warranty under the English law.**—It is commonly said by the English authorities, and by the American authorities which follow the English law, that a warranty is collateral. It is not made wholly clear whether by this is meant collateral in form or in legal effect. There is no doubt that under the English law a warranty is collateral in legal effect, but the

that is to say, a condition on the failure or nonperformance of which the other party may, if he be so minded, repudiate the contract *in toto* and be so relieved from performing his part of it, provided it has not been partially executed in his favor. If, indeed, he has received the whole, or any substantial part, of the consideration for the promise on his part,

the warranty loses the character of a condition, or, to speak more properly, perhaps ceases to be available as a condition and becomes a warranty in the narrow sense of the word, namely, a stipulation by way of agreement, for the breach of which a compensation must be sought in damages."

important question remains, How is a warranty to be identified as such? How is it to be distinguished from other promises? This is something which the English law and English lawyer has never been willing or perhaps able to define entirely.¹¹ Three tests may be supposed, each one of which has doubtless had some weight. These three tests are: (1) Was the promise collateral in form? (2) Was the transaction an executed sale or an executory contract to sell? (3) Did the transaction relate to specific goods? These tests may be considered in order.

§ 183. **A warranty need not be collateral in form.**—It is probable that the form in which the words of the seller are put is instinctively regarded as the essential feature by most lawyers adopting the English doctrine. There is no doubt that the typical warranty is collateral in form. The seller sells a horse and, as a separate statement, says that he warrants him to be sound. In the early English law, it is probable that all warranties were collateral in form, but in the early English law promises implied in fact were not recognized and the doctrine of *caveat emptor* was carried so far that unless the seller expressly said that he warranted the goods there was no obligation imposed upon him in regard to their quality.¹² In the nature of the case, therefore, the seller had to make a separate and distinct promise; that is, a promise collateral in form. At the present day, however, it is clear in England and elsewhere that a promise need not be collateral in form in order to constitute a warranty. When A. contracts to sell B. a sound horse, there is no collateral promise.

¹¹ In the Sale of Goods Act, § 11 (1. B.), it is said that whether a stipulation in a contract is a condition or a warranty "depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract." The authority for this provision in the Sale of Goods Act is *Graves v. Legg*, 9 Ex. 709, and other cases where it is similarly laid down that whether the performance of the duty of one party to the contract is a condition precedent to the liability of the other depends on the

intention of the parties in each case. But in the law of contracts, in the determination of each case the court has the further aid of considering the materiality of the stipulation in question. The Sale of Goods Act affords no such clue.

¹² *Chandelor v. Lopus*, Dyer, 75 A, note, Croke Jac. 4. In this case it was held "that the bare affirmation that it was a bezoar stone without warranting it to be so is no cause of action." See further Ames, *History of Assumpsit*, 2 Harv. L. Rev. 9, and following.

Yet if A. delivers to B. an unsound horse and B. takes title to him, A. is a warrantor of the horse's soundness with precisely the same consequences as if he had sold the horse with a separate statement, "I warrant him sound."¹³ Further, it may be supposed that specified goods are sold in compliance with an order describing the goods desired. A buyer asks for "strap leaf red top turnip seed,"¹⁴ or "large Bristol cabbage seed,"¹⁵ or "rape seed"¹⁶ or bulbs of a named variety.¹⁷ No agreement to sell precedes the actual sale, but when the seller furnishes goods, he is held to warrant that the goods are of the kind asked for, yet the description is not collateral in form. It may be added that it is an undesirable policy to make important distinctions in substantial rights turn upon the form of words in which the transaction was put. Parties do not use language in their ordinary dealings with reference to such distinctions. A. says to B., "I will sell you this sound horse for \$100." Such a promise of soundness is certainly not collateral. Suppose, however, A. said, "I will sell this horse for \$100," and B. inquiring, "is he sound?" and A. replies, "Yes." It may be said that the statement of soundness is collateral, but a rule which distinguishes the rights of the parties in these two cases is not to be commended.

§ 184. **May there be a collateral warranty in an executory contract to sell?**—It is sometimes held that where a seller makes a promise in regard to the goods, there is always a warranty, in the limited English sense of the word, if the property in the goods passes at the time; and, on the other hand, if the property does

¹³ Sale of Goods Act, § 11 (1) (a); *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438, 38 N. J. L. 496, 20 Am. Rep. 425; *Morse v. Union Stock Yards*, 21 Or. 289, 28 Pac. 2, 14 L. R. A. 157. In New York and some other States if B. had taken title to the horse after an opportunity to inspect him and the unsoundness was capable of being discovered by inspection, A. would be under no further liability. See *infra*, § 489.

¹⁴ *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438.

¹⁵ *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13, 78 N. Y. 393, 34 Am. Rep. 544.

¹⁶ *Hoffman v. Dixon*, 105 Wis. 315, 81 N. W. 491, 76 Am. St. Rep. 916.

¹⁷ *Edgar v. Breck*, 172 Mass. 581, 52 N. E. 1083. There was in this case an agreement to sell before the completed sale. The cases last cited are American decisions but the English law is presumably the same. See *Allan v. Lake*, 18 Q. B. 560. Compare, however, *Varley v. Whipp*, [1900] 1 Q. B. 513.

not pass, a promise of the seller, however expressed, in regard to the quality of the goods, is a condition in the English use of that word; that is, the buyer need not take the goods.¹⁸ This does not seem, however, the view adopted by the Sale of Goods Act.¹⁹ In this country there are a number of decisions holding that an executory contract to sell may contain a collateral warranty. In New York and some other States it is held that acceptance of goods under an executory contract to sell ordinarily waives any patent defect in the goods but that such an acceptance does not waive a right of action on an express warranty in such a contract.²⁰ In England if it be admitted that there may be a true warranty in an executory contract, it must necessarily follow from the words of the Sale of Goods Act that in such a contract the buyer must accept the goods although not in conformity with the warranty, and must seek his redress in cross-action, counterclaim, or recoupment. If this is the English law, however, it may be doubted whether it would be followed even in such States as profess to follow the English law of warranty. The rule seems general in the United States that the buyer may reject the goods if they fail to conform to a warranty of quality²¹ or of title.²² If the distinction between a warranty collateral in character and other promises of the seller in regard to the goods is to be allowed to affect the substantial rights of the parties, it is probable that the transfer of title would furnish the best because the most clearly defined test. And although the distinction is not commonly put in that form, the law of those States which purport to follow the English law of warranty is perhaps most accurately expressed by the rule that in any case where the seller's promise is executory the buyer may refuse to accept the goods if they are not in accordance with the seller's promise, what-

¹⁸ This view is taken in *Smith's Leading Cases*, and in *Benjamin, Sale* (5th Eng. ed.), 1003.

¹⁹ Section 11 (1) (b) necessarily presupposes the possibility of a warranty which would not give a right to reject the goods in "a contract of sale." "Contract of sale" is defined in § 62 (1) as including an agreement to sell as well as a sale.

²⁰ See *infra*, § 489.

²¹ *Rubin v. Sturtevant*, 80 Fed. Rep. 930, 51 U. S. App. 286, 26 C. C. A. 259; *Owens v. Sturges*, 67 Ill. 366; *Boothby v. Plaisted*, 51 N. H. 436, 437, 12 Am. Rep. 140.

²² *Nevels v. Kentucky Lumber Co.*, 108 Ky. 550, 56 S. W. 969, 94 Am. St. Rep. 388.

ever form that promise may have taken; and, on the other hand, if the buyer has become owner of the goods, he cannot thereafter return them.²³

§ 185. **Specification of the goods as an essential of collateral warranty.**—A collateral warranty undoubtedly ordinarily applies to specific goods. In the typical case the seller at the time of selling a specified chattel warrants its qualities. Even in the case where the seller contracts to deliver goods of a particular kind and later delivers goods in attempted fulfillment of the contract, whereby according to the English law his obligation in regard to the quality of the goods becomes a warranty,²⁴ the goods have been specified before the seller's obligation is treated as a collateral warranty. Necessarily the possibility of a collateral warranty in regard to unspecified goods can occur only in executory contracts to sell. In regard to such a contract the question seems to be similar to that discussed in the preceding section. If a collateral warranty is possible in the case of an executory contract to sell, it seems that such a possibility is not precluded though the goods are unspecified at the time of the bargain. If the seller's promise to sell his horse "Dobbin" next month with a warranty of soundness imposes merely a collateral obligation on the seller, so that the buyer is obliged to take the horse even though unsound on the day named, it will follow that if the seller promises to sell next month a black horse which he will warrant sound, the buyer there, also, cannot claim that the soundness of the horse is such a part of the seller's promise that unsoundness of the horse enables the buyer to refuse to take title. In either of these cases it is probable that the American law would in any jurisdiction allow the buyer to refuse the horse if not sound,²⁵ and it may be that in such a case as this the English court would make use of the privilege given by the statute to hold that "a stipulation may be a condition though called a warranty in the contract."²⁶

²³ See further *infra*, §§ 600, 608.

²⁴ Sale of Goods Act, § 11 (1) (a).
See further *infra*, § 205.

²⁵ *Rubin v. Sturtevant*, 80 Fed. Rep. 930, 51 U. S. App. 286, 26 C. C. A.

259; *Owens v. Sturges*, 67 Ill. 366;
Boothby v. Plaisted, 51 N. H. 436,
437, 12 Am. Rep. 140.

²⁶ Sale of Goods Act, § 11 (1) (b).

§ 186. **Express conditions.**—An express condition may qualify either the obligation of the seller or that of the buyer; or, it may qualify the obligation of both. This last effect is necessarily produced where the condition is said to be a condition of the contract or sale. Instances of this sort may readily be supposed. The commonest are conditions requiring valuation, or conditions requiring the arrival or acquisition of the goods by the buyer. Such conditions protect both parties. If the condition does not happen, neither party is responsible. On the other hand there may be conditions which qualify merely the obligation of the buyer to take the goods or the obligation of the seller to sell and deliver. Common instances of condition qualifying only the obligation of the buyer to take the goods are conditions that the goods shall be satisfactory to the buyer or to a third person, or that they shall be shipped or delivered within a certain time. Conditions qualifying only the seller's obligation to sell have no great variety because a contract which excuses the seller from selling in a particular contingency generally excuses the buyer from buying in the same contingency. The seller's obligation to transfer title is, however, frequently conditional on payment of the price by the buyer. The commonest type of conditional bargains, so common as to have appropriated to itself the name "conditional sale," is of this type, as is the seller's obligation in a cash sale. In bargains of both these kinds the seller's obligation to transfer title is expressly conditional on the payment of the price by the buyer. In the former, possession is immediately transferred to the buyer but credit given for the price; in the latter, no credit is contemplated. Some of the common types of condition that have thus been referred to may be now treated somewhat more in detail. Bargains conditional upon valuation have already been dealt with,²⁷ so that further treatment of that topic is unnecessary, and conditional sales and cash sales are dealt with in a later chapter.²⁸ Before taking up the express conditions commonly found in bargains, however, it is desirable to say a few words in regard to implied conditions. For the language in which a stipulation is couched may have important re-

²⁷ *Supra*, §§ 173-177.

²⁸ See *infra*, c. X, § 324 *et. seq.*

sults. Whether words in question create a promise or a condition, or both, should always be a preliminary inquiry.

§ 187. **Implied conditions.**—The term “implied conditions” is applied ambiguously in the law both to conditions intended by the parties but not expressed in so many words, and more often to conditions imposed by law because of the inherent injustice of allowing a promise on one side of a bilateral contract to be enforced when the counter-promise has been broken. These types of condition shade into one another by imperceptible gradations, and in contracts to sell especially it is frequently not easy to say absolutely to which type a particular case belongs. Thus, if A. promises to transfer a horse and B. promises to pay \$1,000, B.’s promise is in terms absolute. A condition in such a bargain that A. must deliver the horse before B. can be liable for the price is one imposed by law. There is nothing in the language of B.’s promise on which such a result could be rested. If, on the other hand, B. had promised to pay \$1,000 on delivery of the horse, it would be equally clear that B.’s promise was expressly conditional. The intermediate cases which are perhaps commoner than those at either extreme are more difficult to classify. If B.’s promise was, “I will pay \$1,000 for him,” it may seem that the condition of delivery is clearly expressed by the words “for him” but it is to be observed that there is no impossibility in paying the price in advance, and that if the price of the horse is so paid, the money is as truly paid “for him” as if the price had been paid simultaneously with delivery.²⁹ Probably a fair construction would generally hold such words, however, to make the promise to pay expressly conditional on delivery. Suppose again, the buyer’s promise is to “buy him for \$1,000,” the word “buy” of itself imports more than a promise to pay the price; it means to accept the goods and pay for them. If so, the word “buy” of itself imposes a condition which if called “implied” is not implied in the sense of imposed by the law. Fortunately in most

²⁹ Many of the early cases on conditional contracts were expressly concerned with the problem of whether the word “for” created a condition.

These cases are reviewed by Lord Holt in *Thorp v. Thorp*, 12 Mod. 455, and the rules laid down by him for deciding the question.

cases it does not lead to a material difference in the result whether the condition is express or implied, although it may do so. In case of even a slight breach of an express condition the promisor is as a rule excused.³⁰ In the case of condition imposed by the law, however, on grounds of justice, courts properly can and do use greater freedom in regard to releasing or holding the promisor. If the breach of obligation on the other side has been material, the promisor is excused, but not if the breach is trifling. Again if the breach occurs after the contract has been partly performed, the court will be more ready to excuse a comparatively small breach than if it occurred before any performance.³¹ In any particular case, therefore, it is important to note whether a stipulation expressly or by fair construction of the language used qualifies the defendant's promise, or whether the stipulation in terms merely imposes an obligation upon the plaintiff so that such excuse as the defendant may have because of the plaintiff's nonperformance of the stipulation is due to a condition imposed by the law.

§ 188. **Sales to arrive.**—A bargain either in the form of a contract to sell or of an immediate sale by general usage may be called a "sale to arrive."³² In a contract to sell, the arrival of the goods is a condition precedent to any sale. In a sale, if the goods existed at the time of the bargain but do not arrive, the condition is subsequent, the property in the goods transferred by the

³⁰ Page, *Contracts*, § 61; Langdell, *Summary of Law of Contracts*, § 157.

³¹ These principles are stated in effect in *Graves v. Legg*, 9 Ex. 709. See further Langdell, *Summary of Law of Contracts*, § 158 *et seq.*

³² It is true that in *Neldon v. Smith*, 36 N. J. L. 148, the court said of a sale to arrive: "The contract is executory and does not pass the property in the goods to arrive. It is merely an agreement for the sale and delivery of the articles named at a future period when they shall arrive," and similar statements may be found in other cases. *Shields v. Pettie*, 4 N. Y. 122; *Dike v. Reitlinger*, 23 Hun, 241. Doubtless there

is no liability on either side unless the goods arrive, which is the point courts have been primarily interested in establishing. For this point it is immaterial whether the title passed subject to be divested or whether the bargain was executory. It seems impossible to doubt, however, that the parties may pass title to existing goods subject to a condition subsequent if the goods do not arrive; and where goods in course of transportation are specifically described, and the parties expressly state that they have been bought and sold, it seems most accurate to give their language its natural meaning.

bargain being divested by the failure to arrive. If the vessel arrives but without the goods which were the subject of the bargain, whether the seller's contract was conditional not simply on the arrival of the named vessel but also of the goods is a question of fact. But generally as the power of the seller to deliver the goods and the value of the bargain to the buyer both depend on the arrival of the goods, the true construction will be that the condition is not satisfied by the arrival of the vessel.³³ There may, however, be cases where the only condition is that of the arrival of the vessel, so that if the vessel arrives without the goods the seller is not protected from liability on his promise to sell.³⁴ The converse case is not so clear. Suppose goods arrive but the vessel does not, or the goods arrive and the vessel also arrives but not carrying the goods. Here again the question is one of construction. If the parties clearly indicate by their language that the goods must arrive in the named vessel, there will be no liability otherwise.³⁵ As it is the arrival of the

³³ In *Boyd v. Siffkin*, 2 Campb. 326, the bargain was for the sale of "32 tons, more or less, of Riga Rhine hemp, arrival per Fanny Almira." It was held that the seller's obligation was conditional not simply on the arrival of the vessel, but of the hemp. He was, therefore, held not liable when the vessel arrived without the hemp. So in *Hawes v. Humble*, 2 Campb. 327, note "for and by your order, on arrival, 100 tons, etc." So in *Johnson v. Macdonald*, 9 M. & W. 600, a memorandum of sale of 100 tons of nitrate of soda, "to arrive ex Daniel Grant," provided, "should the vessel be lost this contract to be void." The vessel arrived without the goods on board. The court held the contract conditional not simply on the arrival of the vessel but also on the goods being in the vessel. In *Vernede v. Weber*, 1 H. & N. 311, the bargain was for the sale of 400 tons of Aracan Necrensie rice per Minna "at 11s. 6d. per cwt. for Necrensie or 11s. for Larong, the latter quality not to exceed fifty tons, or else at the

option of the buyer to reject any excess." The vessel arrived without any Necrensie rice but with 285 tons of Larong rice and 159 tons of a third variety. The court held the buyer was neither entitled to damages for failure to deliver Necrensie rice nor for failure to deliver either the whole cargo that arrived or the portion thereof consisting of Larong rice. Compare this case with *Simond v. Braddon*, 2 C. B. (N. S.) 324.

³⁴ *Hale v. Rawson*, 4 C. B. (N. S.) 85. This was a contract to sell tallow "to be delivered on safe arrival of the Countess of Elgin." The vessel arrived without the tallow and the seller was held liable. See also *Dike v. Reitlinger*, 23 Hun, 241.

³⁵ In *Lovatt v. Hamilton*, 5 M. & W. 639, a sale of palm oil "to arrive per Mansfield" had this express stipulation: "In case of nonarrival, or the vessel's not having so much in after delivery of former contracts, this contract to be void." A part of the cargo of the Mansfield was transferred into another vessel while en route;

goods, however, which makes it possible to perform the contract, and the arrival of the vessel merely affects the means or time of performance, a contract may well bear the contrary construction.³⁶ Whether the seller promises that the condition of the contract shall happen is also a question of construction. It is well settled, however, that the words "to arrive" or their equivalent, do not of themselves import a promise that the goods shall arrive.³⁷ The same effect was given in a New York decision to the words attached to a sold note, "on board" a specified vessel, known to be then at sea.³⁸ Not infrequently, however, the seller promises or warrants that the goods shall be shipped, or that the goods are on board at the time of the bargain, or that the goods are of a particular quality.³⁹ Some of the early cases

not only did the oil safely arrive on this second vessel but the Mansfield also arrived. The court, however, held that it was clearly a condition precedent to the buyer's right to claim the oil that it should arrive in the Mansfield.

³⁶ In *Harrison v. Fortlage*, 161 U. S. 57; 16 S. Ct. 488, 40 L. ed. 616, there was a contract to sell 2,500 tons of sugar "to be shipped per steamship *Empress of India*, no arrival, no sale." This amount of sugar was shipped on the vessel named but 700 tons were transhipped en route into another vessel. Both vessels arrived safely but the buyers refused to take the cargo of either on the ground that the *Empress of India* did not carry the required cargo and the other vessel was not that named in the contract. The court held, however, that the only condition in regard to the vessel was shipment in that vessel, the condition in regard to arrival relating only to the goods. Compare with this case *Idle v. Thornton*, 3 Campb. 274, a contract for tallow "on arrival ex *Catherina Evers*" and "if it should not arrive before the 31st of December the bargain to be void." The *Catherine Evers* was wrecked but most of the tallow was saved and

could have been forwarded to the port of destination before the 31st of December. It was held that the seller was not liable for failure to forward it, at least, unless the buyer so requested and indemnified the seller.

³⁷ *Johnson v. McDonald*, 9 M. & W. 600; *Neldon v. Smith*, 36 N. J. L. 148; *Abe Stein Co. v. Robertson*, 167 N. Y. 101, 60 N. E. 329; *Rogers v. Woodruff*, 23 Ohio St. 632, 13 Am. Rep. 276. See also *Hale v. Rawson*, 27 L. J. C. P. 189.

³⁸ *Shields v. Pettie*, 4 N. Y. 122.

³⁹ *Abe Stein Co. v. Robertson*, 167 N. Y. 101, 60 N. E. 329. In this case the memorandum of the bargain stated that there were sold "85,000 Tein-Sin goat skins" of specified quality which were "expected to arrive." By letter the bargain was modified by the addition of the condition "no arrival, no sale." Goods were shipped by the defendants and duly arrived. The court held these goods were "obviously intended to be furnished under the agreement," but they were not of the quality the contract called for. It was held that the seller was liable for their defective character. The condition imposed by the words "expected to arrive," and "no arrival, no sale," applied only

seem to have gone to an unreasonable extent in holding the seller free from any promise whenever goods of the particular description called for by the contract do not arrive.⁴⁰ It seems a more probable intent that the condition in regard to arrival is merely to protect the seller from risks of transportation as was held in the most recent New York decision, though doubtless a broader intent is possible and if expressed, should be made effectual. If part of the goods arrive but part do not, when the condition applies not simply to the arrival of the vessel but to the arrival of the goods, neither the buyer is bound to take the portion that arrives nor the seller to deliver it. The arrival of part of the goods is not the happening of the condition requisite for the validity of the bargain.⁴¹

§ 189. **Time.**—A provision in regard to the time when goods must be furnished is very common in contracts to sell. The stipulation in regard to time may like the condition imposed by the words "to arrive" impose a condition qualifying the obligation of both parties but of itself impose an obligation on neither. This is especially likely to be the case where the delivery of the goods on time depends on wholly adventitious circumstances with-

to the risks of navigation, not to the shipment of proper goods. In *Simond v. Braddon*, 2 C. B. (N. S.) 324, there was an express engagement by the seller "to deliver what is shipped on his account and in conformity with his invoice." To the same effect is *Dike v. Reitlinger*, 23 Hun, 241. In *Gorissen v. Perrin*, 2 C. B. (N. S.) 681, a sale of a specified number of bales "now on passage" was held to import a warranty by the seller that these bales were then on passage.

⁴⁰ Thus in *Shields v. Pettie*, 4 N. Y. 122, a contract was concluded in these terms: "New York, July 19, '47. Sold for Messrs. Geo. W. Shields & Co., to Messrs. Pettie & Mann, 150 tons Gartshemi pig iron, No. 1, at \$29 per ton, one-half at 6 mos., one-half cash less 4 pr. ct., on board Siddons. Thos. Ingham, broker." The court said: "There was no warranty, express or implied, either that

any iron should arrive, or that arriving, it should be of a particular quality. One hundred and fifty tons of Gartshemi pig iron of the quality denominated No. 1 was expected to arrive by the Siddons, and the contract was to the effect, that if that quantity and quality of iron did so arrive, one party should sell and the other should receive it at a certain price per ton. The iron called for by the contract did not arrive, but iron of a different quality, and I think the contract was at an end." This decision seems inconsistent with the later case of *Abe Stein Co. v. Robertson*, 167 N. Y. 101, 60 N. E. 329, stated in the preceding note. The earlier New York case is, however, supported by *Vernede v. Weber*, 1 H. & N. 311, stated *supra*, note 33.

⁴¹ *Vernede v. Weber*, 1 H. & N. 311; *Shields v. Pettie*, 4 N. Y. 122, 124.

out the control of either party. Thus in sales of goods to arrive a condition in regard to the time is not infrequently inserted, and if the goods arrive but not on time, neither party is liable.⁴² Where the provision relating to time requires something that in its nature is within the power of the seller, upon a proper construction it will generally be found that an obligation is imposed upon the seller to conform to the stipulation as well as an excuse given to the buyer for refusing the goods if the stipulation is not fulfilled. Frequently contracts require shipment or delivery by a certain date. As it is settled that in mercantile contracts time is essential,⁴³ the buyer may refuse the goods unless the delay is very trifling, whether his promise is expressly conditional on the goods having been shipped or delivered on time or whether the stipulation in regard to time is wholly contained in the seller's promise.⁴⁴ A stipulation in time may qualify the seller's obligation

⁴² *Alewyn v. Pryor, Ryan & Moody*, 406. In this case the sale was of oil "on arrival" "but not to exceed the 30th day of June next." The vessel did not arrive until July 4th. In an action by the purchaser the court held the sellers had not agreed that the oil should arrive by June 30th and also said the buyer was excused from any obligation to take it if it did not. A similar condition may be found in *Idle v. Thornton*, 3 Campb. 274.

⁴³ *Bowes v. Shand*, 2 A. C. 455; *Norrington v. Wright*, 115 U. S. 188, 6 S. Ct. 12, 29 L. ed. 366; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 7 S. Ct. 882, 30 L. ed. 920; *Camden Iron Works v. Fox*, 34 Fed. Rep. 200; *Cromwell v. Wilkinson*, 18 Ind. 365; *Bearden Mercantile Co. v. Madison Oil Co.*, 128 Ga. 695, 58 S. E. 200; *White-Branch-McConkin-Shelton Co. v. Carson*, 25 Ky. L. Rep. 1230, 77 S. W. 366; *New Bedford Copper Co. v. Southard*, 95 Me. 209, 49 Atl. 1062; *Salmon v. Boykin*, 66 Md. 541, 7 Atl. 701; *Crane v. Wilson*, 105 Mich. 544, 63 N. W. 506; *Redlands Assoc. v. Gorman*, 76

Mo. App. 184; *Denton v. McInnis*, 85 Mo. App. 542; *Frost-Trigg Lumber Co. v. Forrester*, 124 Mo. App. 304, 101 S. W. 164; *Booth v. Rolling Mill Co.*, 60 N. Y. 487; *Higgins v. Delaware, etc., R. R. Co.*, 60 N. Y. 553; *Blossom v. Shotter*, 59 Hun, 481; *affd.*, without opinion, 128 N. Y. 679, 29 N. E. 145; *Sun Publishing Co. v. Minnesota Type Foundry Co.*, 22 Or. 49, 29 Pac. 6; *Fountain City Drill Co. v. Lindquist (S. Dak.)*, 114 N. W. 1098; *Goff v. Pacific Coast SS. Co.*, 9 Wash. 386, 37 Pac. 418. Compare *Woolfe v. Horne*, 2 Q. B. D. 355; *Kauffman v. Raeder*, 108 Fed. Rep. 171, 47 C. C. A. 278; *Montgomery v. Thomson*, Cal., 92 Pac. 866; *Re Canadian Niagara Power Co.*, 30 Ont. 185.

"In *Hoare v. Rennie*, 5 H. & N. 19, the action was on a contract for "667 tons of iron to be shipped in June, July, August, and September, in about equal portions." The buyers when sued for not accepting the iron when tendered set up the defense that the shipment in June was of about twenty tons only. The court held the defense sufficient.

to sell the goods instead of the buyer's obligation to buy them. Thus it is not infrequently provided in contracts to sell that the buyer shall take delivery at a certain time. If the seller's obligation is made expressly conditional on the buyer's performing the stipulation as to time, there can be no doubt that the seller is excused if the buyer fails to observe the condition. Even though the seller's promise be not expressly conditional, the requirement as to time being contained solely in the promise of the buyer, in view of the general principle referred to above that time is essential in mercantile contracts, the buyer's delay should excuse the seller and so it is generally held.⁴⁵ Where payment of the price and transfer of the property in the goods are by the agreement to be simultaneous, default in payment by the buyer will also mean default in taking the property, but in agreements where payment of the price or part of it is to precede final performance by the seller a condition in regard to the time of performance of the buyer's payment of the price also may be imposed. How far the

This case has been somewhat criticised in England, probably without reason, but only on the point that the defective delivery of one instalment was allowed to excuse the buyers from taking later instalments. In *Bowes v. Shand*, 2 A. C. 455, contracts for the sale of rice to be shipped during the months of March and April, 1874, were involved. The House of Lords held an action could not be maintained by the seller because the rice tendered under the contract was mostly shipped in February. In *Norrington v. Wright*, 115 U. S. 138, 6 S. Ct. 12, 29 L. ed. 366, the contract provided for the sale of 5,000 tons of rails for shipment at the rate of about 1,000 tons a month, beginning February, 1880. The buyer was held entitled to throw up the contract after having received but 400 tons by February shipment. See also *Cleveland Rolling Mills v. Rhodes*, 121 U. S. 255, 7 S. Ct. 882, 30 L. ed. 920.

⁴⁵ *Cresswell Co. v. Mastindale*, 63 Fed. Rep. 84, 27 U. S. App. 277, 11 C. C. A. 33; *Loudenback Fertilizer Co. v. Tennessee Phosphate Co.*, 121 Fed. Rep. 298, 61 L. R. A. 402, 58 C. C. A. 220; *Middle Division Elevator Co. v. Vandeventer*, 80 Ill. App. 669. See also *Worthington v. Gwin*, 119 Ala. 44, 24 So. 739; *Hamilton v. Thrall*, 7 Neb. 210. These are cases of instalment contracts but they necessarily involve the principle that delay in taking excuses failure to deliver. The English decision of *Simpson v. Crippin*, L. R. 8 Q. B. 14, decides that delay in taking some instalments is not a ground for refusing to deliver later instalments. In this the case is opposed to the decisions cited above, but it does not go so far as to hold that the buyer's delay as to any instalment would not excuse delivery of that instalment.

mere promise on the part of the buyer to pay at a certain date constitutes an implied condition qualifying the seller's obligation to sell and deliver, so that unless payment is made or tendered by that day the seller is excused, will be considered hereafter.⁴⁶ It is enough here to refer to the possibility of an express condition excusing the seller if payment is not made promptly. The time at which subsidiary obligations of buyer or seller are to be performed may also be essential.⁴⁷

§ 190. **Notice.**—Contracts to sell are frequently conditional on notice of some fact. The condition may be attached to the obligation of either party. It may be express or derived by implication⁴⁸ from the promise of the other party or the nature of the bargain may be such that it is a condition implied in fact or inherent condition.⁴⁹ The principle on which notice is sometimes held an

⁴⁶ See *infra*, § 457.

⁴⁷ In *Lorymer v. Smith*, 1 B. & C. 1, a bargain for the sale of wheat in the seller's warehouse was made on September 11th. On September 19th, the buyer called and asked leave to inspect it. The seller refused to allow the inspection in bulk to which the buyer was entitled and the latter thereupon said he would not have the wheat. A few days later the seller offered to allow proper inspection, and on the buyer's refusal brought this action, but it was held that the action could not be maintained.

⁴⁸ Sometimes questions of construction may arise even though the condition is express. In *Main v. Fields*, 144 N. C. 307, 56 S. E. 943, 11 L. R. A. (N. S.) 245, however, a condition requiring notice of defects to be sent by registered letter was held satisfied by notice sent in an unregistered letter, which reached its destination.

⁴⁹ In *Busk v. Spence*, 4 Campb. 329, the seller agreed to sell flax to be shipped, "and as soon as he knows the name of the vessel in which the flax will be shipped he is to mention

it to the buyer." A delay of eight days on the part of the seller in mentioning the name of the vessel to the buyer was held to justify the buyer in refusing to accept the goods. In this case the condition was derived from the seller's promise; the contract did not in terms provide that the buyer should take the goods, only if the name of the vessel was promptly declared. In *Graves v. Legg*, 9 Ex. 709, a sale of wool was made on terms stated in the declaration, the contract adding near the end "the names of the vessels to be declared as soon as the wools were shipped." The buyer refused to accept the sale and when sued set out in his plea that wool was a commodity which fluctuated greatly in price and it was important to know the names of the vessels in which the wool was shipped in order to enable the buyer to make a resale promptly should he so desire. On demurrer he was sustained. The language of the contract as stated in the declaration does not make it clear whether the requirement in regard to the names of the vessels was

inherent condition is thus expressed in the leading case on the subject: "The rule to be collected from the cases seems to be this, that where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him."⁵⁰ This case, it is true, is not one relating to sales but the principle therein laid down finds frequent application in the law of sales. Thus, a sale for a price "as great as that for which the seller should sell to any other man," imposes a condition upon the buyer's obligation, and unless the seller performs that condition by giving notice, he cannot hold the buyer.⁵¹ So where the seller is to manufacture goods and the buyer is bound to come for them, the buyer's obligation is qualified by the condition that the seller give notice.⁵² So if goods are deliverable at a particular place, but the time for delivery is not specified, the seller must give notice of the time chosen before he can put the seller in default.⁵³ And in any case where either party has an option in regard to any detail of performance by the other party, notice of the choice made is necessarily a condition of the right to hold the other party liable. This option may relate to

intended as a condition qualifying the promise of the defendant to buy, or was a promise on the part of the seller, in which case the buyer's excuse would be based on a condition implied in law rather than expressed. The court discusses the question rather on the latter assumption, considering the materiality of the requirement for the buyer's purposes. The buyer was held not liable. See also *Alpena Cement Co. v. Backus*, 156 Fed. Rep. 944, 84 C. C. A. 444; *Florence Wagon Works v. Kalamazoo Co.*, 144 Ala. 598, 42 So. 77; *Frontier Supply Co. v. Loveland*, 15 Wyo. 313, 88 Pac. 651.

⁵⁰ *Vyse v. Wakefield*, 6 M. & W. 442.

⁵¹ *Henning's Case*, Cro. Jac. 432, cited in *Vyse v. Wakefield*, 6 M. & W. 442, 454.

⁵² *Hunter v. Wetsell*, 84 N. Y. 549, 38 Am. Rep. 544; *Bliss Co. v. United States Gaslight Co.*, 149 N. Y. 300, 43 N. E. 859; *Lockhart v. Bonsall*, 77 Pa. St. 53.

⁵³ *Empire State Phosphate Co. v. Heller*, 61 Fed. Rep. 280, 20 U. S. App. 589, 9 C. C. A. 504; *Henkle v. Smith*, 21 Ill. 238; *Cullum v. Wagstaff*, 48 Pa. St. 300.

time,⁵⁴ place,⁵⁵ quantity of goods,⁵⁶ or method of shipment,⁵⁷ or to any other matter.⁵⁸

§ 191. **Satisfaction of the buyer.**—A common condition in modern times qualifying the obligation of the buyer is that the goods shall be satisfactory to him. This type of condition is not confined to contracts to sell, and the same principle is applicable whether the contract relates to the sale of goods or requires some other performance. It has been questioned whether an agreement in which the promise of one party was conditional on his own satisfaction contained the elements of a contract,—whether the agreement was not illusory in character,⁵⁹ and doubtless if the condition is to be construed as meaning at the whim or pleasure of the promisor, the objection is well taken. This construction, however, seems inaccurate; the intention of the parties may fairly be assumed to have been that satisfaction after the exercise of an honest judgment was required, but no more. The contract so construed has been almost universally upheld.⁶⁰ In New York

⁵⁴ *Dingley v. Oler*, 117 U. S. 490, 6 S. Ct. 850, 29 L. ed. 984; *Colvin v. Weedman*, 50 Ill. 311; *Posey v. Scales*, 55 Ind. 282; *Sousely v. Burns' Adm.*, 10 Bush, 87.

⁵⁵ *Warner v. Wilson*, 4 Cal. 310; *Weill v. American Metal Co.*, 182 Ill. 128, 54 N. E. 1050; *Hunter v. Wetsell*, 84 N. Y. 549, 38 Am. Rep. 544; *Lockhart v. Bonsall*, 77 Pa. St. 53.

⁵⁶ *Kingman v. Hanna Wagon Co.*, 176 Ill. 545, 52 N. E. 328; *Harrow Spring Co. v. Whipple Harrow Co.*, 90 Mich. 147, 51 N. W. 197, 30 Am. St. Rep. 421.

⁵⁷ *Wackerbarth v. Masson*, 3 Campb. 270; *Armitage v. Insole*, 14 Q. B. 728; *Sutherland v. Allhusen*, 14 L. T. (N. S.) 666; *Walton v. Black*, 5 Del. 149; *Dwight v. Eckert*, 117 Pa. St. 490, 12 Atl. 32.

⁵⁸ *Hinckley v. Pittsburgh Steel Co.*, 121 U. S. 264, 30 L. ed. 967. The duty of the defendant to give directions as to the drilling of rails which

the plaintiff was to deliver to him was held to precede the plaintiff's obligation to perform, and the defendant was held liable for failure to give notice. *A fortiori*, the seller would have been excused for failure to deliver the rails had the action been brought by the buyer. So in *Hurd v. Gill*, 45 N. Y. 341, a refusal to designate a place where the plaintiff might take sand from the defendant's land was held breach of a contract to allow the plaintiff to take sand at such a place as the defendant might designate. See also *Aller v. Pennell*, 51 Iowa, 537, 2 N. W. 385; *Butler v. Butler*, 77 N. Y. 472, 33 Am. Rep. 648.

⁵⁹ *Gibson v. Cranage*, 39 Mich. 49, 33 Am. Rep. 351.

⁶⁰ *Andrews v. Belgfield*, 2 C. B. (N. S.) 779 (sale of a carriage); *Silsby Mfg. Co. v. Chico*, 24 Fed. Rep. 893 (sale of steam engine); *Campbell Printing Press Co. v. Thorp*, 36 Fed. Rep. 414 (sale of printing presses);

and a few other States, however, another rule prevails. Unless the subject-matter of the contract is one involving personal taste, the contract is as matter of law construed as imposing upon the seller the requirement only that a reasonable man would be satisfied with the performance.⁶¹ This is an arbitrary refusal by the

Re George M. Hill Co., 123 Fed. Rep. 866, 59 C. C. A. 354 (sale of machine); *Hallidie v. Sutter St. Ry. Co.*, 63 Cal. 575 (sale of steel rope or cable); *Zaleski v. Clark*, 44 Conn. 218, 26 Am. Rep. 446 (making plaster bust); *Goodrich v. Van Nortwick*, 43 Ill. 445 (sale of a fanning mill); *Buckley v. Meidroth*, 93 Ill. App. 460 (sale of acetylene gas generator and fixtures); *Inman Mfg. Co. v. American Cereal Co.*, 124 Iowa, 737, 100 N. W. 860 (sale of machine for mill); *Brown v. Foster*, 113 Mass. 136, 18 Am. Rep. 463 (sale of suit of clothes); *Gibson v. Cranage*, 39 Mich. 49, 33 Am. Rep. 351 (contract for enlarging a photograph); *Wood Reaping & Mowing Machine Co. v. Smith*, 50 Mich. 565, 45 Am. Rep. 57 (sale of agricultural machine); *Platt v. Broderick*, 70 Mich. 577, 38 N. W. 579 (sale of machine); *United States Fire Alarm Co. v. Big Rapids*, 78 Mich. 67, 43 N. W. 1030 (sale of fire alarm bell); *Housding v. Solomon*, 127 Mich. 654, 87 N. W. 57 (sale of horses); *McCormick Machinery Co. v. Chesrown*, 33 Minn. 32, 21 N. W. 846 (sale of machinery); *Magee v. Scott Lumber Co.*, 78 Minn. 11, 80 N. W. 781 (contract to tow logs); *Gwynne v. Hitchner*, 66 N. J. L. 97, 48 Atl. 571 (contract for employment of color mixer); *Hoffman v. Gallaher*, 6 Daly, 42 (contract to paint a portrait); *Tyler v. Ames*, 6 Lans. 280 (contract to employ an agent); *Gray v. Central R. R. Co.*, 11 Hun, 70 (sale of a steamboat); *Moore v. Goodwin*, 43 Hun, 534 (contract for crayon portrait); *Haven v. Russell*, 34 N. Y. Suppl. 292 (contract for

playwright to write a play); *Garland v. Keeler*, 15 N. Dak. 548, 108 N. W. 484 (sale of machine); *Singerly v. Thayer*, 108 Pa. St. 291, 2 Atl. 230, 56 Am. Rep. 207 (sale of hydraulic elevator); *Seeley v. Welles*, 120 Pa. St. 69, 13 Atl. 736 (sale of reaper and binder); *Rossiter v. Cooper*, 23 Vt. 522 (contract for labor); *McClure v. Briggs*, 58 Vt. 82, 2 Atl. 583, 56 Am. Rep. 557 (sale of organ); *Tatum v. Geist*, 46 Wash. 226, 89 Pac. 547 (sale of machine); *Exhaust Ventilator Co. v. Chicago, etc., Ry. Co.*, 66 Wis. 218, 28 N. W. 343, 57 Am. Rep. 257, 69 Wis. 454, 34 N. W. 509 (sale of exhaust fans). These decisions do not all relate to sales of goods, but the principle in all is identical. It is expressed in the opinion of the court in *Inman Mfg. Co. v. American Cereal Co.*, 124 Iowa, 737, 739, 100 N. W. 860, as follows: "The plaintiff did not undertake to make and install machines which the defendant ought in reason to be satisfied with, and, therefore, ought to pay for, but he undertook to furnish machines which the defendant would be satisfied with, and by this contract he is bound, provided only that the defendant acted in good faith, and was honestly dissatisfied. This much and no more the law requires of the contemplated purchaser, and if his dissatisfaction is in good faith, it matters not whether it be reasonable or unreasonable, for the law will not make contracts for persons *sui juris*."

⁶¹ *Keeler v. Clifford*, 165 Ill. 544, 46 N. E. 248; *Union League Club v. Blymer Ice Machine Co.*, 204 Ill. 117,

court to enforce the contract that the parties made and seems unwarranted. Moreover it involves a distinction that is almost impossible to make between contracts involving personal taste and those which do not. In truth the difference between contracts in this respect is almost wholly one of degree, and in many cases it must be impossible to decide upon which side of the line a given case falls until the highest court has passed upon the case.⁶² No doubt there are contracts of which the true construction is that a condition of reasonable satisfaction rather than actual satisfaction is imposed. This is well illustrated in a Massachusetts case.⁶³ In determining the proper construction of any

68 N. E. 409; *Boyd v. Hallowell*, 60 Minn. 225, 62 N. W. 125; *Barnett v. Sweringen*, 77 Mo. App. 64; *Doll v. Noble*, 116 N. Y. 230, 22 N. E. 406, 15 Am. St. Rep. 398; s. c., *sub nom.* *Dall v. Noble*, 5 L. R. A. 554; *Hummel v. Stern*, 164 N. Y. 603, 58 N. E. 1088; *Richison v. Mead*, 11 S. Dak. 639, 80 N. W. 131.

⁶² In *Doll v. Noble*, 116 N. Y. 230, 22 N. E. 406, 15 Am. St. Rep. 398; s. c., *sub nom.* *Dall v. Noble*, 5 L. R. A. 554, a contract "to finish woodwork to the entire satisfaction of the owner" was held complied with by finishing the work in a workmanlike manner. So in *Hummel v. Stern*, 164 N. Y. 603, 58 N. E. 1088, the same doctrine was applied in regard to a contract for ventilating machinery which it was agreed should ventilate the premises to satisfaction of the buyer. On the other hand in *Haven v. Russell*, 34 N. Y. Suppl. 292, a contract to write a play to the satisfaction of a theatrical manager was held to make the actual satisfaction of the manager the only test. So in *Gray v. Alabama Bank*, 14 N. Y. Suppl. 155, a contract to make a lithographic design subject to a similar condition. So in *Crawford v. Mail & Express Co.*, 163 N. Y. 404, 57 N. E. 616, a

contract to write articles for a newspaper, a provision for the satisfaction of the defendant was held to mean actual satisfaction. It will be observed that the line of distinction between these cases is rather fine. The finish of woodwork and the ventilation of a room are matters involving a good deal of personal taste to some people—as much perhaps as the writing of a newspaper article.

⁶³ *Hawkins v. Graham*, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422. In this case the buyer promised to pay for a system of heating upon its "satisfactory completion" and later the contract provided "In the event of the system proving satisfactory, and conforming with all the requirements as above provided for, the sum of fifteen hundred and seventy-five dollars as above provided for to be paid me, after such acknowledgment has been made by the owner or the work demonstrated." The court held, and with reason, "The last words, 'or the work demonstrated,' offer an alternative to the owner's acknowledgment. They imply that, if the work is demonstrated, it is satisfactory within the meaning of the contract, although the owner has not acknowledged it. The previous words, 'and conforming with all

contract it is proper to consider the subject-matter of the bargain, and if this is a picture or other work of art no doubt that circumstance tends to show that the parties actually intended personal satisfaction to be the sole determining factor. If on the other hand the subject-matter of the contract is a machine, as all a buyer would naturally want would be that the machine should do its appointed work properly, it is more probable that a provision for satisfaction means satisfaction of a reasonable man, and in case of doubt the latter construction as the less harsh would properly be adopted. As was said by Holmes, J., in the Massachusetts case previously referred to, "When the consideration furnished is of such a nature that its value will be lost to the plaintiff, either wholly or in great part, unless paid for, a just hesitation must be felt, and clear language required, before deciding that payment is left to the will, or even to the idiosyncrasies, of the interested party. In doubtful cases, courts have been inclined to construe agreements of this class as agreements to do the thing in such a way as reasonably ought to satisfy the defendant."⁶⁴ So long as the court does not refuse to give effect to an intention clearly expressed to make personal satisfaction of the buyer the test, no criticism can be made. However strongly the condition may be worded, and however fully a court may be disposed to give effect to it, it is everywhere agreed that the dissatisfaction of the buyer must be real and honest, in order that he may escape liability.⁶⁵ Therefore, not only if the buyer

the requirements,' tend the same way. Taking these phrases with the test prescribed, and the system is 'to readily as well as easily heat or raise the temperature at any point * * * to the temperature of seventy degrees (70°) Fahr. in the coldest weather that may be experienced,' etc., we are of opinion that the satisfactoriness of the system and the risk taken by the plaintiff were to be determined by the mind of a reasonable man, and by the external measures set forth in the contract, not by the private taste or liking of

the defendant." See also *Lockwood Mfg. Co. v. Mason Co.*, 183 Mass. 25, 66 N. E. 420.

⁶⁴*Hawkins v. Graham*, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422.

⁶⁵*Richardson v. Coffman*, 87 Iowa, 121; *McCormick Co. v. Ockerstrom*, 114 Iowa, 260, 86 N. W. 284; *Hawkins v. Graham*, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422; *Lockwood Mfg. Co. v. Mason Co.*, 183 Mass. 25, 66 N. E. 420; *Frary v. American Rubber Co.*, 52 Minn. 264, 53 N. W. 1156, 18 L. R. A. 644.

expresses dissatisfaction either fraudulently, or merely because he has changed his mind about buying any goods of the sort, but also where he refuses to make any examination of the goods at all, the seller can recover.⁶⁶ The principles stated in this section in regard to bargains conditional upon the buyer's satisfaction apply with at least equal force to bargains conditional upon the satisfaction of third persons specified in the contract or named by the buyer.⁶⁷

§ 192. **Waiver of conditions.**—If a condition in the contract is wholly for the benefit of one party thereto, he may waive it.⁶⁸ The other party cannot insist that the condition shall be performed. A common instance of this arises where a contract, as a lease or insurance policy, declares that it shall be void on the happening of a certain contingency. If the nature of the contingency is such as to show clearly that the provision was inserted for the benefit of one party only, the meaning given to the word "void" is voidable at the option of this party, and if he does not choose to avoid the contract, he need not do so.⁶⁹ Waiver is more commonly indicated by acts than words. Wherever the nonperformance of a condition would justify a party to the contract or sale refusing to proceed further with the transaction his continuing to perform or to receive performance with knowledge of the breach of condition will be a waiver of the con-

⁶⁶ *Sidney School Furniture Co. v. Warsaw School District*, 130 Pa. St. 76, 18 Atl. 604.

⁶⁷ *Haegerstrand v. Anne Thomas SS. Co.*, 10 Comm. Cas. 67; *Arkansas-Missouri Zinc Co. v. Patterson*, 79 Ark. 506, 96 S. W. 170. In the case last cited it was further held that the condition was not waived by the failure of the arbiter to make objections during the progress of the work.

⁶⁸ *Westbrook v. Reeves*, 133 Iowa, 655, 111 N. W. 11.

⁶⁹ 29 Am. & Eng. Encyc. Law, 1070. In *Neill v. Whitworth*, 18 C. B. (N. S.) 435, a sale of cotton to arrive contained this clause, "the cotton to be

taken from the quay." On arrival of the cotton it was stored in a warehouse but the sellers offered delivery orders for the cotton from the warehouse at quay weights and free of expense, or to return the cotton to the quay and deliver it there. On behalf of the buyers it was argued that their only obligation was to take the cotton from the quay on arrival, and that the sellers were bound to deliver it from the quay on arrival. The court held, however, that the stipulation was evidently for the seller's benefit in order to save warehouse charges, and consequently the buyer could not insist on the provision.

dition. The commonest illustration of this is where goods are accepted which are not of the sort the seller has agreed to furnish. In such a case the seller by delivering goods of a different character not only fails to comply with his promise to furnish goods of a certain sort, but also fails to comply with the express or implied condition qualifying the buyer's promise to buy goods or pay the price. The acceptance of the goods by the buyer with knowledge of their character clearly is a waiver of the condition. It is not always clearly perceived that the question whether it is a waiver of the promise or obligation of the seller to furnish the proper kind of goods is an entirely different question. This question is fully considered subsequently.⁷⁰

§ 193. **Prevention.**—Prevention of the happening of conditions is to be distinguished from prevention of performance of a promise. Prevention of performance of a promise excuses the promisor from liability for nonperformance. Prevention of the performance of a condition entitles the party prevented to a right of action although the condition has not been performed. It is true that an act of prevention will frequently be a prevention both of performance by the other party of his promise and also of the condition qualifying the liability of the preventing party. Thus where a buyer refuses to take goods properly tendered to him by the seller, he thereby prevents the seller from performing his promise to deliver, and also prevents performance of the implied or express condition of delivery qualifying his own promise to pay for the goods. In cases of this sort the same act operates as an excuse to the innocent party for his own nonperformance, and also as an excuse for nonperformance of a condition qualifying the obligation of the party guilty of the prevention.⁷¹ The

⁷⁰ §§ 481-489.

⁷¹ *United States v. Peck*, 102 U. S. 64, 26 L. ed. 46; *Clearwater v. Meredith*, 1 Wall. 25, 39, 17 L. ed. 604; *King, etc., Co. v. St. Louis*, 43 Fed. Rep. 768; *Hood v. Hampton, etc., Co.*, 106 Fed. Rep. 408, 413; *Tennessee & C. R. Co. v. Danforth*, 112 Ala. 80, 20 So. 502; *McKee v. Miller*, 4 Blackf. 222; *Shulte v. Hennessy*, 40

Iowa, 352; *Marshall v. Craig*, 1 Bibb, 379, 386, 4 Am. Dec. 647; *Parker Vein Coal Co. v. O'Hern*, 8 Md. 197; *Fredenburg v. Turner*, 37 Mich. 402; *Hammer v. Breidenbach*, 31 Mo. 49; *Wilt v. Ogden*, 13 Johns. 56; *Stewart v. Keteltas*, 36 N. Y. 388; *Gallagher v. Nichols*, 60 N. Y. 438; *Dannat v. Fuller*, 120 N. Y. 554, 24 N. E. 815; *Vandegrift v. Cowles*

condition, however, may be something which neither party has promised shall be performed, and in such a case it may be important to distinguish between prevention as excusing a condition and as excusing performance of an obligation. Instances of this sort have already been referred to in connection with the condition of valuation in order to determine a price. Where the valuer is prevented by the wrongful act of one party from making the valuation or where the certificate of an architect or engineer is made a condition of the liability of one party and the giving of it is wrongfully prevented by him, the other party may recover although he has not performed the condition of the contract,⁷² and the principle is general that prevention of a condition gives the injured party an excuse for the nonperformance of the condition.⁷³ It is often said that such prevention operates as a waiver of the condition. It would be better to reserve the word "waiver" for cases where the effect produced is the same as if the condition had been performed. This is not true in cases of prevention. Where one who has made a promise subject to a condition says to the promisee, in effect: "I will perform my promise though you do not perform the condition," the condition is properly said to be waived. Common instances of the sort arise where condition in insurance policies are waived, the insurance company becoming liable to the same extent as if the condition has been performed.⁷⁴ With such cases should be contrasted cases where the

Engineering Co., 161 N. Y. 435, 55 N. E. 941, 48 L. R. A. 685; Ashcraft v. Allen, 4 Ired. L. 96; Sutton v. Tyrell, 12 Vt. 79. In United States v. Peck, 102 U. S. 64, 26 L. ed. 46, the plaintiff entered into a contract with an officer of the government to furnish a certain quantity of hay at a military station. The court found that the contracting parties contemplated hay to be cut in a particular valley, which was indeed the only hay within hundreds of miles. The government officers fearing that the plaintiff would not be able to carry out the contract allowed other persons to cut the hay

and deliver it at the station. The government was held liable upon its contract.

⁷² See *supra*, §§ 176, 177.

⁷³ Ruble v. Massey, 2 Ind. 636; Leonard v. Smith, 80 Iowa, 194, 45 N. W. 762; Jones v. Walker, 13 B. Mon. 163, 56 Am. Dec. 557; Holt v. Silver, 169 Mass. 435, 48 N. E. 837; Navigation Co. v. Wilcox, 7 Jones L. 481, 78 Am. Dec. 260; Bright v. Taylor, 4 Sneed, 159; Camp v. Barker, 21 Vt. 469; Jones v. Railroad Co., 14 W. Va. 514.

⁷⁴ See May on Insurance, § 464 *et seq.*

promisor says, in effect: "Even though you perform the condition, I shall not perform my promise." In cases of this type the promisor is doubtless liable, but the measure of his liability is not the same. His liability is not for what he has promised but merely for the injury the plaintiff suffers by being deprived of the opportunity of acquiring a right to the performance which the promisor promised.⁷⁵

§ 194. **Express warranty.**—The Sales Act thus defines express warranty.

Sec 12. DEFINITION OF EXPRESS WARRANTY.

—Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

The English Sale of Goods Act contains no definition of warranty except by stating the legal effect of a warranty. The term "express" warranty of itself is sometimes used in different senses. Sometimes the words are regarded as meaning only such promises as contain the word "warrant;" more frequently, however, in modern times the term is treated as including all cases where the seller's warranty is derived from expressed language, no matter what may be the form of the language. This usage is observed in the Sales Act and in this book. The term "implied warranty" is reserved for cases where the law attaches an obligation to the seller which is not expressed in any form.

§ 195. **Early law of warranty.**—The law of warranty is older by a century than special *assumpsit*, and the action upon the case on a warranty was one of the bases upon which the law of *assump-*

⁷⁵ The simplest illustration of this is where one has contracted to buy and prevents the seller from delivering the goods by refusing to accept them. The seller is entitled not to the price which the buyer has promised, but to the difference be-

tween that price and the value of the performance upon which the payment of the price was conditional. In some jurisdictions, however, on special reasoning, the seller in such a case is allowed to recover the full price. See *infra*, § 562.

sit seems to have been built. The action on a warranty was regarded as an action of deceit, and the words "*warrantizando vendidit*" seem to have been necessary to make a good count as the words "*super se assumpsit*" later were in the action of *assumpsit*. The action was thus conceived of at the outset as an action of tort.⁷⁶ This is, of course, also true of the action of *assumpsit*, but it was not long before *assumpsit* came to be regarded, as it is regarded to-day, as distinguished from tort and rather to be classed in its essential nature with covenant than with trespass on the case. But the right of action on a warranty was not regarded at once as similar in its nature to *assumpsit*. It was, indeed, not until 1778 that the first reported decision occurs of an action on a warranty brought in *assumpsit*,⁷⁷ though from the language of the court in that case it appears that the practice of declaring in *assumpsit* had been common for some years before. It is probable that to-day most persons instinctively think of a warranty as a contract or promise; but it is believed that the original character of the action cannot safely be lost sight of, and that the seller's liability upon a warranty may sound in tort as well as in contract. In the early

⁷⁶ 'Ames' History of Assumpsit; 2 Harv. L. Rev. 1, 8. "Notwithstanding the undertaking, this action also was, in its origin, a pure action of tort. In what is, perhaps, the earliest reported case upon a warranty, Fitz. Ab. Monst. de Faits, pl. 160 (1383) the defendant objects that the action is in the nature of covenant, and that the plaintiff shows no specialty but "*non allocatur*, for it is a writ of trespass." There was regularly no allusion to consideration in the count in case; if, by chance, alleged, it counted for nothing. Moor v. Russel, Skin. 104; s. c., 2 Show. 284. How remote the action was from an action of contract appears plainly from a remark of Choke, J.: "If one sells a thing to me, and another warrants it to be good and sufficient, upon that warranty made by parol, I shall not have an action of deceit; but if it was

by deed, I shall have an action of covenant." Y. B. 11 Ed. IV, 6, pl. 11. That is to say, the parol contract of guaranty, so familiar in later times, was then unknown. The same judge, and Brian, C. J., agreed, although Littleton, J., inclined to the opposite view, that if a servant warranted goods which he sold for his master, that no action would lie on the warranty. The action sounding in tort, the plaintiff, in order to charge the defendant, must show in addition to his undertaking, some act by him, that is, a sale; but the owner was the seller, and not the friend or servant, in the cases supposed. A contract, again, is properly a promise to act or forbear in the future. But the action under discussion must be, as Choke, J., said, in the same case, upon a warranty of a thing present, and not of a thing to come."

⁷⁷ Stuart v. Wilkins, 1 Doug. 18.

case of *Chandelor v. Lopus*,⁷⁸ the court held that a declaration was insufficient after verdict which stated that the defendant affirmed a stone which he, as a goldsmith skilled in precious stones, sold to the plaintiff to be a bezoar stone whereas it was not, and the court said: "The bare affirmation that it was a bezoar stone, without warranting it to be so, is no cause of action; and although he knew it to be no bezoar stone, it is not material, for every one in selling his wares will affirm that his wares are good, or the horse which he sells is sound; yet if he does not warrant them to be so, it is no cause of action." It seems a fair inference from this language that the use of the word "warrant" was necessary in order to make the seller liable, or at least words importing a direct and positive promise on the part of the seller. This attitude of the law is in conformity with the general unwillingness manifested by the early law to make any implications and to rely strictly on the exact form in which a transaction was put.⁷⁹

§ 196. **Later development.**—The law of warranty in its modern form was largely fixed by Lord Holt. At the time of Lord Holt's decisions breach of warranty was still looked upon rather as a tort than as breach of contract, but the result was established that an affirmation of title in the seller though not known to be false, and though not put in the form of a warranty or express promise, was ground for liability.⁸⁰ Though there is a dearth of authority dur-

⁷⁸ Cro. Jac. 4.

⁷⁹ The effect of this decision has been somewhat discussed and it has been forcibly urged that the case has no bearing upon any question of the sufficiency in law of an affirmation to bind the seller, but merely decided that the declaration was imperfect in pleading evidence from which warranty might have been inferred instead of pleading the transaction according to its legal effect. 1 Harv. L. Rev. 191; 1 Smith's Leading Cases (9th Am. ed.) 329. Doubtless the decision only involved the sufficiency of the declaration, and if the declaration was inartificially drawn the court might have rested its decision on that ground, but it

might instead take the broader ground that the facts stated in the declaration were insufficient on which to base an action, no matter how the pleading was drawn. That the court took this latter course is evident from its language. The only importance of the decision to-day is, in any event, not the point decided but the language of the court which is enlightening as to the view taken at that time in regard to what constituted an express warranty.

⁸⁰ *Cross v. Gardner*, [1689] 1 Show. 68; s. c., *sub nom.* *Crosse v. Gardner*, Carthew, 90; s. c., *sub nom.* *Cross v. Garnet*, 3 Mod. 261. In this case the declaration alleged that the

ing the ensuing century in regard to the same question where the quality of goods was concerned, it is probable from the cases about the beginning of the nineteenth century that an affirmation of quality inducing a sale had for some time been recognized as rendering the seller liable as a warrantor. The further step was also taken of allowing the action of *assumpsit* for the enforcement of a warranty. The first reported decision to this effect was in 1778.⁸¹ Whatever the form of action the requirements were the same, that is, the gist of the action was the affirmation of the seller, irrespective of any fraudulent deceit on his part. Therefore, an action on the case for breach of warranty did not need to allege that the defendant knew that his affirmation was false, and if such an allegation was made it did not have to be proved.⁸² The form

defendant sold oxen to the plaintiff "and did falsely affirm them to be his own, whereas in truth they were the oxen of another man." After verdict, it was moved in the arrest of judgment the declaration was not good because the plaintiff had not alleged that the defendant knew the oxen were not his own; but, nevertheless, the plaintiff had his judgment. It was said that it might have been good upon demurrer but after verdict was well enough. *Medina v. Stoughton*, [1700] 1 Ld. Raym. 593; s. c., 1 Salk. 210. In this case the plaintiff declared that the defendant being possessed of certain lottery tickets, sold them to the plaintiff, affirming them to be his own, whereas in truth they were not. The defendant pleaded that he bought them in good faith before the sale and so sold them in good faith. The plaintiff demurred, and Holt, C. J. said: "The plea is ill, and the action well lies. Where a man is in possession of a thing, which is a colour of title, an action will lie upon a bare affirmation that the goods sold are his own." How far these decisions advanced beyond the earlier law is not perfectly clear. *Furnis v. Leicester*,

Cro. Jac. 474; *Anon.*, 1 Rolle Abr. 90, 91, pl. 5-8 — but Lord Holt at least made clear what was doubtful before.

⁸¹ *Stuart v. Wilkins*. 1 Dougl. 18. Apparently the practice of declaring in *assumpsit* was fully recognized at the time of this decision, although judicial sanction had not previously been given to it. Buller, J., said: "This mode has been in use ever since I have known anything of practice, and my brother Ashhurst remembers it much longer. There is no objection to it, in point of form, which could prevail even on a special demurrer. Promises are not all executory. Do not all our books make a distinction between promises executed and promises executory;—that in one you may traverse the consideration, in the other not? Because another action would lie, it does not follow that this will not. It was determined in *Slade's Case*, that there may be different actions for the same injury. T., 44 Eliz. 4 Co. 92 b."

⁸² *Denison v. Ralphson*, 1 Vent. 365, the second count which stated a warranty that the goods sold were good and merchantable, and averred that

in which the affirmation was made became continually of less importance.⁸³ The English cases of the past century show that the form which the seller's affirmation took was not the essential matter. Any express affirmation inducing the sale appears to have been enough.⁸⁴

the defendant delivered them bad and not merchantable, knowing them to be naught; the court observe that though the declaration be "knowing them to be naught," yet the knowledge need not be proved in evidence. In *Williamson v. Allison*, 2 East, 446, 450, Lord Ellenborough said: "For if one man lull another into security as to the goodness of a commodity, by giving him a warranty of it, it is the same thing whether or not the seller knew it at the time to be unfit for sale: the warranty is the thing which deceives the buyer who relies on it, and is thereby put off his guard. Then if the warranty be the material averment, it is sufficient to prove that broken to establish the deceit: and the form of the action cannot vary the proof in that respect. The ancient method of declaring was in tort on the warranty broken, and that was just going out of general practice when the case of *Stuart v. Wilkins*, 1 Dougl. 18, was discussed, because it was found more convenient to declare in *assumpsit* for the sake of adding the money counts. So general was the former method, that declarations in that form were familiar in every arrangement of precedents in tort. And the more modern practice of declaring in *assumpsit* in these cases has not prevailed generally above forty years. No other proof was required to sustain the former mode of declaring than the warranty itself and the breach of it. Here then the plaintiff will be equally entitled to

recover in the tort upon the same proof, by striking out the whole averment of the *scienter*. The old doctrine is not yet obsolete. See *infra*, § 197, note 89.

⁸³ In *Yates v. Pym*, 6 Taunt. 446, a description of bacon in a sale-note as "prime singed," was held to be a warranty that it was prime singed. So in *Bridge v. Wain*, 1 Stark, 504, the goods sold were described in the invoice as "scarlet-cuttings." Held, a warranty that they answered the known mercantile description of scarlet-cuttings.

⁸⁴ *Jendwine v. Slade*, 2 Esp. 572. In this case the question was whether selling pictures by a catalogue in which the name of the artist was put opposite to each picture constituted a warranty by the seller that the pictures in question were painted by the artist whose names were put opposite. Lord Kenyon held that it was impossible to make this a case of warranty, but he did not rely on the ground that there was no warranty in form, but rather on the ground that in view of the antiquity of the pictures it could only be matter of opinion by whom they were painted, and this must have been understood. The artists, it may be added, by whom the pictures were supposed to have been painted, died a little more than a hundred years before the time of the sale. *Power v. Barham*, 4 A. & E. 473, may be compared with the preceding case. Four

§ 197. **Nature of the obligation of warranty.**—Much of the intrinsic difficulty and still more of the divergence of authority which characterize the law of warranty are due to an imperfect recognition of the nature of the obligation imposed by a warranty.

pictures were sold by the following bill of sale:

Mr. N. Power.

Bought of J. Barham.

May 14, 1832.

Four pictures, Views in Venice, Canaletto £160 00

Settled by two pictures £50 00

And a bill at five months 110 00

£160 00

J. Barham.

The jury found that this constituted a warranty and the following instruction to the jury was held to be correct: Whether the defendant had made a representation, as part of his contract, and the pictures were genuine, not using the name of Canaletti as matter of description merely, or as an expression of opinion upon something as to which both parties were to exercise a judgment, but taking upon himself to represent that the pictures were Canaletti's. It may be added that Canaletti died about seventy years before the sale in question in this case. In *Budd v. Fairmener*, 8 Bing. 48, a receipt for £10 "for a gray four-year old colt warranted sound" was held to give no warranty of age. *Shepherd v. Kain*, 5 B. & Ald. 240 an advertisement for the sale of a ship described her as "a copper-fastened vessel," adding, that the vessel was to be taken with all faults, without any allowance for any defects whatsoever, and it appeared that she was only partially copper-fastened: Held, that notwithstanding the words, "with all

faults, etc.," the vendor was liable for the breach of the warranty. *Freeman v. Baker*, 2 Nev. & M. 446, this was an action on the case of an advertisement of a ship for sale which described her as copper-fastened, and afterward contained an enumeration of masts, etc., which was headed "Inventory." The contract for the sale of the ship referred to the "inventory." This reference was held to have the effect of entitling the vendee to consider the description in the advertisement as forming part of the contract, though it was shown to be usual to designate the whole advertisement by the name of "Inventory," *Wright v. Crookes*, 1 Scott, 635, N. R., this was an action on the case; though there was a written contract for the sale of a vessel, the plaintiff was held at liberty to give in evidence verbal statements and declarations made by the defendant in regard to the ship before the written contract was entered into, to the effect that the frame was composed of English and African oak, in order to establish a warranty, *Carter v. Crick*, 4 H. & N. 412. This was an action on a warranty that barley sold by the defendant to the plaintiff was "seed barley." The defendant's agent showed the plaintiff a sample of barley which the agent said was seed barley and the plaintiff on examination of it said it was a good sample of seed barley and agreed to buy it. The plaintiff afterward resold it as "chevalier seed barley." The barley was not of this kind and the plaintiff was compelled to pay damages to the person to whom he had sold it and now sought to recoup these damages

As has been seen,⁸⁵ the action upon a warranty was in its origin a pure action of tort. There is no doubt that to-day the obligation of a warrantor is generally conceived of as contractual, and there can be no doubt also that a seller may expressly promise to be answerable for some alleged quality of the articles sold, or that if he makes such a promise for good consideration he enters into a contract. This, however, does not either upon authority or reason exhaust the possibilities of express warranties. It should not be the law, and by the weight of modern authority,⁸⁶ it is not the law that a seller who by positive affirmation induces a buyer to enter into a bargain can escape from liability by denying that his affirmation was an offer to contract. A positive representation of fact is enough to render him liable. The distinction between warranty and representation which is important in some branches of the law is not appropriate here. The representation of fact which induces a bargain is a warranty.⁸⁷ As an actual agreement to contract is not essential the obligation of the seller in such a case is one imposed by law as distinguished from one voluntarily assumed. It may be called an obligation either on a *quasi-contract* or a *quasi-tort*, because remedies appropriate to contract and also to tort are applicable. That this is the character of the seller's obligation was recognized by Blackstone,⁸⁸ and that this point of view has been lost sight of by some courts is no doubt due to the fact that *assumpsit* became so generally the remedy for the enforcement of a warranty. But even at the present time an action of tort for warranty still lies

from the defendant. The court held that there was no warranty, apparently because the plaintiff had as much knowledge of the matter as the defendant's agent and that the statement of each that the barley was seed barley was a statement of opinion only.

⁸⁵ See *supra*, § 195.

⁸⁶ See *infra*, § 201.

⁸⁷ See cases cited, *infra*, § 201.

⁸⁸ Blackstone includes his treatment of warranty under the head of contracts which are implied by law. "Which are such as reason and justice dictate, and which therefore the

law presumes that every man has contracted to perform; and, upon this presumption, makes him answerable to such persons, as suffer by his non-performance." Under the last class of contracts "implied by reason and construction of law," Blackstone includes a warranty: "Also, if he, that selleth any thing, doth upon the sale warrant it to be good, the law annexes a tacit contract to this warranty, that if it be not so, he shall make compensation to the buyer; else it is an injury to good faith, for which an action on the case will lie to recover damages "

irrespective of any fraud on the part of the seller or knowledge on his part that the representations constituting the warranty were untrue.⁸⁹

§ 198. **Intent to warrant.**—It was said by Buller, J., in a case which did not involve the question of warranty:⁹⁰ “It was rightly held by Holt, C. J., in the subsequent cases, and has been uniformly adopted ever since that an affirmation at the time of a sale is a warranty provided it appears on evidence to have been

⁸⁹ This was so held in England (see *supra*, § 196), and was so held by the Supreme Court of the United States in *Shippen v. Bowen*, 122 U. S. 575, 7 S. Ct. 1283, 30 L. ed. 1172. The court said: “In *1 Chitty's Pleadings*, 137, the author says, that case or *assumpsit* may be supported for a false warranty on the sale of goods, and that, ‘in an action upon the case in tort for a breach of a warranty of goods, the *scienter* need not be laid in the declaration, nor, if charged, could it be proved.’ In *Lassiter v. Ward*, 11 Ired. L. 443, 444, Ruffin, C. J., citing *Stuart v. Wilkins*, 1 Dougl. 18, and *Williamson v. Alison*, 2 East, 446, said: ‘It was accordingly there held that the declaration might be in tort, without alleging a *scienter*, and, if it be alleged in addition to the warranty, that it need not be proved. The doctrine of the case is, that, when there is a warranty, that is the gist of the action, and that it is only when there is no warranty that a *scienter* need be alleged or proved. It is nearly a half century since the decision, and during that period the point has been considered at rest, and many actions have been brought in tort, as well as *ex contractu*, on false warranties.’ And so in *House v. Fort*, 4 Blackf. 293, 295, it was said that ‘the breach of an express warranty is of itself a valid ground of action whether the suit be founded on tort

or on contract;’ and that, ‘in the action on tort, the forms of the declaration are, that the defendant falsely and fraudulently warranted, etc., but the words falsely and fraudulently, in such cases, are considered as only matters of form.’ But as to the *scienter*, the court said, ‘that is not necessary to be laid, when there is a warranty, though the action be in tort; or, if the *scienter* be laid, in such a case, there is no necessity of proving it.’ See also *Hillman v. Wilcox*, 30 Maine, 170; *Osgood v. Lewis*, 2 Har. & G. 495, 520, 18 Am. Dec. 317; *Trice v. Cochran*, 8 Grat. 442, 450, 56 Am. Dec. 151; *Gresham v. Postan*, 2 C. & P. 540.” To the same effect are: *Farrell v. Manhattan Market Co.*, 198 Mass. 271, 84 N. E. 481; *Erre Iron Works v. Barber*, 106 Pa. St. 125, 51 Am. Rep. 508; *Place v. Merrill*, 14 R. I. 578, and *Piche v. Robbins*, 24 R. I. 325, 53 Atl. 92. See also *Watson v. Jones*, 41 Fla. 241, 25 So. 678, 681; *Tyler v. Moody*, 111 Ky. 191, 63 S. W. 433, 54 L. R. 3. 417, 419, 98 Am. St. Rep. 406.

⁹⁰ *Pasley v. Freeman*, 3 T. R. 51. This was an action of deceit for a false and fraudulent statement by the defendant that a person to whom the plaintiff was about to deal was of good credit. It was held that a good cause of action was stated although the defendant did not benefit by his false representation.

so intended.”⁹¹ This statement in regard to the necessity of intent to warrant seems to have no earlier foundation. The decisions of Holt, alluded to, say nothing about intent, and Blackstone mentions no such requirement in his treatment of the subject.⁹² In theory all that seems necessary is that the affirmation should have been such as to lead a reasonable man to believe that a statement of fact was made to induce the bargain. Even in the formation of ordinary contracts the only intent, or assent to contract, necessary is that words or conduct shall justify the other party in assuming a particular meaning. Accordingly in England little stress seems to have been laid on the requirement of intent,⁹³ and in a recent case the doctrine was thus stated: “In determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case it is a warranty, in the latter not.”⁹⁴ If this is the true meaning of the requirement of intent, it would seem better to find less misleading language to express the idea. The distinction stated in the language just quoted is that between an affirmation of fact and a statement of opinion. What is to be regarded as an affirmation of fact and what a statement of opinion will be hereafter considered.⁹⁵

§ 199. **American law—Pennsylvania.**—What has been said furnishes sufficient introduction to a consideration of the modern law in America. Owing to the development of the subject it might be expected that the different jurisdictions in this country would hardly follow at the same pace the changes which have been traced in the English law, and such is indeed the case. Pennsylvania alone of the United States seems to have retained without substantial change the English law of three hundred

⁹¹ *Pasley v. Freeman*, 3 T. R. 51, 57.

⁹² 3 Comm. 164.

⁹³ See, however, *Stucley v. Baily*, 1 H. & C. 405.

⁹⁴ *De Lassalle v. Guildford*, [1901] 2 K. B. 215, 221. This statement was borrowed from Benjamin on

Sale (5th Eng. ed.), 659. The passage has also the sanction of American authority. *Carleton v. Jenks*, 80 Fed. Rep. 937, 47 U. S. App. 734, 26 C. C. A. 265; *Roberts v. Applegate*, 153 Ill. 210, 38 N. E. 676.

⁹⁵ *Infra*, § 202.

years ago on the subject of express warranty. This is due probably to the strong bent given to the law by Chief Justice Gibson.⁹⁶ As shown by the quotations in the preceding note, the law of Pennsylvania requires that a warrantor shall intend to *promise*; it is not enough that he intends to affirm. This rule is probably so thoroughly established that it can only be done away with by statute. A statute is the more necessary.

§ 200. **Other American authorities requiring intent on the part of the seller.**—Many American authorities, especially the older

⁹⁶ In *Borrekins v. Bevan*, 3 Rawle, 23, 42, 23 Am. Dec. 85, Chief Justice Gibson expresses regret that the excellent rule of *Chandelor v. Lopus*, "has been swept away by a flood of innovation in England and some of our sister States." In *McFarland v. Newman*, 9 Watts, 55, 34 Am. Dec. 497, the action was *assumpsit* on an alleged warranty in the sale of a horse, and the court below charged the jury that "a positive averment, made by the defendant at the time of the contract, is a warranty; that it is a part or parcel, of the contract." This ruling was reversed in the Supreme Court, Gibson, C. J., saying in his opinion: "As the cause goes back to another jury, it is proper to intimate the principle on which a correct decision of it must depend. Though, to constitute a warranty requires no particular form of words, the naked averment of a fact is neither a warranty of itself nor evidence of it. In connection with other circumstances, it certainly may be taken into consideration; but the jury must be satisfied, from the whole, that the vendor actually, and not constructively, consented to be bound for the truth of his representation. Should he have used expressions fairly importing a willingness to be thus bound, it would furnish a reason to infer that he had intentionally induced the vendee to treat on that basis; but a naked affirmation is not to be dealt with as a warranty,

merely because the vendee had gratuitously relied on it; for not to have exacted a direct engagement, had he desired to buy on the vendor's judgment, must be accounted an instance of folly. Testing the vendor's responsibility by these principles, justice will be done without driving him into the toils of an imaginary contract." To similar effect is *Jackson v. Wetherill*, 7 S. & R. 480; again in *Wetherill v. Neilson*, 20 Pa. St. 448, 59 Am. Dec. 741: "A bill of sale described the soda ash, which was the subject of the sale, as being of a certain strength, and it was held no warranty." This still represents the law in Pennsylvania. In *Holmes v. Tyson*, 147 Pa. St. 305, 23 Atl. 564, 15 L. R. A. 209, there was evidence of statements that a horse was kind, sound, and gentle. The court held that not only was this not a warranty, but that it was no evidence of a warranty. "There was the mere assertion of a fact." In *McAllister v. Morgan*, 29 Pa. Super. Ct. 476, the buyer asked the seller in regard to a horse. "Is he sound?" The seller replied, "Yes, he is sound." Whereupon the buyer bought the horse. The court again applied Chief Justice Gibson's rule "that the naked averment of a fact is neither a warranty of itself or evidence of it." See *Krauskopf v. Pennypack Yarn Co.*, 26 Pa. Super. Ct. 506.

ones, require an intention to warrant on the part of the seller. By this requirement, however is generally meant not what Chief Justice Gibson⁹⁷ required, an intent to contract or to agree to be bound, but rather, as in England, an intent to make a statement as matter of fact rather than as matter of opinion. An examination of these cases will disclose a growing tendency to regard a positive statement by the seller by way of description of the goods or in regard to them as a statement of fact, not opinion, and, consequently, a warranty.⁹⁸

⁹⁷ See *supra*, note 96.

⁹⁸ *Berman v. Woods*, 38 Ark. 351, an order was given for a printing press based on representations in the seller's letters and catalogue of the size and capacity of the press. The press was sent but the buyer claimed it was not in accordance with the statements. The court held that as the press did not correspond in one material respect, the size of the form which it would print, with the representations made in correspondence, rescission for breach of warranty might have been made if the buyer had acted promptly. As to the representations, the nature of which is not stated, in regard to the merits of the press made by the sellers in their circular, the court held that they did not amount to warranties, saying: "They are the usual artifices of enterprise and competition," and quoting 1 Parsons on Contracts, 588, to the effect that a purchaser "cannot rely upon all statements and assertions made by the maker in circulars concerning the article as a warranty that it will do what is stated." An intention to warrant is also said to be necessary in *Hartin Commission Co. v. Pelt*, 76 Ark. 177, 88 S. W. 929. In *Barnett v. Stanton*, 2 Ala. 181, the seller of clothing represented it to be "fresh, well made, and suitable for the market." The court held

that there was no warranty, saying: "No matter how positive the representation of the seller may be, it will be regarded as an expression of his belief, or opinion, unless it was intended and received as a stipulation that the property was of the quality represented." In *McCaa v. Elam Drug Co.*, 114 Ala. 74, 86, 21 So. 479, 62 Am. St. Rep. 88, the court said, however, "Every vendor, whether he be a dealer or not, is responsible for his representation or affirmation as to quality, which are more than expressions of opinion and which are relied upon, and upon which the party purchasing has the right to rely," and, also: "The purchaser may have had no opportunity to examine the article, or if subject to examination and in fact examined, he may not possess the requisite information to enable him to determine. In such a case, if the vendor affirms or represents the quality of the goods, as a fact, he is bound by such representation or affirmation." It will be seen that in these statements nothing is said about the seller's intention. In *Polhemus v. Heiman*, 45 Cal. 573, 578, the court defined a warranty as follows: "Any affirmation made at the time of sale as to the quality or condition of the thing sold will be treated as a warranty if it was so intended." In *McLennan v. Ohmen*,

§ 201. **Best modern authorities disregard the seller's intent.—**

So far as the intent spoken of by courts is restricted to the mean-

75 Cal. 558, 17 Pac. 687, the court laid down the same rule, adding: "Whether it was so intended and the purchaser acted upon it are questions of fact for the jury." In Illinois several early cases laid stress upon the intention of the seller. In *Ender v. Scott*, 11 Ill. 35, an instruction to the jury that "if the defendant represented in positive terms to the plaintiff before the exchange that the mare was sound, such positive assertion will amount to a warranty," was held to be erroneous because it was said that the plaintiff might not have intended the assertion as a proposition to warrant. Intention was also laid stress upon in *Adams v. Johnson*, 15 Ill. 345. In *Hanson v. Busse*, 45 Ill. 496, the court, though giving a definition of warranty which included the requirements of intention, held that in case of a sale by sample a representation that the bulk was as good as the sample necessarily amounted to a warranty. In *Reed v. Hastings*, 61 Ill. 266, 268, the court effectually limited its earlier decisions by holding that "the intention with which the representation is made is to be determined by the character of the representation made, and the object to be effected by it." The court further said, broadly: "When the representation is positive and relates to a matter of fact, it constitutes a warranty." "It surely cannot be the law that a vendor of a chattel is permitted to make any false statements of fact in relation to the article which he may choose to indulge in, thereby inducing the purchase, and not being accountable to the purchaser." The same test was applied in *Kenner v. Harding*, 85 Ill. 264, 28 Am. Rep. 615, and in

Roberts v. Applegate, 153 Ill. 210, 216, 38 N. E. 676. In *Phillips v. Vermillion*, 91 Ill. App. 133, however, the court, without citing any cases, held that the question of intention was vital. In Indiana the court lays stress on intent. In *House v. Fort*, 4 Blackf. 293, the court held that a statement that a horse was sound, made to induce the sale, was not, *per se*, a warranty. "It is of itself only a representation. To give it the effect of a warranty, there must be evidence to show that the parties intended it to have that effect." So in *Jones v. Quick*, 28 Ind. 125, it was held that the words must have been "intended and understood" as a warranty. In *Smith v. Borden*, 160 Ind. 223, 228, 66 N. E. 681, the court does not put the matter so strongly: "Any positive representation, assertion, or affirmation, made by the seller during the pendency of the negotiations for the sale, not the mere expression of an opinion or belief, which fairly expresses the intention of the seller to warrant the article or property sold to be what it is represented, will constitute an express warranty." See also *Bowman v. Clemmer*, 50 Ind. 10. In *Ransberger v. Ing*, 55 Mo. App. 621, the court held: "Mere assertions of the quality or condition of a chattel at the time of a sale is not, as matter of law, a warranty, but is merely evidence thereof as it may tend to show the intention of the parties, which is a question for the jury." In *Kircher v. Conrad*, 9 Mont. 191, 23 Pac. 74, 18 Am. St. Rep. 731, the court held that a statement made by a seller that certain wheat was "spring wheat," was not a warranty. The court relied on *Shisler v. Baxter*,

ing of apparent intent to assert a fact, undoubtedly a real requirement of the law of warranty is stated by the word; but as the word "intent" naturally means rather the seller's actual intent than

109 Pa. St. 443, 58 Am. Rep. 738, and *Lord v. Grow*, 39 Pa. St. 88, 80 Am. Dec. 504, which do indeed support the decision of the Montana court, but as has been seen the law of Pennsylvania is peculiar. *Seixas v. Woods*, 2 Caines, 48, 2 Am. Dec. 215. In this case the seller advertised certain wood he had for sale as "brazilletto," and showed to the plaintiff an invoice of the wood received from the person who had sold it to him, describing the wood by that name. He also made out a bill of parcels to the plaintiffs for the wood under that name. In fact, the wood was peachum, but the defendant did not know it. This was held no warranty because it did not appear by the evidence that the seller so intended. Again, in *Swett v. Colgate*, 20 Johns. 196, 11 Am. Dec. 266, the court held a description of certain goods by the seller as "barilla" did not amount to a warranty though they were such. The law of New York, however, is no longer indicated by these cases. In *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. Rep. 595, Earl, J., says: "It is not true, as sometimes stated, that the representation, in order to constitute a warranty, must have been intended by the vendor, as well as understood by the vendee, as a warranty. If the contract be in writing and it contains a clear warranty, the vendor will not be permitted to say that he did not intend what his language clearly and explicitly declares; and so, if it be by parol, and the representation as to the character or quality of the article sold be positive, not mere matter of opinion or judgment, and the vendee understands it as a

warranty, and he relies upon it, and is induced by it, the vendor is bound by the warranty, no matter whether he intended it to be a warranty or not. He is responsible for the language he uses, and cannot escape liability by claiming that he did not intend to convey the impression which his language was calculated to produce upon the mind of the vendee." See also *Heath Dry Gas Co. v. Hurd*, 124 N. Y. App. Div. 68, 108 N. Y. Supp. 410. In North Carolina early decisions laid stress on intent, and apparently by intent meant an intent to contract. *Erwin v. Maxwell*, 3 Murph. 241, 9 Am. Dec. 602; *Foggart v. Blackweller*, 4 Ired. 238. But in *McKinnon v. McIntosh*, 98 N. C. 89, 92, 3 S. E. 840, the court said: "That for misrepresentation the vendor is liable as on a warranty 'if such representation was intended not as a mere expression of an opinion but the positive assertion of a fact upon which the purchaser acts,' and this is a question for the jury." Compare *Wrenn v. Morgan*, N. C. , 61 S. E. 641. In Vermont the rule as to intention has been strictly applied until recently. In *Enger v. Dawley*, 62 Vt. 164, 19 Atl. 478, an instruction was requested that if a catalogue was used by the parties and referred to by them in completing the sale, and the defendant relied on statements therein and believed them to be true, they were, in legal effect, warranties. The court held the instruction correctly refused, saying: "To constitute a representation a warranty it must have been so intended and understood by the parties, both vendor and vendee. *Beeman v. Buck*,

the justifiable belief of the buyer, and as intent to warrant seems to mean intent to promise or enter into a contract quite as naturally as intent to assert a fact, it is much better to avoid the

3 Vt. 53, 21 Am. Dec. 571; *Foster v. Caldwell's Estate*, 18 Vt. 176; *Bond v. Clark*, 35 Vt. 577; *Houghton v. Carpenter*, 40 Vt. 588; *Pennock v. Stygles*, 54 Vt. 226; or, intended by the parties as a part of the contract; *Richardson v. Grandy*, 49 Vt. 22; or, have formed the basis of the contract; *Beals v. Olmstead*, 24 Vt. 114, 58 Am. Dec. 150; *Drew v. Edmunds*, 60 Vt. 401, 15 Atl. 100, 6 Am. St. Rep. 122." In *Hobart v. Young*, 63 Vt. 363, 369, 21 Atl. 612, 12 L. R. A. 693, however, the court modified its previous position, saying: "Any affirmation as to the kind or quality of the thing sold, not uttered as matter of commendation, opinion, nor belief, made by the seller pending the treaty of sale, for the purpose of assuring the purchaser of the truth of the affirmation and of inducing him to make the purchase, if so received and relied upon by the purchaser, is deemed to be an express warranty. And in case of oral contracts, it is the province of the jury to decide, in view of all the circumstances attending the transaction, whether such a warranty exists or not." In *Mason v. Chappell*, 15 Gratt. 572, 583, the court said: "No affirmation, however strong, will constitute a warranty unless it was so intended. If it is intended as a warranty the vendor is liable, if it turns out to be false, however honest he may have been in making it; but if it is intended as an expression of opinion merely, or as simple praise or commendation of the article, he is not liable unless it can be shown that he knew at the time that it was untrue." In later Virginia cases, however, less stress is laid upon intent. In *Herron v.*

Dibrell, 87 Va. 289, 12 S. E. 674, the court held that statements made in regard to tobacco that it was "sound" and "redried" and in "good keeping order," amounted to a warranty. The court quoted with approval: "The general rule is that whatever a person represents at the time of the sale is a warranty." See also *Milburn Wagon Co. v. Nisewarner*, 90 Va. 714, 19 S. E. 846. In *Giffert v. West*, 33 Wis. 617, the court held: "That an affirmation made by the vendor at the time of the sale amounts to an express warranty, if it appears on the facts stated or proven to have been so intended and received." In *Hoffman v. Dixon*, 105 Wis. 315, 81 N. W. 491, 76 Am. St. Rep. 916, however, the court held: "An affirmation of the fact as to the kind or quality of an article offered for sale of which the vendee is ignorant but on which he relies in purchasing such article is as much a binding contract of warranty as a formal agreement using the plainest and most equivocal language on the subject." "The better class of cases hold that a positive affirmation of a material fact as a fact, intended to be relied upon as such and which is so relied upon, constitutes in law a warranty, whether the vendor mentally intended to warrant or not. The latter is the doctrine of this court, as indicated by numerous cases where it has been applied." To similar effect is *J. H. Clark Co. v. Rice*, 127 Wis. 451, 106 N. W. 231. See also *Bagley v. Cleveland Rolling Mill Co.*, 21 Fed. Rep. 159; *Unland v. Garton*, 48 Neb. 202, 66 N. W. 1130; *Cole v. Carter*, 22 Tex. Civ. App. 457, 54 S. W. 914.

use of the word in this connection altogether, and the best modern authorities have reached this result.⁹⁹

⁹⁹ This is shown by quotations in the note to the preceding section taken from late decisions of the courts of Alabama, Illinois, New York, Vermont, Virginia, and Wisconsin. It is also stated in recent cases in other jurisdictions. *McClintock v. Emick*, 87 Ky. 160, 7 S. W. 903. In reply to a question the seller of mules said they were "all right." The plaintiff's petition averred that the defendant merely "represented" the mules were all right. It was held the petition sufficiently stated a cause of action and the evidence justified recovery. The court said: "Some of the cases, however, seem to make the existence of a warranty depend upon the intention of the vendor; and it is urged in this case that the petition is defective in failing to aver that the appellant expected or intended the appellee to rely upon his representation in making the purchase. If the true construction of this class of cases is that the decision did not turn upon whether the party intended to be held by a warranty, but whether he intended to affirm a fact or merely express an opinion, then they are reconcilable with the cases which, in our opinion, correctly hold that if one even supposes that he is not making himself liable upon a warranty, yet if he makes a positive affirmation as to the condition of the property, or utters what is equivalent to a promise as to it, instead of expressing a belief merely, then such affirmation or promise amounts to a warranty, and he is liable upon it. It does not depend upon whether the vendor intends to be bound by his warranty or not, but upon whether he made an affirmation as to the con-

dition of the article or merely expressed an opinion as to it." In *Ormsby v. Budd*, 72 Iowa, 80, 33 N. W. 457, the court held representations amounted to a warranty, and said nothing in regard to the seller's intent. In *Stroud v. Pierce*, 6 Allen, 413, 416, the court said: "The defendant contends that it should have been left to the jury to find whether this language was used with the intent of affirming the fact or of expressing an opinion, but the intent of the party is immaterial." So in *Ingraham v. Union R. R. Co.*, 19 R. I. 356, 33 Atl. 875, a public announcement at an auction sale "that all horses about to be offered had been driven single, and that all horses which were not kind and safe to drive single would be specified at the time they were sold," was held to amount to a warranty that all horses then sold were kind and safe to drive singly unless the contrary were stated, and the court said: "Nor is it true, as sometimes stated, that the representation, in order to constitute a warranty, must have been intended by the vendor, as well as understood by the vendee, as a warranty. For if the representation as to the character or quality of the article sold be positive, and not mere matter of opinion, and the vendee understands it and relies upon it as a warranty, the vendor is bound thereby, no matter whether he intended it to be a warranty or not." See also *Shippen v. Bowen*, 122 U. S. 575, 30 L. ed. 1172; *Accumulator Co. v. Dubuque St. Ry. Co.*, 64 Fed. Rep. 70, 77, 27 U. S. App. 364, 12 C. C. A. 37; *Miller v. Moore*, 83 Ga. 684, 10 S. E. 360, 6 L. R. A. 374, 20 Am. St. Rep. 329; *Conkling*

§ 202. Distinction between affirmation of fact and opinion.—

It is not easy to draw the line accurately between affirmation of fact on the one hand and statements of opinion on the other. Several distinctions may be noticed. In the first place it seems obvious that any statement may be put in the form of a statement of opinion. If the seller says a horse is sound, he affirms a fact; but when he states that he believes him to be sound, the only fact which he asserts is his belief, and if he does in fact believe the horse to be sound, he could not be held liable if the horse were not sound. Again there are some matters which, even though asserted positively, are in their nature so dependent on individual opinion that no matter how positive the seller's assertion it is not held to create a warranty. Such assertions as that things are fine or valuable, or better than productions of rival makers, are of this sort. It should be noticed, however, that the continual tendency of the law is to restrict the seller in regard to untruthful puffing of his wares. A further test has been suggested; namely, that if the statement is in regard to something of which the buyer is ignorant and relies upon the seller for information, a statement of the seller would be a warranty; but if the matter was one in regard to which the buyer had as good opportunity for forming an accurate judgment and was as competent to pass such a judgment as the seller, the statement will be matter of opinion. This test does not seem conclusive, however. Though a buyer has the opportunity and the skill to pass judgment upon goods, he may be induced not to do so by positive statements of the seller. If such statements are made for the purpose of inducing a sale and do induce it, there seems no reason why the seller should not be liable. In any event the test last suggested concerns rather the buyer's reliance on the assertion than the char-

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| <i>v. Standard Oil Co.</i> , Iowa, , | 496, 20 Am. Rep. 425; Fairbank |
| 116 N. W. 822; <i>Harrigan v. Advance</i> | <i>Canning Co. v. Metzger</i> , 118 N. Y. |
| <i>Thresher Co.</i> , 26 Ky. L. Rep. 317, | 260, 23 N. E. 372, 16 Am. St. Rep. |
| 81 S. W. 261; <i>Creenshaw v. Slye</i> , | 753; <i>Wrenn v. Morgan</i> , N. C. , |
| 52 Md. 140; <i>Potomac Steamboat Co.</i> | 61 S. E. 641; <i>Northwestern Lumber</i> |
| <i>v. Harlan, etc., Co.</i> , 66 Md. 42, 4 | <i>Co. v. Callendar</i> , 38 Wash. 492, 498, |
| Atl. 903; <i>J. I. Case Machine Co. v.</i> | 79 Pac. 30; <i>Huntington v. Lombard</i> , |
| <i>McKinnon</i> , 82 Minn. 75, 84 N. W. | 22 Wash. 202, 60 Pac. 414; <i>Camp-</i> |
| 646; <i>Wolcott v. Mount</i> , 36 N. J. L. | <i>bell v. Smith</i> , 13 Vict. L. Rep. 439. |
| 262, 13 Am. Rep. 438, 38 N. J. L. | |

acter of the assertion itself, and the question should be dealt with under reliance. A more detailed consideration of authorities may now be given.

§ 203. **Contrasting decisions of statements of fact and of opinion.**

— Since the distinction between what are statements of fact and what are expressions of opinion involves a discrimination between expressions which gradually shade from one to the other, the best way of indicating where the line between the two is to be drawn is by stating a number of decisions on each side. It is to be noticed that the same sort of question that is involved in the law of warranty is also to be observed in actions of tort for deceit and in proceedings to rescind a transaction on account of fraud.¹ While it cannot be asserted that any statement which is too largely mere matter of opinion to amount to a warranty may not, at least if fraudulently made, be ground for an action for deceit or proceedings for rescission of a bargain, the converse statement may be made, that is, if a statement falsely and fraudulently made will not sustain an action of deceit or afford ground for rescinding a contract, it is still more clear that it cannot amount to a warranty.²

¹ As to these, see *infra*, § 628.

² In the following cases relief was allowed: *Sauerman v. Simmons*, 74 Ark. 563, 86 S. W. 429, an action of rescission for breach of warranty. Held a question for jury whether representations as to a pump "that it would lift water thirty-five feet on a straight lift" amounted to a warranty. *Mason v. Thornton*, 74 Ark. 46, 84 S. W. 1048, an agreement that the price of the goods sold should be determined by the cost marks upon them was held to involve a statement by the seller that the marks purporting to indicate the cost did so in fact, and that tort for deceit would lie if the seller knew the marks to be inaccurate. *Burge v. Stroberg*, 42 Ga. 88, a statement that a horse was fourteen years old, held a warranty. *Christian v. Knight*,

128 Ga. 501, a statement that clothing to be delivered shall be of as good quality as some shown the buyer, held a warranty. In *French v. Hardin County Canning Co.*, 67 Ill. App. 269, the seller wrote "understand we quote you only on cans that are well made, tested, and in every way satisfactory for your work." This was held to create a warranty that cans bought thereafter were first class in every particular. *Forcheimer v. Stewart*, 65 Iowa, 593, 22 N. W. 886, 54 Am. Rep. 30, a description of hams as "choice sugar-cured canvassed hams" was held a statement of fact. *Latham v. Shipley*, 86 Iowa, 543, 53 N. W. 342, statements were made in a catalogue in regard to a machine that it was in "first class order" and in letters that "it will certainly do your

The question whether a statement by the seller of an animal that it was sound is or may be a matter of opinion is one that

work," the buyer had not seen the machine and relied on the seller's statements. Held the seller was liable in damages for breach of warranty. *Stevens v. Bradley*, 89 Iowa, 174, 56 N. W. 429, the owner of hogs at an auction sale announced that they were as "thrifty a lot as he had ever owned, and that he had been in the hog business a good many years." Held a warranty of soundness. *Conkling v. Standard Oil Co.* (Iowa), 116 N. W. 822. A seller of oil represented that it was non-inflammable and safe and fit to use as a cooling medium for gasoline engines. Held a warranty. *Harrigan v. Advance Thresher Co.*, 26 Ky. L. Rep. 317, 81 S. W. 261, statements in regard to a second-hand engine that it was "all right, in good condition," and "could do the work of any good twelve horse-power engine" if untrue, justified recoupment in an action for the price. *McClintock v. Emick*, 87 Ky. 160, 7 S. W. 903, a statement pending a bargain that mules were "all right" amounts to a warranty of soundness. *Bryant v. Crosby*, 40 Me. 9, the statement that "sheep are young and healthy" is a statement of fact. *Morse v. Moore*, 83 Me. 473, 22 Atl. 362, 13 L. R. A. 224, 23 Am. St. Rep. 783, "good clear merchantable ice not less than twelve inches in thickness." These words were part of the seller's promise in a written contract and were held to amount to a warranty. *J. I. Case Co. v. McKinnon*, 82 Minn. 75, 84 N. W. 646, an assurance that an engine had "ample power" to run a separator was held to render the seller liable as a warrantor. *Branson v. Turner*, 77 Mo. 489, the seller wrote the buyer that he had a fine steer for

sale, that the steer had a sore under his neck, "but that don't hurt him, it is most well." The buyer replied, "if your cattle are as good as represented you can deliver them." The steer was thereupon sent with others. It was held this amounted to a warranty. *Burr v. Redhead*, 52 Neb. 617, 72 N. W. 1058, a statement that bicycles were to be of "good materials" and of the "highest possible grade" were held statements of fact. *Lederer v. Yule*, 67 N. J. Eq. 65, 57 Atl. 309, a representation that a patented burglar alarm could be made as good as a sample for a specified price, was held ground for rescission for fraud. This necessarily involved a decision that the representation was as to matter of fact rather than opinion. *Phillips v. Crosby*, 70 N. J. L. 785, 55 Atl. 814, representations by the seller of oil stock, as to the lands owned by the company, the number of oil wells upon the lands and their productiveness, it was held should be submitted to the jury to find whether there was a warranty. *Money v. Fisher*, 92 Hun, 347, on purchase of a bull the buyer asked is he "fat and all right," and said he would purchase on that condition. The seller answered "yes." This was held a warranty. *Titus v. Poole*, 145 N. Y. 414, 40 N. E. 228, on selling bank stock the seller stated that the bank was organized under the laws of Pennsylvania, that the stock was worth 100 cents on the dollar, and that it was good high dividend paying stock. It was held the seller was liable for these statements as upon a warranty that the stock was worth par, and that the bank was organized as represented. *May v. Loomis*, 140 N. C. 350, 52 S. E.

has been much litigated. In the older cases the tendency was to hold that such a statement might be matter of opinion, although

728, statements fraudulently made by the sellers of timber that they had had it carefully estimated, and that the estimate showed a specified quantity, are statements of fact, and entitle the buyer to a counterclaim when sued for the price. *Reese v. Bates*, 94 Va. 321, 26 S. E. 865, a statement that guano was "as good as any in the market" is a statement of fact. *Northwestern Lumber Co. v. Callendar*, 36 Wash. 492, 79 Pac. 30, representations by the seller for machinery to make boxes, as to the worth of the machinery and the boxes made by it, were held warranties, justifying a finding for the buyer in an action for the balance of the price. *Winkler v. Patten*, 57 Wis. 405, 15 N. W. 380, statements that goods were "good bagging and gunnies" and were "far superior to any Chicago and Milwaukee packings," and were "worth two and one-half cents per pound" amounted to a warranty, justifying the buyer in counterclaiming in an action for the price. *Milwaukee Machine Co. v. Hamacek*, 115 Wis. 422, 91 N. W. 1010, the seller's statement that an engine was "as good as new in every particular" is an assertion of fact. See also *Lamme v. Gregg*, 1 Mete. (Ky.) 444, 71 Am. Dec. 489; *Dickens v. Williams*, 2 B. Mon. 374; *Young v. Van Natta*, 113 Mo. App. 550, 88 S. W. 128; *Love v. Miller*, 104 N. C. 582, 10 S. E. 685; *Reiger v. Worth*, 130 N. C. 268, 41 S. E. 377, 89 Am. St. Rep. 865; *Beasley v. Surles*, 140 N. C. 605, 53 S. E. 360.

In the following cases relief was denied: *Chalmers v. Harding*, 17 L. T. (N. S.) 571, a statement in regard to a reaping machine

that it would "cut wheat, barley, etc., efficiently," held no warranty. *Brawley v. United States*, 96 U. S. 168, 24 L. ed. 622, a contract for the sale of an entire lot of goods, naming the quantity, with the addition of the words "more or less." It was held that the representation as to quantity was merely an estimate of opinion. *Schroeder v. Trubee*, 35 Fed. Rep. 652, a statement by the seller, made in good faith of stock, that dividends which had been declared had been earned, and that the stock account was "all right," held to be no warranty. *Sleeper v. Wood*, 60 Fed. Rep. 888, 21 U. S. App. 127, 9 C. C. A. 289, a statement that canned corn was of the "best packing of 1888," accompanied with "usual guaranty against swells," was matter of opinion. *Crosby v. Emerson*, 142 Fed. Rep. 713, 74 C. C. A. 45, a statement by the seller of mining stock in regard to the value of the property, with prophesies as to the prospects of the company, held no defense to an action for the price. *Farrow v. Andrews*, 69 Ala. 96, a representation by a seller of guano that it was a good fertilizer, held no warranty. *Shiretzki v. Kessler* (Ala.), 37 So. 422, a statement that certain whiskey would meet the wants of the buyer's trade, held no defense to an action for the price. *Bain v. Withey*, 107 Ala. 223, 18 So. 217, a statement that a patented article was "a valuable and useful improvement," held a mere expression of opinion, and no defense for an action for the price. *Baldwin v. Daniel*, 69 Ga. 782, a representation that a plow would "sell well in Mississippi," held a statement of opinion, and no defense to an action for the price.

not so necessarily.³ The modern and better view is that such a statement positively made in such a way as to form part of the

Navassa Co. v. Commercial Co., 93 Ga. 92, 18 S. E. 1000, a sale of specific pile of guano, "estimated" to contain 253½ tons, was agreed upon. The purchaser was held bound to take the entire pile, though it contained 702 7-10 tons. *Towell v. Gatewood*, 3 Ill. 22, 33 Am. Dec. 437, statement in a bill of sale describing tobacco as "good first and second rate tobacco," held a statement of opinion. *Barrie v. Jerome*, 112 Ill. App. 329, statements by a seller of Balzac's works, that they were "nice books," "books that children would love to read," were statements of opinion merely, and no defense to an action for the price. *Jackson v. Mott*, 76 Iowa, 263, 41 N. W. 12, a statement of the age of a horse was held erroneously ruled as warranty as matter of law. The question should have been submitted to the jury. *Shambaugh v. Current*, 111 Iowa, 121, 82 N. W. 497, and *Burnett v. Hensley*, 118 Iowa, 575, 92 N. W. 678, a description of animals as "thoroughbred," held not a statement of fact. *Gaar v. Halverson*, 128 Iowa, 603, 105 N. W. 108, statements that an engine was "practically as good as new," and was of sufficient power to drive the defendant's machinery, held expressions of opinion, and no defense to an action for the price. *Bryant v. Crosby*, 40 Me. 9, a statement that "sheep would shear from three to five pounds of wool per head, and that the buyer could pay for the sheep by the wool from the sheep in two years, and have wool left," a statement of opinion. *Rice v. Codman*, 1 Allen, 377, bill of sale of gunny cloth which specified the weight as "per foreign invoice" was held not a warranty that the actual

weight corresponds with the invoice weight, and the seller was not liable in damages. *Deming v. Darling*, 148 Mass. 504, 20 N. E. 107, 2 L. R. A. 473, a statement that a bond was "an A1 bond" was held a matter of opinion, not making the seller liable for fraudulent representations. In *Morley v. Consolidated Mfg. Co.* (Mass.), 81 N. E. 993, the plaintiff bought a second-hand automobile for about one-half the price of a new car. He used it several months when the crank shaft broke and damaged the engine materially. The agent who sold the machine to the plaintiff said at the time of the sale "that the machine had been used as a demonstrating car, and had been run about 500 miles; that it was in first-class condition and all right." The trial court ordered a verdict for the defendant, which was upheld, the court saying: "There was no express warranty, all that Read said as to the value and nature of the machine was mere sellers' talk." *Worth v. McConnell*, 42 Mich. 473, 4 N. W. 198, a statement that a threshing machine "is a very good machine and will do very nice work," held not a warranty and no defense to an action for the price. *Linn v. Gunn*, 56 Mich. 447, 23 N. W. 84, the seller of a stock of goods represented that the stock equalled in cost an amount shown by an inventory less an amount shown in his books as received from sales. The seller was held not liable. His statements were made in good faith and the purchaser was experienced. *Matlock v. Meyers*, 64 Mo. 531, statement in regard to a mare that she is a "good mare," held not a warranty of soundness, and not to making the seller liable

inducement of a sale is necessarily a warranty.⁴ Another class of cases that deserves special notice is that relating to statements of value. Such statements are generally expressions of opinion. The question more often arises in attempts to hold the seller for fraudulent conduct and the cases are referred to in that con-

for a defect in her eyes. *Bartlett v. Hoppock*, 34 N. Y. 118, 88 Am. Dec. 427, a statement in regard to cattle by an Ohio drover to a New York city stock buyer in regard to hogs that they were "suitable and proper for the New York market" was held matter of opinion. The hogs were open to inspection and the court said: "The purchaser had much the better opportunity of knowledge, and were it otherwise it would not constitute a warranty in law." There was, therefore, no defense to an action for the price. *Stumpp v. Lynber*, 84 N. Y. Suppl. 912, a statement that roses offered for sale "were very fine stock," held not a warranty, and no defense to an action for the price. *Cash Register Co. v. Townsend Grocery Store*, 137 N. C. 652, 50 S. E. 306, statements that a cash register "would do away with a bookkeeper," "that the books could be kept on the machine," "that the machine could be operated by a person of ordinary intelligence," held to be statements of opinion, and no defense to an action for the price. *Osborne v. McCoy*, 107 N. C. 726, 12 S. E. 383, a statement by the seller "that a horse was sound as far as he knew," honestly made, held no warranty. *Worrell v. Kinnear Mfg. Co.*, 103 Va. 719, 49 S. E. 988, a statement that a bid was as low as work in question could be done for, and that there was no profit at that price, held expressions of opinion, which did not justify rescission by the purchaser. *Baker v. Henderson*, 24 Wis. 509, a

statement that "trees had not been injured by exposure to the weather," held no warranty and no defense to an action for the price. *Elkins v. Kenyon*, 34 Wis. 93, a statement of an agricultural machine that it would work "in all kinds of hay, grain, straw, and other grass," held no warranty. See also *Tabor v. Peters*, 74 Ala. 90, 49 Am. Rep. 804; *Englehardt v. Clanton*, 83 Ala. 336, 3 So. 680; *Collins v. Tigner*, 5 Del. 345, 60 Atl. 978; *Roberts v. Applegate*, 153 Ill. 210, 38 N. E. 676; *Lynch v. Murphy*, 171 Mass. 307, 50 N. E. 623; *Bates County Bank v. Anderson*, 85 Mo. App. 351; *Anthony v. Potts*, 63 Mo. App. 517; *Walsh v. Hall*, 66 N. C. 233; *Oneal v. Weisman* (Tex. Civ. App.), 88 S. W. 290; *Tenney v. Cowles*, 67 Wis. 594, 31 N. W. 221.

³ See *Tyre v. Causey*, 4 Har. (Del.) 425; *Hawkins v. Berry*, 10 Ill. 36; *House v. Fort*, 4 Blackf. 293; *Baird v. Matthews*, 6 Dana, 129; *Hazard v. Irwin*, 18 Pick. 95; *Whitney v. Sutton*, 10 Wend. 411; *Erwin v. Maxwell*, 3 Murph. 241, 9 Am. Dec. 602; *Inge v. Bond*, 3 Hawks, 101. In Pennsylvania the court has gone still further and held such a statement no evidence of a warranty. See *supra*, § 199.

⁴ *Riddle v. Webb*, 110 Ala. 599, 18 So. 323; *Cummins v. Ennis*, 4 Del. 424, 56 Atl. 377; *Joy v. Bitzer*, 77 Iowa, 73, 41 N. W. 575, 3 L. R. A. 184; *McClintock v. Emick*, 87 Ky. 160, 7 S. W. 903; *Hobart v. Young*, 63 Vt. 363, 21 Atl. 612, 12 L. R. A. 693.

nection.⁵ A statement of facts upon which value depends is, however, an affirmation of fact. Therefore, a statement of the cost of property or of offers received for it should be beyond the line allowed for seller's puffing.⁶

§ 204. **Liability for erroneous statement of opinion.**—Even though a statement is of such a character that it would be regarded merely as an expression of opinion, under ordinary circumstances, there may be cases where a seller is subject to an extraordinary duty. Thus, the seller may expressly warrant the correctness of his opinion.⁷ So where statements are made by one occupying the position of a fiduciary or an expert, expressions which might not render a person of a different character liable will be actionable. This is well settled in the law governing actions of tort for deceit,⁸ and there seems no reason to doubt that in the law of warranty the same distinction should be taken. A third class of cases which may be suggested consists of cases where the seller's expression of opinion is made with knowledge of its falsity. But whether a knowingly false statement of the seller's opinion may ever afford ground for an action of deceit, because of the seller's fraud, on the ground that a statement by the seller of what he believes is in itself a statement of his own mental attitude, which he should have no right fraudulently to misrep-

⁵ See *infra*, § 628.

⁶ See *infra*, § 628. See also *Phillips v. Crosby*, 70 N. J. L. 785, 55 Atl. 814, stated, *supra*, note 2; *Titus v. Poole*, 145 N. Y. 414, 40 N. E. 228; also stated in note 2; *Oneal v. Weisman* (Tex. Civ. App.), 88 S. W. 290.

⁷ *Aultman v. Weber*, 28 Ill. App. 91, the seller of a machine "warranted" that it would do as good work as any other in the market. This was held actionable. Had the buyer merely made a statement to this effect in the course of the negotiations, it may, perhaps, be doubted whether the court would have reached the same result. So in *Briggs v. Rumely Co.*, 96 Iowa, 202, 64 N. W. 784, the seller of a machine "war-

ranted" it "to do as good work as any other separator of its size in the United States." In *Hazelton Boiler Co. v. Fargo Gas Co.*, 4 N. Dak. 365, 61 N. W. 151, the sellers said "we guarantee" that the boiler, which was the subject-matter of the sale, "will make a saving of at least 20 per cent. in fuel as compared with any other horizontal boiler." This was held an actionable warranty. See also *McCormick Harvesting Machine Co. v. Brower*, 88 Iowa, 607, 55 N. W. 537. See also *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582, 54 N. E. 987.

⁸ 2 Cooley, *Torts* (3d ed.), 925. See also *infra*, § 628.

resent, knowledge of the incorrectness of his opinion seems to impose no liability on the ground of warranty.⁹

§ 205. **Description of the goods.**—It was held in an early English case,¹⁰ where the seller gave the following receipt “received of [the buyer] 10 pounds for a gray, 4yr. old colt, warranted sound in every respect,” that there was no warranty of the colt’s age, the words being mere description. It is obvious that the seller’s promise to warrant in this case related only to soundness, but that should give him no right to make positive untruthful assertions in regard to matters not included in the promises, the decision seems, therefore, erroneous.¹¹ If the statement “warranted

⁹ *Deming v. Darling*, 148 Mass. 504, 20 N. E. 107, 2 L. R. A. 743, this was an action for fraudulently inducing the plaintiff to purchase a bond by representing that it was an A1 bond, and that the mortgaged railroad was good security for it. Holmes, J., in delivering the opinion of the court said: “The language of some cases certainly seems to suggest that bad faith might make a seller liable for what are known as seller’s statements, apart from any other conduct by which the buyer is fraudulently induced to forbear inquiries. *Pike v. Fay*, 101 Mass. 134. But this is a mistake. It is settled that the law does not exact good faith from a seller in those vague commendations of his wares which manifestly are open to difference of opinion, which do not imply untrue assertions concerning matters of direct observation (*Teague v. Irwin*, 127 Mass. 217), and as to which it always has been “understood, the world over, that such statements are to be distrusted.” *Brown v. Castles*, 11 Cush. 348, 350; *Gordon v. Parmelee*, 2 Allen, 212; *Parker v. Moulton*, 114 Mass. 99, 19 Am. Rep. 315; *Poland v. Brownell*, 131 Mass. 138, 142, 41 Am. Rep. 215; *Burns v. Lane*, 138 Mass. 350, 356. *Parker v. Moul-*

ton also shows that the rule is not changed by the mere fact that the property is at a distance, and is not seen by the buyer. Moreover, in this case, market prices at least were easily accessible to the plaintiff.” It may safely be assumed that the court would have been at least equally clear that the language complained of did not amount to a warranty. In *Osborne v. McCoy*, 107 N. C. 726, 730, 12 S. E. 383, the court said of a statement of opinion: “If knowingly false, it might have been cause for an action of deceit, but it was no warranty.” In regard to the liability of the maker of such a statement for deceit rather than warranty, the reasoning upon which a promise made with intent not to keep it has been held fraudulent may be considered. See *infra*, § 630.

¹⁰ *Budd v. Fairman*, 8 Bing. 48.

¹¹ To the same effect is *Richardson v. Brown*, 1 Bing. 344. These decisions were followed in *Willard v. Stevens*, 24 N. H. 271, where the memorandum was as follows: “Bought one red horse, six years old for \$125, which I warrant sound and kind,” and in *Anthony v. Halstead*, 37 L. T. (N. S.) 433. See *infra*, § 213.

sound in every respect" had been omitted, the decisions presently to be referred to sufficiently show that the statement of age or any other descriptive statement would be a warranty. The addition of the warranty of soundness was undoubtedly for the purpose of giving the buyer an additional right, not for the purpose of restricting the seller's liability, and should not affect the question.¹² Occasionally decisions still refer to "matter of description," or "descriptive statements" as if those terms were inconsistent with a warranty.¹³ No doubt there is a distinction between matter of description and collateral warranties in regard to the question whether the promise of a seller is an integral part of a single contract or is a collateral bargain, if that question is important, as it is held to be in some States in determining whether a promise in a contract to sell is a warranty which survives acceptance of the goods, a question hereafter considered.¹⁴ But the cases here criticised seem to hold that matter of description imposes no obligation whatever on the seller. The law, however, is now convincingly settled that descriptive statements do constitute a warranty, whether the seller makes them or whether the buyer in ordering goods makes them and the seller furnishes goods in response to such order.¹⁵ Doubtless a description of goods by the seller does not necessarily imply

¹² See *infra*, § 213.

¹³ In *Shambaugh v. Current*, 111 Iowa, 121, 82 N. W. 497, a description of cattle in a written contract as "thoroughbred" was held not to constitute a warranty on the grounds that the word was merely descriptive. The case was followed in *Burnett v. Hensley*, 118 Iowa, 575, 92 N. W. 678. See also *Carondelet Iron Works v. Moore*, 78 Ill. 65; *Baird v. Matthews*, 6 Dana, 133; *Staiger v. Soht*, 116 N. Y. App. Div. 874, 102 N. Y. Suppl. 312; *affd.*, 191 N. Y. 527, 84 N. E. 1120; *Brown v. Baird*, 5 Okla. 133, 48 Pac. 180.

¹⁴ *Infra*, § 489.

¹⁵ *Josling v. Kingsford*, 13 C. B. (N. S.) 447 ("oxalic acid"); *Allan v. Lake*, 18 Q. B. 560 (turnip seeds were sold as "Skiving's Swedes"); *Bagley v. Cleveland Rolling Mill Co.*, 21 Fed. Rep. 159 ("same quality as

last lot" of steel); *Flint v. Lyon*, 4 Cal. 17 ("Haxall" flour); *Miller v. Moore*, 83 Ga. 684, 10 S. E. 360, 6 L. R. A. 374, 20 Am. St. Rep. 329 ("No. 2 white mixed corn"); *Americus Grocery Co. v. Brackett*, 119 Ga. 489, 46 S. E. 657 ("Texas red rust-proof seed oats"); *Henderson Elevator Co. v. North Georgia Milling Co.*, 126 Ga. 279, 55 S. E. 50; *De Loach Mfg. Co. v. Tutweiler Coal Co.*, 2 Ga. App. 493, 58 S. E. 790 ("Standard Alabama No. 1 soft and Alabama foundry No. 2 pig iron"); *Foss v. Sabin*, 84 Ill. 564 ("fat cattle"); *Telluride Power Co. v. Crane Co.*, 103 Ill. App. 647; *Aultman-Taylor Co. v. Ridenour*, 96 Iowa, 638, 65 N. W. 980 (order for "twelve dingee horse-power"); *Morse v. Moore*, 83 Me. 473, 22 Atl. 362, 13 L. R. A. 224, 23 Am. St. Rep. 733 ("good clear merchantable ice, not

that the description is literally true, and if a reasonable person would not draw that inference from the description there can be no warranty that the description is literally true. In a Massachusetts case,¹⁶ the sellers manufactured chains known in the market as horn chains. The buyer bought of the seller "all the horn chains they manufactured." The chains regularly manufactured by the seller, though they were what were known as horn chains in the market, were made partly of horn and partly of hoof. It was held that there was no warranty that the chains were all horn. The court put as an illustration the case of a sale of "gold watches." There is of course no warranty that watches sold under that designation are made of gold in every part. So a sale of a "No. 4 fire-proof safe" does not carry with it a warranty that the safe is in fact absolutely fire-proof.¹⁷ These cases are not, however, opposed to the rule suggested in this section. In each of the

less than twelve inches in thickness"); *Osgood v. Lewis*, 2 H. & G. 495, 18 Am. Dec. 317 ("winter pressed sperm oil"); *Edgar v. Breck*, 172 Mass. 581, 52 N. E. 1083 (bulbs of a named variety); *Gould v. Stein*, 149 Mass. 570, 22 N. E. 47, 5 L. R. A. 213, 14 Am. St. Rep. 455 ("second-class Ceara rubber"); *Henshaw v. Robbins*, 9 Metc. 83, 43 Am. Dec. 367 ("blue vitriol"); *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438, 38 N. J. L. 496, 20 Am. Rep. 425 ("strap-leaf, red-top turnip seed"); *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. Rep. 595 ("paris green"); *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13 ("large Bristol cabbage seed"); *Depew v. Peck Hardware Co.*, 121 N. Y. App. Div. 28, 105 N. Y. Suppl. 390 (seed); *Abel v. Murphy*, 43 N. Y. Misc. Rep. 648, 88 N. Y. Suppl. 256 ("grape fruit"); *Lewis v. Rountree*, 78 N. C. 323 ("strained rosin"); *Northwestern Cordage Co. v. Rice*, 5 N. Dak. 432, 67 N. W. 298, 57 Am. St. Rep. 563 ("pure manilla twine"); *Morse v. Union Stock Yards*, 21 Or. 289, 28 Pac. 2, 14 L. R. A. 157 ("beef cat-

tle"); *Hoffman v. Dixon*, 105 Wis. 315, 81 N. W. 491, 76 Am. St. Rep. 916 ("rape seed"). See also *Tinken Carriage Co. v. Smith*, 123 Iowa, 554, 99 N. W. 183; *Hastings v. Lovering*, 2 Pick. 214, 13 Am. Dec. 420; *Hogins v. Plympton*, 11 Pick. 97; *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136; *Jones v. George*, 61 Tex. 345, 48 Am. Rep. 280; *Drew v. Edmunds*, 60 Vt. 401, 15 Atl. 100, 6 Am. St. Rep. 122. Also *infra*, §§ 223-225. In Pennsylvania, however, in conformity with the narrow limits imposed by the law of that State on warranty, it is held that it is only in executory contracts to sell that the description of the goods imports a promise on the part of the seller: *Selser v. Roberts*, 105 Pa. St. 242; *Ryan v. Ulmer*, 108 Pa. St. 332, 137 Pa. St. 310, 56 Am. Rep. 210; *Fogel v. Brubaker*, 122 Pa. St. 7, 15 Atl. 692. See further, *supra*, § 199.

¹⁶ *Swett v. Shumway*, 102 Mass. 365.

¹⁷ *Diebold Safe Co. v. Huston*, 55 Kans. 104, 39 Pac. 1035, 28 L. R. A. 53.

cases just put there was a warranty. The question simply related to the construction of it. What is the proper meaning of "horn chain," "gold watch," "fire-proof safe?" The seller warrants anything he sells by such a description to be the sort of thing that a reasonable person, having knowledge of any customs of trade bearing upon the matter which would be binding upon him, would be justified in calling by that name.¹⁸ And where the bargain relates to specific goods, which are known to the buyer, words which can only properly be understood as identifying the goods, not as stating directly or indirectly some fact about them as an inducement to the purchase, there is no warranty.¹⁹ The reason for this is not because the words are descriptive, but because the buyer does not rely on the description as a basis for his purchase.

§ 206. **Reliance of the buyer.**—As it is essential to maintain the action of deceit that the plaintiff should have relied, to his injury, on the false statements complained of, and as it is necessary in *assumpsit* that the plaintiff should have done some act in reliance upon the offer, so it was an early requirement of the law of warranty that the buyer should have relied on the warranty. The cases in which the principle was first brought out relate to statements in regard to goods which were obviously defective, especially horses with defective eyes. In an early case, Brian, C. J., said: "If a man sells me a horse and warrants that he has two eyes, if he has not, I shall not have an action of deceit, as I could know this at the beginning."²⁰ This was repeated in later cases and the point of the remark was brought out by a later discrimination, "and the distinction is taken where I sell a horse that has no eye, there no action lies; otherwise where he has a counterfeit, false, and bright eye."²¹ It is evident, however, that a buyer might rely on a seller's statement and be deceived even though he could have found out the truth by careful inspection and this was recognized before long.²² There is danger of giving greater effect

¹⁸ See also *Rollins v. Northern Land Co.*, Wis., 114 N. W. 819.

¹⁹ *St. Anthony Elevator Co. v. Princeton Mill Co.*, 104 Minn. 401, 116 N. W. 935. And see cases cited in note 13.

²⁰ Y. B., 11 Ed. IV, 6, 10.

²¹ *Southerne v. Howe*, 2 Rolle, 5. See also Y. B., 13 Henry IV, 1, 4.

²² *Butterfield v. Burroughs*, 1 Salk. 211. This was an action for breach of warranty of a horse which lacked an eye. After verdict for the plaintiff it was objected in arrest of judgment

to the requirement of reliance than it is entitled to. It is, of course, true that the warranty need not be the sole inducement to the buyer to purchase the goods.²³ And as in *assumpsit*, as a general rule no evidence of reliance by the buyer is necessary other than that the seller's statements were of a kind which naturally would induce the buyer to purchase the goods and that he did purchase the goods.²⁴ The difficulties which arise in regard to questions of reliance relate to several special cases which may be classified under four headings, as follows: 1, Obvious or known defects; 2, inspection; 3, statements made previously to the bargain; 4, statements made subsequent to the bargain.

§ 207. **Obvious or known defects.**—The rule in regard to obvious defects is not always clearly stated, and two conceptions exist which are not always kept separate. In the first place a warranty in general terms is held not to cover defects which the buyer must have observed.²⁵ This is a rule of a construction, and

that "the want of an eye is a visible thing, whereas the warranty extends only to secret infirmities, but to this it was answered and resolved by the court that this might be so, and was intended to be so since the jury has found that the defendant did warrant." *Roscorla v. Thomas*, 3 Q. B. 234; 3 Bl. Comm. 165.

²³ *Mitchell v. Pinckney*, 126 Iowa, 696, 698, 104 N. W. 286; *Chicago Telephone Supply Co. v. Marne*, 134 Iowa, 252, 111 N. W. 935. And see cases on warranty, *passim*.

²⁴ *Shordan v. Kyler*, 87 Ind. 38; *Mitchell v. Pinckney*, 126 Iowa, 696, 699, 104 N. W. 286; *J. I. Case Co. v. McKinnon*, 82 Minn. 75, 84 N. W. 646.

²⁵ *Thompson v. Harvey*, 86 Ala. 519, 5 So. 825; *Huston v. Plato*, 3 Colo. 402; *Marshall v. Drawhorn*, 27 Ga. 275; *Ragsdale v. Shipp*, 108 Ga. 817, 34 S. E. 167; *O. H. Jewell Filter Co. v. Kirk*, 102 Ill. App. 246; *affd.*, 200 Ill. 382; *Connersville v. Wadleigh*, 7 Blackf. 102, 41 Am. Dec. 214; *Dean v. Morey*, 33 Iowa, 120; *Storrs*

v. Emerson, 72 Iowa, 390, 34 N. W. 176; *Scott v. Geiser Mfg. Co.*, 70 Kans. 498, 80 Pac. 955; *Richardson v. Johnson*, 1 La. Ann. 389; *Brown v. Bigelow*, 10 Allen, 242; *McCormick v. Kelly*, 28 Minn. 135, 9 N. W. 675; *Hansen v. Gaar*, 63 Minn. 94, 65 N. W. 254; *Branson v. Turner*, 77 Mo. 489; *Doyle v. Parish*, 110 Mo. App. 470, 85 S. W. 646; *Hanson v. Edgerly*, 29 N. H. 343; *Leavitt v. Fletcher*, 60 N. H. 182; *Schuyler v. Russ*, 2 Caines, 202; *Jennings v. Chenango County Ins. Co.*, 2 Denio, 75 Day v. Pool, 52 N. Y. 416, 11 Am. Rep. 719; *Parks v. Morris Ax & Tool Co.*, 54 N. Y. 586; *Bennett v. Buchan*, 76 N. Y. 386; *Van Schoick v. Niagara Ins. Co.*, 68 N. Y. 434; *Studer v. Bleistein*, 115 N. Y. 316, 22 N. E. 243, 5 L. R. A. 702; *Mulvany v. Rosenberger*, 18 Pa. St. 203; *Fisher v. Pollard*, 2 Head, 314, 75 Am. Dec. 740; *Long v. Hicks*, 2 Humph. 305; *Williams v. Ingram*, 21 Tex. 300; *McAfee v. Meadows*, 32 Tex. Civ. App. 105, 75 S. W. 813; *Hill v. North*, 34 Vt. 604.

is based on an endeavor by the court to give effect to the intention of the parties. If the seller of a horse which is obviously blind, and which both parties know to be blind, says he is sound, the meaning of sound as used in that connection must be sound except as to his eyes. The same rule is applicable to a defect which is not obvious, but of which the seller tells the buyer,²⁶ or of which the buyer knows.²⁷ Doubtless the early authorities²⁸ go beyond this and justify the conclusion that even if the seller said "I warrant his eyes are all right," the buyer could not recover. It may be supposed in such a case, either that the buyer did actually observe the defect or that he did not. In so far as the supposition is that the buyer actually observed the defect the question may seem academic, but it is not altogether so; for though the defect may be observed, the nature or extent, or consequence of it, may not be. There seems no reason if the seller contracts in regard to an obvious defect or if he makes representations upon which the buyer in fact relies, why the seller should escape liability. It can hardly lie in his mouth to say that though he was making false representations or promises to induce the buyer to make the bargain, and the buyer was thereby induced, he should not have been. Certainly there is a growing tendency in the law not to allow that sort of argument.²⁹ A well recognized limitation on any doctrine freeing the seller from liability for statements or promises in regard to obvious defects is that if the seller successfully uses

²⁶ *Knoepker v. Ahman*, 99 Mo. App. 30, 72 S. W. 483.

²⁷ *Harwood v. Breese*, 73 Neb. 521, 103 N. W. 55.

²⁸ See *supra*, § 206.

²⁹ In *Norris v. Parker*, 15 Tex. Civ. App. 117, 38 S. W. 259, the court said: "There seems to be no good reason why a warranty may not cover obvious defects as well as others, if the vendor is willing to give it, and the buyer is willing to buy defective property on the assurance of the warranty. If he relies on his own judgment alone, he does not rely on his warranty." "A special warranty on the sale of a horse may be made to cover blemishes or defects which are

open and visible, if the intention to do so is clearly manifested," is the language of the Supreme Court of Minnesota in the case of *Fitzgerald v. Evans*, 49 Minn. 541, 52 N. W. 143. In *Watson v. Roode*, 30 Neb. 264, 46 N. W. 491, it is said: "The seller may bind himself against patent defects, if the warranty is so worded." *Henderson v. Railroad Co.*, 17 Tex. 560, 67 Am. Dec. 675; *Hobart v. Young*, 63 Vt. 363, 21 Atl. 612, 12 L. R. A. 693; *Powell v. Chittick*, 89 Iowa, 513, 56 N. W. 652; *Williams v. Ingram*, 21 Tex. 300. See also *Branson v. Turner*, 77 Mo. 489, stated *supra*, § 204, note; *June v. Falkinburg*, 89 Mo. App. 563.

art to conceal the defects, the seller is liable.³⁰ That the buyer may be protected from the consequences of known defects by a warranty is well settled.³¹

§ 208. **Inspection.**—Inspection may conceivably have a three-fold importance in this connection. In the first place, if the defect was one which could be discovered by inspection and the buyer inspected the goods, it may be urged that the parties did not intend that the language used should cover this defect. This reasoning is analogous to that adopted in regard to obvious defects. An obvious defect, however, means a defect that is apparent upon casual inspection and does not need careful or expert examination for its discovery. If the defect required examination of the latter sort, it is still more plain than in the cases of obvious defects that a seller who clearly promises or affirms that the goods are free from the defect which in fact vitiates them will be liable. A second aspect in which inspection or rather the right to inspect may have a bearing on the seller's liability arises where the buyer has full power and opportunity to inspect, and inspection, if made, would have disclosed the defective character of the goods,

³⁰ *Kenner v. Harding*, 85 Ill. 264, 268, 28 Am. Rep. 615, citing *Chadsey v. Greene*, 24 Conn. 562; *Robertson v. Clarkson*, 9 B. Mon. 506; *Gant v. Shelton*, 3 B. Mon. 420; *Irving v. Thomas*, 18 Me. 418. To the same effect are *Armstrong v. Bufford*, 51 Ala. 410; *Roseman v. Canovan*, 43 Cal. 110; *Perdue v. Harwell*, 80 Ga. 150, 4 S. E. 877; *Brown v. Weldon*, 99 Mo. 564, 13 S. W. 342; *Biggs v. Perkins*, 75 N. C. 397.

³¹ *Thompson v. Harvey*, 86 Ala. 519, 5 So. 825; *Fitzgerald v. Evans*, 49 Minn. 541, 52 N. W. 143; *Branson v. Turner*, 77 Mo. 489; *Samuels v. Guin's Estate*, 49 Mo. App. 8; *Watson v. Roode*, 30 Neb. 264, 46 N. W. 491, 43 Neb. 348, 61 N. W. 625; *Pinney v. Andrus*, 41 Vt. 631. In all these cases a defect in an animal which was the subject of the sale was observed by the buyer and to induce the sale the seller warranted or repre-

sented the disease to be less serious than it in fact proved. The seller was, therefore, held liable. *Walker, Evans & Cogswell Co. v. Ayer*, S. C. , 61 S. E. 557, is a similar case in regard to a typesetting machine. Compare with these cases *Ragsdale v. Shipp*, 108 Ga. 817, 34 S. E. 167. There the buyer examining an animal offered for sale, and finding its throat swollen, asked the seller what was the matter with it? The seller replied that it had shipping cold and would be all right in a few days. There was nothing to show that the buyer did not have as full knowledge of the nature of the disorder as the seller. It was held to be merely an expression of opinion. The court does not decide, however, that if the other requisites of a warranty had existed, the fact that the defect was patent would have prevented the seller from being liable.

but the buyer fails to make the inspection. Whatever may be the law in regard to implied warranty³² in the case of express warranty it is no defense that the buyer, had he inspected, might have found out the falsity of the seller's statements. The buyer is justified in taking the seller at his word, and in relying upon the seller's statements rather than upon his own examination.³³ A third possible importance of inspection by the buyer is as excluding reliance by the buyer on any statement of the seller in regard to the goods. It was held in a recent decision in New York that such was the effect of inspection.³⁴ Such a decision, however, misinterprets the requirement of reliance. There is no

³² See *infra*, § 234. Courts sometimes fail to observe distinction between express and implied warranty in this respect. See *e. g.*, *Egbert v. Hanford Produce Co.*, 92 N. Y. App. Div. 252, 86 N. Y. Suppl. 1118.

³³ *Thompson v. Bertrand*, 23 Ark. 730. The seller of a slave gave a warranty of soundness. The buyer might have discovered the unsoundness of the slave's feet and knee by examination. The seller was held liable upon the warranty. *Leitch v. Gillette-Herzog Mfg. Co.*, 64 Minn. 434, 67 N. W. 352. The seller of 500 iron bedsteads stated that if the parts of one of the beds went together properly the parts of all would do so. The buyer having found that one could be put together properly made no further inspection. It was held that the plaintiff was entitled to recover, though had he set up more of the bedsteads he would have discovered that the parts would not go together properly. See also *Jones v. Just*, L. R. 3 Q. B. 197, 204; *First Bank v. Grindstaff*, 45 Ind. 158; *Meckley v. Parsons*, 66 Iowa, 63, 23 N. W. 265, 55 Am. Rep. 261; *Cook v. Gray*, 2 Bush, 121; *Gould v. Stein*, 149 Mass. 570, 577, 22 N. E. 47, 5 L. R. A. 213, 14 Am. St. Rep. 455;

Woods v. Thompson, 114 Mo. App. 38; *Drew v. Edmunds*, 60 Vt. 401, 15 Atl. 100, 6 Am. St. Rep. 122; *Barnum Wire Works v. Seley*, 34 Tex. Civ. App. 47, 77 S. W. 827; *Tacoma Coal Co. v. Bradley*, 2 Wash. 600, 27 Pac. 454, 26 Am. St. Rep. 890.

³⁴ *Crocker-Wheeler Electric Co. v. Johns-Pratt Co.*, 29 N. Y. App. Div. 300; *affd.*, without opinion, 164 N. Y. 593, 58 N. E. 1086. The seller of material called "vulcabeston" represented that it was made of the best para rubber and selected asbestos, and that it was practically a perfect insulating material. Specimens were furnished the buyer who experimented with them. The court said, as to the seller's statements: "They were not relied upon by the plaintiff or its predecessor; for, before making any contract, the officers of the plaintiff or its predecessor satisfied themselves, by their own investigation or experiment, that the representations made respecting the material and its sufficiency for their purposes were true. It is elementary that, in order to entitle the plaintiff to maintain an action for breach of an express warranty, it must be established that the warranty was relied on. Such was not the case here."

reason in the nature of things why a buyer should not rely both on the seller's statements and on his own judgment. Observation shows that ~~sellers~~ constantly do this, and accordingly it is generally and rightly held that inspection by the buyer does not excuse the seller from liability for words which amount to an express warranty.³⁵

§ 209. **Statements previous to the bargain; English decisions.**—

If a warranty be conceived of exclusively as an express contract, it is obvious that an offer of the warrantor accepted by the buyer is essential. If a statement made by the seller precedes the sale by a long period and especially if the statement was not made as part of the negotiations culminating in the sale, it will be difficult to find such an offer and acceptance. On the other hand, it is apparent that the buyer may be as completely deceived by statements prior to the ultimate negotiations as by statements made at the time of the bargain. If the view is sound that has been previously expressed, that the law imposes upon the seller the obligation of a warrantor, not simply when he agrees to assume it, but also when he induces the buyer to enter into the bargain by positive statements in regard to the goods, the buyer may well be protected. The original basis of warranty, as has been seen, a basis which still cannot be safely lost sight of, is the deception of the buyer because of his natural and, therefore, justifiable reliance on the seller's statements. This should furnish the test by which the seller's liability for past statements should be governed. There seems no reason to distinguish a case where the seller makes a statement in regard to goods at the time of the sale, a little while before that time, or a long time before, if the statement was originally made with reference to a possible sale, or was expressly or impliedly adopted as the basis for subsequent negotiations. Affirmation may induce the sale as fully when the buyer buys after considerable further negotiation, as when he buys immediately. The question has vexed the English courts during

³⁵ *Miller v. Moore*, 83 Ga. 684, 10 S. E. 360, 6 L. R. A. 374, 20 Am. St. Rep. 329; *South Bend Co. v. Caldwell*, 21 Ky. L. Rep. 1084, 1363, 55 S. W. 208; *Gould v. Stein*, 149 Mass. 570, 22 N. E. 47, 5 L. R. A. 213, 14

Am. St. Rep. 455; *Smith v. Hale*, 158 Mass. 178, 33 N. E. 493, 35 Am. St. Rep. 485; *Keely v. Turbeville*, 11 Lea, 339; *Woods v. Thompson*, 114 Mo. App. 38.

the last century, and it was held in two or three cases which are still cited that the affirmation must have been made at the time of the sale in order to constitute a warranty.³⁶ It is believed, however, that these decisions are inconsistent with later English cases.³⁷

³⁶It should be premised that in *Lysney v. Selby*, *Ld. Raym.* 1118, 1120, Lord Holt had said: "If, upon a treaty about buying certain goods, the seller warrants them, the buyer takes time for a few days and then gives the seller his price, though the warranty was before the sale, yet this will be well, because the warranty was the ground of the treaty; and this is *warrantizando vendidit*." *Camac v. Warriner*, [1845] 1 C. B. 356. In this case the material had been bought called oropholithe. In September the buyer's agent had a conversation with the seller's agent about roofing certain buildings with this patent article. On this occasion the seller's agent gave the buyer's agent a prospectus which described the material as fit for external roofings. There had been a previous sale of the material to the buyer which had been described as "flooring" and had been so applied. In April and July following this conversation between the agents the seller bought material and put it on his roof. It was held that there was no warranty that it was fit for the purpose. The court said: "The contract for the goods in question is not shown to have been made with any reference whatever to the treaty for roofing which took place in September, or to the prospectus which had been delivered." *Hopkins v. Tanqueray*, 15 C. B. 130. The plaintiff bought a horse at auction which belonged to the defendant. On the day before the sale the defendant came up while the plaintiff was examining the horse at the sales stable and said: "You have

nothing to look over, I assure you he is perfectly sound in every respect." The plaintiff replied: "If you say so, I am satisfied," and made no further examination. The seller's representation was made in good faith. All the judges held that this representation was no part of the contract which was made by the buyer when he bid for the horse; that it was but a statement of the seller's opinion. *Stuckley v. Baily*, 1 H. & C. 405. Parties here were treating in regard to a yacht. The buyer's agent told the seller's agent that he must have the masts overhauled or examined by a shipwright. The defendant's agent subsequently wrote: "I have had a good overhaul at the masts and find they are all as sound as ever." There was further correspondence and in a subsequent letter the defendant said: "Her masts have been examined and found as sound as when put in. After still further correspondence the plaintiff bought the vessel. It was held that even assuming the statement in the letter was some evidence of a warranty of soundness, it was competent for the seller to prove by what passed between the parties both before and after the letters were written that no warranty was intended, and the court intimate that aside from such evidence the representation in the letters did not amount to a warranty.

³⁷*Percival v. Oldacre*, 18 C. B. (N. S.) 398. The seller in this case meeting the buyer at Tattersall's and being informed by the latter that he had been looking at the seller's horse, said: "He is a good harness horse.

§ 210. **Statements previous to the bargain; American decisions.—**

The best American authorities agree with the views expressed in the preceding section, in not regarding it as essential that statements should be made at the time of the sale in order that they should be warranties.³⁸ But decisions may be found, especially

He belonged to Baron Rothschild, who sold him because he could not match him." The buyer thereafter tried the horse and ultimately bought him. No fraud was imputed to the seller but the animal turned out to be a kicker. The court held that there was evidence to go to the jury and that they were justified in finding for the plaintiff; that the representation made by the defendant at Tattersall's was part of the contract. *Cowdy v. Thomas*, 36 L. T. (N. S.) 22. The buyer wrote to the seller in regard to a second-hand locomotive. The buyer inquired "the age of the locomotive, the name of the maker, and the material of the firebox and tubes. The seller replied, giving the maker's name, the age of the locomotive, and stated that the firebox and tubes were copper. An inspection was arranged for and made by the buyer, who thereafter bought the engine. It turned out that most of the boiler tubes were iron. A verdict was found for the plaintiff and the Exchequer Division held rightly. *Kelly, C. B.*, said: "When to a plain and direct question the answer given is equally plain and direct, and perfectly unqualified, as it was in the present instance, it is impossible, in my opinion, to treat such an answer as amounting to less than a warranty." In *De Lassalle v. Guildford*, [1901] 2 K. B. 215, the plaintiff and the defendant negotiated for the lease of a house by the latter to the former. The terms were arranged but the plaintiff refused to hand over the counterpart that he had signed unless he received an as-

surance that the drains were in order. The defendant verbally represented that they were in good order and the counterpart was thereupon handed to him. The lease contained no reference to drains. The drains were not in good order, and an action was brought to recover damages for breach of warranty. Held, that the representation made by the defendant as to the drains being in good order was a warranty which was collateral to the lease, and for breach of which an action was maintainable.

³⁸In *Leavitt v. Fiberloid Co.*, 196 Mass. 540, 82 N. E. 682, it was held that the fact that statements were made long prior to the sale did not prevent them from being warranties. In *Powers v. Briggs*, 139 Mich. 664, 103 N. W. 194, the plaintiff, in trying to sell a hayloader to the defendant, offered to warrant it. After some negotiations the defendant refused to buy. Later, further negotiations were had and the defendant bought the machine. The trial judge ruled that, under the circumstances, a new warranty would have to be made by the plaintiff in order to bind him. This was held error, and the court said: "The evidence shows that, after the conversation referred to in the request, the subject was again taken up and the loader ordered. In the view most favorable to plaintiff, it was a question for the jury as to whether the subsequent order had reference to, and was understood to have reference to, the preceding conversation, and whether both parties understood that the

in jurisdictions which require an intent to warrant, to the effect that representation prior to a sale, though inducing it, did not amount to a warranty.³⁹ These decisions, however, commend themselves neither on principle nor for practical reasons.

loader was ordered under the warranty which was a part of the offer of the machine in the first instance. The case of *Childs v. O'Donnell*, 84 Mich. 533, 47 N. W. 1108, is easily distinguished. It was there held that a warranty on a sale of one bill of goods did not attach to a sale of another bill at a later time. In the present case the negotiations all related to the identical machine delivered to the defendant, and the question is whether all that was said during the negotiations was understood to have reference to these machines, and whether, in the understanding of the parties, the proposed warranty attached when the sale was finally consummated." In *Empire State Bag Co. v. McDermott*, 89 N. Y. App. Div. 234, the buyers had bought burlap on previous occasions to the one in question and the court held that they "had a right to expect a grade of material as high as the (seller) had previously furnished them." This ruling necessarily carries over into the later purchases terms of the earlier bargains. In *Way v. Martin*, 140 Pa. St. 499, 21 Atl. 428, evidence showed that the negotiations occupied several interviews extending over about a week. At the end of the week the horse, which was the subject of the bargain, was sold. At earlier interviews the seller had offered to warrant the horse. It was held that the jury would have a right to infer that what was said by the seller in the course of the negotiations, as an inducement to the sale, by way of guaranty, whether on the day of sale or shortly before, was operative with the plaintiff and in-

duced her to make the purchase. It was entirely for the jury to say whether the sale was made on the faith of the alleged warranty; and, to determine this question, they should know all that passed between the parties in relation to the terms of the sale. This case was followed in *Selig v. Rehfüss*, 195 Pa. St. 200, 206, 45 Atl. 919. In *San Antonio Machine Co. v. Josey* (Tex. Civ. App.), 91 S. W. 598, the seller offered a cable to the buyer, representing it to be of the very best manilla hemp. The buyer at this time told him he did not care to buy the rope but if it was on hand when he wanted it he would see him about it. About ten days later the plaintiff telephoned an order for the cable. The court held that the continuity of the transaction was not broken by the conclusion of the early negotiations. See also *Wilmot v. Hurd*, 11 Wend. 584; *Dayton v. Hooglund*, 39 Ohio St. 671; *Hobart v. Young*, 63 Vt. 363, 21 Atl. 612, 12 L. R. A. 693; *Crossman v. Johnson*, 63 Vt. 333, 22 Atl. 608, 13 L. R. A. 678; *Somers v. O'Donohue*, 9 U. C. C. P. 208.

³⁹ *James v. Bocage*, 45 Ark. 284; *Bryant v. Crosby*, 40 Me. 9, 12. In *Ransberger v. Ing*, 55 Mo. App. 621, the court held that a statement in a posted notice of an auction sale that certain shoats were in good health and condition was not a warranty, and the court said (at p. 625): "Now this handbill, advertising a future sale of defendant's hogs, could, at most, only amount to an antecedent representation of the quality and condition of the shoats as they were when the bills were circulated; and this statement could not be con-

§ 211. **Statements subsequent to the bargain.**—If the seller's liability on a warranty is based on an agreement to contract, consideration is essential, and the requirement for the maintenance of an action on the case for deceit of reliance by the plaintiff on the defendant's statement also involves the idea of detriment suffered by the plaintiff relying upon the statement, and in an action of tort for breach of warranty the same element is essential.⁴⁰ If the statement was unknown to the buyer at the time the sale was completed, it is obvious that there can be neither consideration from the standpoint of the law of contracts nor detrimental reliance from the standpoint of the law of torts.⁴¹ Still more clearly if no warranty was made at the time of the sale, a subsequent agreement to warrant will be invalid unless new consideration is given for it.⁴² What constitutes new consideration depends on the general principle of the law of contracts. If the buyer was entitled to return the goods for any reason or

strued as any part of the contract subsequently entered into between plaintiff and defendant, unless expressly made so at the time of the sale. The office of such advertisement is simply to induce the buyer to attend the future sale, and any representation as to quality of the goods to be sold contained in the published notice will not be considered as a part of the contract, unless imported into the sale at the auction. The test is, what was the contract between the vendor and vendee at the time of the sale. Were the goods then sold with or without a warranty as to quality." This case was followed in *Doyle v. Parish*, 110 Mo. App. 470, 85 S. W. 646. See also *Byrd v. Campbell Printing Press Co.*, 90 Ga. 542, 16 S. E. 267.

⁴⁰ See *supra*, § 206.

⁴¹ *Landman v. Bloomer*, 117 Ala. 312, 23 So. 75. It was held that where the only evidence of express warranty was a printed circular issued by the seller, a charge that if the evidence failed to show that the

circular came to the buyer's knowledge there was no express warranty so properly given. *Lindsey v. Lindsey*, 34 Miss. 432.

⁴² *Baldwin v. Daniel*, 69 Ga. 782; *Summers v. Vaughan*, 35 Ind. 323, 9 Am. Rep. 741; *Farmers' Assoc. v. Scott*, 53 Kans. 534; *White v. Oakes*, 88 Me. 367, 34 Atl. 175, 32 L. R. A. 592; *Cady v. Walker*, 62 Mich. 157, 28 N. W. 805, 4 Am. St. Rep. 834; *Fletcher v. Nelson*, 6 N. Dak. 94, 69 N. W. 53; *Morehouse v. Comstock*, 42 Wis. 626. So a warranty which has lapsed because of the failure of the buyer to comply with its terms cannot be subsequently renewed without new consideration. *Walters v. Akers*, 31 Ky. L. Rep. 259, 101 S. W. 1179. It need hardly be said that if a warranty forms part of the terms of the sale, no separate consideration need be shown for the warranty. *Standard Cable Co. v. Denver Electric Co.*, 76 Fed. Rep. 422, 39 U. S. App. 340, 22 C. C. A. 258, and cases in this chapter *passim*.

in good faith claimed such a right, a warranty given to induce him to forbear to exercise it and to keep the goods is supported by sufficient consideration.⁴³ But if the buyer had no color of right to return the goods, a warranty made subsequently to the sale as an inducement to the buyer to keep them is without consideration.⁴⁴ Where the title to property has passed but the price has not been fixed, a warranty made as part of the agreement fixing the price is binding.⁴⁵ It has been held that a purchaser at an auction sale who exacts a warranty after the goods have been knocked down to him but before he has paid for them may enforce a warranty.⁴⁶ A similar decision has been made in a sale not at auction.⁴⁷ So it has been held that a warranty made at any time before delivery of the property will be valid.⁴⁸ These decisions cannot be accepted, however, without some qualification. Unless the buyer had some right or color of right for refusing to pay the price, a warranty given to induce him to do so would not be supported by sufficient consideration, for the payment of the price would be merely a performance by the buyer of what he was already under

⁴³ *Blaess v. Nichols & Shepard Co.*, 115 Iowa, 373, 88 N. W. 829. Similarly where goods are not promptly delivered by the seller and the buyer has the right to refuse to accept them, a warranty given to induce the buyer to overlook the breach of agreement is binding. *Ohio Thresher Co. v. Hensel*, 9 Ind. App. 328, 36 N. E. 716; *Congar v. Chamberlain*, 14 Wis. 258. Or where a written warranty made at the time of the sale did not accurately express the intention of the parties, one executed subsequently to correct the mistake is effectual. *Barton v. Chicago Covering Co.*, 113 Mo. App. 462, 87 S. W. 599.

⁴⁴ *White v. Oakes*, 88 Me. 367, 34 Atl. 175, 32 L. R. A. 592; *Fletcher v. Nelson*, 6 N. Dak. 94, 69 N. W. 53.

⁴⁵ *Vincent v. Leland*, 100 Mass. 432.

⁴⁶ *McGaughey v. Richardson*, 148 Mass. 608. The court approved instructions laying down, in substance, "that if, before the money was paid

and the horse was delivered, the question arose between the parties as to the form of the warranty to be given, and the parties agreed that these words of warranty should be written into the bill of sale as a part of the contract, and they were so written in, and the money was then paid and the horse delivered, the warranty would rest upon a good consideration, and would bind the defendant; but that if, after the horse had been delivered and the money paid, the warranty was inserted by the defendant in the bill of sale, and the defendant was not bound by the contract of sale to insert it, but he voluntarily chose to put it in, then the defendant was not bound by it."

⁴⁷ *Douglass v. Moses*, 89 Iowa, 40, 56 N. W. 271, 48 Am. St. Rep. 353. Compare *Erwin v. Maxwell*, 3 Murph. 241, 9 Am. Dec. 602.

⁴⁸ *Webster v. Hodgkins*, 25 N. H. 128.

a legal obligation to do. Similarly, unless the buyer has a right, or color of right, to refuse proffered delivery of the goods, the acceptance of them will not be consideration sufficient to support a warranty.⁴⁹

§ 212. **Warranty of future events.**—It is said by Blackstone:⁵⁰ “The warranty can only reach the things in being at the time of the warranty made, and not the things *in futuro*; as, that a horse is sound at the buying of him, not that he will be sound two years hence.” An understanding of Blackstone’s meaning requires reflection upon the origin of law of warranty, in an action in the nature of deceit. It is of course law to-day that one may bind himself by contract for the happening of any future event, and a warranty of a piano for a year, for instance, is a contract to be answerable for any defect that may occur during that time.⁵¹ When warranty is based not on an actual contract, however, but on an obligation imposed by law on the seller because of a misrepresentation he has made, the situation is not so plain. It is commonly laid down in the law of deceit that a misrepresentation upon which an action may be founded must be in regard to an existing fact.⁵² This, however, has been qualified, especially in recent times, by recognition that a promise is itself a represen-

⁴⁹These decisions go back to the case of *Butterfield v. Burroughs*, 1 Salk. 211, where the plaintiff declared that the defendant “sold him a horse” and warranted it, “whereupon” the plaintiff paid his money. It was objected in arrest of judgment that as the warranty was set forth it might have been made at a time after the sale, but the court held otherwise, “for the payment was afterward and it was that completed the bargain, which was imperfect without it.” This decision was made at a time, however, when title to property did not pass until the price was paid unless credit was expressly given. See *infra*, § 260. Therefore, until the payment was made in *Butterfield v. Burroughs*, the title had not passed and the language of

the court indicates this was the ground of decision. At the present day, the presumption is that title passes as soon as parties are agreed upon the terms of the bargain and the goods are in deliverable condition. See *infra*, § 264. Consequently the mere fact that the price was not paid would not now show a bargain to be incomplete.

⁵⁰3 Comm. 165.

⁵¹See *Scott v. Keeth*, Mich. , 116 N. W. 183. So a warranty that metallic shells to be manufactured shall “finish sound.” *Franklin Mfg. Co. v. Lamson Mfg. Co.*, 189 Mass. 344, 75 N. E. 624. See also *Osborn v. Nicholson*, 13 Wall. 654, 20 L. ed. 689; *White v. Stelloh*, 74 Wis. 435, 43 N. W. 99.

⁵²Cooley, *Torts* (3d ed.), 929.

tation of an existing intention.⁵³ But this qualification is rather apparent than real, since the deception consists not in the future event to which the promise relates, but in the existing fact of the promisor's intention to keep it. It seems upon principle, therefore, that unless an actual contract can be made out, or unless representations as to future events carry with them necessarily a representation as to a present condition, as may often be the case,⁵⁴ the statement of Blackstone is sound.⁵⁵

§ 213. **Limitations on express warranties.**—The parties may by agreement limit the effect of language which would otherwise be construed as amounting to an express warranty. The most common illustration of this is where the seller makes statements in regard to the goods, but refuses to warrant the truth of the statements. Though the statements by themselves might be sufficient to constitute a warranty the refusal not only indicates an unwillingness to contract for the truth of the statements, but also should put the buyer so on his guard that he would not be justified in buying in reliance upon them.⁵⁶ The seller's refusal to warrant may, however, be so qualified as not to be inconsistent with justifiable reliance by the buyer. A refusal to warrant that a

⁵³ *Edgington v. Fitzmaurice*, 29 Ch. D. 459; *Swift v. Rounds*, 19 R. I. 527, 35 Atl. 45, 33 L. R. A. 561, 61 Am. St. Rep. 791. So it was held in *Lederer v. Yule*, 67 N. J. Eq. 65, 57 Atl. 309, where a representation that a patent burglar alarm could be made cheaply was held a representation of a present fact.

⁵⁴ Thus, a representation that a machine will work well for five years is a representation as to its present condition in effect. The representation means that the machine as it stands is so well constructed as to be capable of enduring use for that period. So a representation that it will require a load of 250 tons to break it. *Miller v. Patch Mfg. Co.*, 101 N. Y. App. Div. 22. So a warranty of seed peas that they would pick four or five days earlier than any other seed on the market. *Landreth v. Wyckoff*,

67 N. Y. App. Div. 145, 73 N. Y. Suppl. 388. See also *Richardson v. Mason*, 53 Barb. 601; *Huntington v. Lombard*, 22 Wash. 202, 60 Pac. 414.

⁵⁵ In *Houser's Case*, 39 Ct. Cl. 508, an assurance by the seller that the buyer would have the right to remove shacks sold by the government until a certain day was held to amount to a warranty that up to that time the seller would have authority to transfer title. In this case the seller may well have been regarded as contracting. In *Collins v. Tigner*, 5 Del. 345, 60 Atl. 978, the court ruled that it was essential that a warranty should be broken when made. This statement clearly needs qualification.

⁵⁶ *Fauntleroy v. Wilcox*, 80 Ill. 477; *Lynch v. Curfman*, 65 Minn. 170, 68 N. W. 5; *Smith v. Bank*, *Riley's Eq.* 113 (S. C.).

horse is sound should not preclude the buyer from relying on a statement that the horse is five years old, or that the horse is sound to the best of the seller's knowledge.⁵⁷ There are, indeed, some cases where an express warranty was made as to one fact and the court refused to construe assertions as to other facts as a warranty.⁵⁸ It is probable that the ground for these decisions is that the latter assertions were descriptive and, therefore, would not constitute a warranty even had there been no other warranty. On whichever ground they are rested these decisions, which are most of them old ones, seem open to criticism as are many of the older cases on warranty. That descriptive statements may constitute a warranty has already been seen.⁵⁹ If this be granted, the express contract of warranty which the parties enter into does not seem to preclude a reasonable man from relying upon assertions as to other matters than those covered by the express contract. If then the buyer does rely upon such statements, an obligation should be imposed by law upon the seller as in other cases where he makes positive statements of fact upon which the buyer is justified in relying, although the words do not indicate an offer to contract.

§ 214. **Construction.**— If the seller's obligation as a warrantor is based on express contract, the construction of that contract is to be determined according to the rules which govern the construction of contracts generally. These rules cannot here be considered at length, but it is enough to say that if the warranty is in writing a construction of it will be for the court, and that if

⁵⁷ *Wood v. Smith*, 5 M. & R. 124.

⁵⁸ In *Richardson v. Brown*, 1 Bing. 344, a memorandum of the sale of a horse stated the subject of the sale, as "a horse five years old, has been constantly driven in the plough, warranted." It was held that this was a warranty of soundness and did not cover the assertion in regard to the horse's age. So in *Budd v. Fairmaner*, 8 Bing. 48, the following memorandum, "received ten pounds for a gray four year old colt, warranted sound in every respect," was held to give no warranty as to the

age of his animal. So in *Anthony v. Halstead*, 37 L. T. (N. S.) 433, this receipt, "received sixty pounds for a black horse, rising five years, quiet to ride and drive, and warranted sound up to this date, or subject to the examination of a veterinary surgeon" was held to give no warranty that the horse was quiet to ride or drive. See also to the same effect, *Dickenson v. Gapp*, cited in 8 Bing. 50, and *Willard v. Stevens*, 24 N. H. 271.

⁵⁹ *Supra*, § 203.

the language used is doubtful, the court will seek to give the meaning to the language which the parties intended it should bear. If the seller's liability is based on representations and affirmations because of which the law imposes upon him the obligation of a warrantor, disputed questions of fact as to the nature of the assertions and the reliance of the buyer will generally give rise to disputed questions of fact which will require submission to the jury of the whole question of warranty.

§ 215. **Parol evidence.**—It is generally laid down that if the terms of a sale are reduced to writing, extrinsic evidence of a warranty not mentioned in the writing is not admissible.⁶⁰ Especially in modern times some qualification of this doctrine is to be observed in the cases. If the writing on its face does not

⁶⁰ *Seitz v. Brewers' Refrigerator Co.*, 141 U. S. 510, 12 S. C. 46, 30 L. ed. 837; *Chandler v. Thompson*, (C. C.) 30 Fed. Rep. 38; *Empire State Phosphate Co. v. Heller*, 61 Fed. Rep. 280, 20 U. S. App. 589, 9 C. C. A. 504; *Wilson v. New United States Cattle Ranch Co.*, 73 Fed. Rep. 994, 36 U. S. App. 634, 20 C. C. A. 244; *Buckstaff v. Russell*, 79 Fed. Rep. 611, 49 U. S. App. 253, 25 C. C. A. 129; *Davis Calyx Drill Co. v. Mallory*, 137 Fed. Rep. 332, 69 L. R. A. 973, 69 C. C. A. 662; *Whitehead v. Lane & Bodley Co.*, 72 Ala. 39; *Fitch v. Woodruff & Beach Iron Works*, 29 Conn. 82; *Allen v. Young*, 62 Ga. 617; *Martin v. Moore*, 63 Ga. 531; *Holcombe v. Cable Co.*, 119 Ga. 466, 46 S. E. 671; *Robinson v. McNeill*, 51 Ill. 225; *Telluride Power Co. v. Crane*, 208 Ill. 218, 70 N. E. 319; *Graham v. Eiszner*, 28 Ill. App. 269; *Nichols v. Wyman*, 71 Iowa, 160, 32 N. W. 258; *Barrett v. Wheeler*, 71 Iowa, 662, 33 N. W. 230; *Rodgers v. Perrault*, 41 Kans. 385, 21 Pac. 287; *Diebold Safe Co. v. Huston*, 55 Kans. 104, 39 Pac. 1035, 28 L. R. A. 53; *Thomson v. Gortner*, 73 Md. 474, 21 Atl. 371; *Rice v. Codman*, 1 Allen, 377; *Frost v. Blanchard*, 97

Mass. 155; *Schramm v. Boston Sugar Refining Co.*, 146 Mass. 211, 15 N. E. 571; *Durkin v. Cobleigh*, 156 Mass. 108, 30 N. E. 474, 17 L. R. A. 270, 32 Am. St. Rep. 436; *Otto v. Braman*, 142 Mich. 185, 105 N. W. 601; *Detroit Shipbuilding Co. v. Comstock*, 144 Mich. 516, 108 N. W. 286; *Nichols, Shepard & Co. v. Crandall*, 77 Mich. 401, 43 N. W. 875, 6 L. R. A. 412; *McCray Refrigerator & Cold Storage Co. v. Woods*, 99 Mich. 269, 58 N. W. 320, 41 Am. St. Rep. 599; *Zimmerman Mfg. Co. v. Dolph*, 104 Mich. 281, 61 N. W. 339; *Day Leather Co. v. Michigan Leather Co.*, 141 Mich. 533, 104 N. W. 797; *McCormick Harvesting Machine Co. v. Thompson*, 46 Minn. 15, 48 N. W. 415; *Eighmie v. Taylor*, 98 N. Y. 288; *Plano Mfg. Co. v. Root*, 3 N. Dak. 165, 54 N. W. 924; *Houghton Implement Co. v. Doughty*, 14 N. Dak. 331, 104 N. W. 516; *Bond v. Clark*, 35 Vt. 577; *Buchanan v. Laber*, 39 Wash. 410, 81 Pac. 911; *Johnson's Adm. v. Mendenhall*, 9 W. Va. 112; *Cooper v. Cleghorn*, 50 Wis. 113, 6 N. W. 491; *Case Plow Works v. Niles & Scott Co.*, 90 Wis. 590, 63 N. W. 1013.

appear to be a complete statement of the contract of the purchase, the reason for the parol evidence rule is lacking and extrinsic evidence of a warranty should be admitted.⁶¹ It must be admitted that the principle thus stated is one very difficult of application, and the decisions cited in the two preceding notes are not all easy to reconcile on their precise facts. Another principle which has not yet been very clearly brought out by the cases should be clear wherever it is recognized that an affirmation or representation may form the basis of liability in warranty even though there is no intent to warrant, and the representations cannot fairly be construed as an offer to contract. The basis of the parol evidence rule is that it must be assumed that when parties contracted in regard to a certain matter and reduced their agreement to writing, the writing expressed their whole agreement in regard to that matter. This reason is obviously in-

"This principle was well expressed by Fuller, C. J., in *Seitz v. Brewers' Refrigerator Co.*, 141 U. S. 510, 12 S. C. 46, 30 L. ed. 837. "Undoubtedly the existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol, if under the circumstances of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them. But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies; that is, it must not be so closely connected with the principal transaction as to form part and parcel of it. And when the writing itself upon its face is couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of

the parties and the extent and manner of their undertaking were reduced to writing. *Greenl. Ev.*, § 275." Other cases illustrating the doctrine are: *Allen v. Pink*, 4 M. & W. 140; *Florence Wagon Works v. Trinidad Mfg. Co.*, 145 Ala. 677, 40 So. 49; *Ruff v. Jarrett*, 94 Ill. 475; *Jackson v. Mott*, 76 Iowa, 263, 41 N. W. 12; *Neal v. Flint*, 88 Me. 72, 33 Atl. 669; *Atwater v. Clancy*, 107 Mass. 369; *Leavitt v. Fiberloid Co.*, 196 Mass. 540, 82 N. E. 682; *Phelps v. Whitaker*, 37 Mich. 72; *Palmer v. Roath*, 86 Mich. 602, 49 N. W. 590; *Hersom v. Henderson*, 21 N. H. 224, 53 Am. Dec. 185; *Perrine v. Cooley*, 39 N. J. L. 449; *Charter Gas Engine Co. v. Kellam*, 79 N. Y. App. Div. 231; *Brigg v. Hilton*, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; *Mayer v. Dean*, 115 N. Y. 556, 22 N. E. 261, 5 L. R. A. 540; *Routledge v. Worthington Co.*, 119 N. Y. 592, 23 N. E. 1111; *Hadley v. Bordo*, 62 Vt. 285. 19 Atl. 476; *Red Wing Mfg. Co. v. Moe*, 62 Wis. 240, 22 N. W. 414; *McMullen v. Williams*, 5 Ont. App. 518.

applicable to a situation where an obligation is imposed by law irrespective of any intention to contract. Therefore, if a buyer is induced by positive statements of fact to enter into a written contract for the purchase of goods, there seems no reason why these statements should not be admitted in evidence. False and fraudulent statements inducing the formation of a written contract may, of course, be proved and if a false but honest statement, inducing the buyer to enter into the bargain, renders the seller liable though he does not intend to contract, there seems every reason for admitting evidence of such statements in spite of the fact that the bargain was reduced to writing.⁶² The exclusion of implied warranties owing to the existence of express warranties is hereafter treated.⁶³

§ 216. Warranties of title — Provisions of the Sales Act.

Sec. 13. IMPLIED WARRANTIES OF TITLE.—

In a contract to sell or a sale, unless a contrary intention appears, there is —

(1.) An implied warranty on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of a contract to sell he will have a right to sell the goods at the time when the property is to pass.

(2.) An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale.

(3.) An implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made.

⁶² This argument is fully supported by the case of *De Lassalle v. Guildford*, [1901] 2 K. B. 215. In that case though the parties had entered into a former lease, a contract of considerable solemnity, the plaintiff was allowed to prove that he took the lease only on receiving an oral assurance that the drains were in order, and the defendant was held liable upon this as upon a warranty collateral to the lease. So in the case of *Waterbury v. Russell*, 8 Baxt.

159, it was held that misrepresentation as to the character of goods, made to influence the bargain, were warranties, though not inserted in the written contract of sale. But see *Telluride Power Co. v. Crane*, 103 Ill. App. 647, which held that such representations could not be shown unless fraudulent. See also *Leavitt v. Fiberloid Co.*, 196 Mass. 540, 82 N. E. 682.

⁶³ *Infra*, § 239.

(4.) This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other person professing to sell by virtue of authority in fact or law goods in which a third person has a legal or equitable interest.⁶⁴

§ 217. **No implied warranty of title in early law.**—The English law started with the assumption that the seller did not warrant the title of the goods which he sold. This is clearly expressed in an often-quoted passage from Noy's Maxims,⁶⁵ "If I take the horse of another man, and sell him, and the owner takes him again, I may have an action of debt for the money; for the bargain was perfect by the delivery of the horse; and *caveat emptor*." If, however, the seller knew that he had no title and concealed the fact, he was early held responsible to the buyer for the fraud.⁶⁶ It was, of course, true as soon as warranty was recognized at all that a seller might warrant the title of the goods which he sold, and Lord Holt made it clear that a bare affirmation of title by the seller amounted to a warranty.⁶⁷ Lord Holt confined his ruling to the case where the seller was in possession, but in *Pasley v. Freeman*,⁶⁸ Buller, J., held an affirmation effective whether the seller was in possession or not. The progress of the law from this point is typical of its tendency in the entire subject of contracts. In early times intentions not expressed by words were disregarded; to-day they are frequently given effect by the recognition of implied meanings. Blackstone says:⁶⁹ "By the civil law (Ef. 21, 2, 1) an implied warranty was annexed to every sale, in respect to the title of the vendor; and so too, in our law, a purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own, and the title proves deficient, without any express warranty for that purpose." (Cro.

"This section closely follows section 12 of the English Sale of Goods Act, except subsection (4) which is an addition. There are some changes of wording in the other subsections of which the essential ones are: In the first line of (1) "warranty" is substituted for "condition;" in (2) the final words "as against any lawful claims existing at the time of the sale" have been added; in (3) the

words "at the time of the sale" have been inserted.

⁶⁵ Chapter 42.

⁶⁶ *Springfield v. Allen*, Aleyn, 91, 2 East, 448, note; *Furnis v. Leicester*, Cro. Jac. 474.

⁶⁷ *Medina v. Stoughton*, 1 Salk. 210, 1 Ld. Raym. 593. See also *Anon.*, 1 Rolle Abr. 90, 91 pl. 5-8.

⁶⁸ 3 T. R. 51.

⁶⁹ 2 Comm. 452.

Jac. 474, 1 Rolle Abr. 90.) Perhaps this statement so far as it implies that the seller by the mere act of selling warrants his title was somewhat ahead of Blackstone's time, for it was not until 1864 that the general doctrine was established that the sale of a chattel is a representation of title in the seller and, therefore, a warranty.⁷⁰

• § 218. **Warranty of title in America.**—Where the seller is in possession of goods it has uniformly been held in this country that a warranty of title is implied.⁷¹ The doctrine suggested by Lord Holt that no warranty existed if the seller was not in possession has been recognized by a number of *dicta* and a few decisions.⁷² This distinction has been disapproved in recent

⁷⁰ Eichholz v. Bannister, 17 C. B. (N. S.) 708. In Raphael v. Burt, Cab. & Ellis, 325, it was held broadly by Stephen, J., that a sale of personal property (bonds) implies an affirmation of title. See also Page v. Cowasjee Eduljee, L. R. 1 P. C. 127, 144; Bagueley v. Hawley, L. R. 2 C. P. 625.

⁷¹ Deatz v. United States, 38 Ct. Cl. 355; Houser's Case, 39 Ct. Cl. 508; Williamson v. Sammons, 34 Ala. 691; Lindsay v. Lamb, 24 Ark. 222; Mason v. Bohannon, 79 Ark. 435, 96 S. W. 181; Miller v. Van Tassel, 24 Cal. 458; Gross v. Kierski, 41 Cal. 111; Starr v. Anderson, 19 Conn. 338; Lines v. Smith, 4 Fla. 47; Morris v. Thompson, 85 Ill. 16; Marshall v. Duke, 51 Ind. 62; Paulsen v. Hall, 39 Kans. 365, 18 Pac. 225; Thurston v. Spratt, 52 Me. 202; Maxfield v. Jones, 76 Me. 135, 137; Rice v. Forsyth, 41 Md. 389; Shattuck v. Green, 104 Mass. 42; Boston & Albany R. R. Co. v. Richardson, 135 Mass. 473; Hunt v. Sackett, 31 Mich. 18; Davis v. Smith, 7 Minn. 414; Close v. Crossland, 47 Minn. 500, 50 N. W. 694; Storm v. Smith, 43 Miss. 497; Schell v. Stephens, 50 Mo. 375; Matheny v. Mason, 73 Mo. 677, 39 Am. Rep. 541; Shultis v. Rice, 114

Mo. App. 274, 89 S. W. 357; Budd v. Power, 8 Mont. 380, 20 Pac. 820; Hall v. Aitkin, 25 Neb. 360, 41 N. W. 192; Sargent v. Currier, 49 N. H. 310, 6 Am. Rep. 524; Wood v. Sheldon, 42 N. J. L. 421, 36 Am. Rep. 523; Gould v. Bourgeois, 51 N. J. L. 361, 18 Atl. 64; Burt v. Dewey, 40 N. Y. 283, 100 Am. Dec. 482; Cohn v. Ammidown, 120 N. Y. 398, 24 N. E. 944; Inge v. Bond, 3 Hawks, 101; Balte v. Bedemiller, 37 Or. 27, 60 Pac. 601, 82 Am. St. Rep. 737; Whitaker v. Eastwick, 75 Pa. St. 229; Krumbhaar v. Birch, 83 Pa. St. 426; Colecock v. Goode, 3 McCord, 513; Word v. Cavin, 1 Head, 506; Gookin v. Graham, 5 Humph. 480; Gilchrist v. Hilliard, 53 Vt. 592, 38 Am. Rep. 706; Byrnside v. Burdett, 15 W. Va. 702; Jarrett v. Goodnow, 39 W. Va. 602, 20 S. E. 575, 32 L. R. A. 321; Edgerton v. Michels, 66 Wis. 124, 26 N. W. 748, 28 N. W. 408.

⁷² Lowman v. Excelsior Pattern Co., 104 Ala. 367, 16 So. 17; Huntingdon v. Hall, 36 Me. 501, 58 Am. Dec. 765; Long v. Hickingbottom, 28 Miss. 772, 64 Am. Dec. 118; Storm v. Smith, 43 Miss. 497; Edick v. Crim, 10 Barb. 445; Hopkins v. Grinnell, 28 Barb. 533, 537; Scranton v. Clark, 39 N. Y.

cases, however, and it may be questioned whether it is likely to be permanently followed even aside from statute.⁷³ The doctrine of implied warranty of title applies not simply to chattels but also to choses in action, both to those having tangible form, such as bonds,⁷⁴ stock,⁷⁵ negotiable paper,⁷⁶ and also to those having no tangible form, such as accounts,⁷⁷ rights in a partnership,⁷⁸ and rights in inventions whether patented or not;⁷⁹ in short the doctrine is applicable to all personal property. Under the Sales Act,⁸⁰ an exchange is properly designated a sale, but apart from statute there is the same warranty of title in a contract of barter as on a sale for money.⁸¹ As has already been seen,⁸² a seller who had no title to the goods which he purported to sell but who afterward acquires a title is estopped to deny the validity of the transfer because of the implied representation and warranty of title. The Sales Act provides expressly in subsection (3) of section 13 that there is an implied warranty against incumbrances. This merely enacts the rule of the common law

220, 100 Am. Dec. 430; *Andres v. Lee*, 1 Dev. & Bat. Eq. 318; *Scott v. Hix*, 2 Sneed, 192, 62 Am. Dec. 458; *Byrnside v. Burdett*, 15 W. Va. 702.

⁷³ In *Gould v. Bourgeois*, 51 N. J. L. 361, 18 Atl. 64, De Pue, J., delivering the opinion of the court said: "In this country the distinction between sales where the vendor is in possession and where he is out of possession, with respect to implied warranty of title, has been generally recognized, but the tendency of later decisions is against the recognition of such a distinction and favorable to the modern English rule." In *Whitney v. Heywood*, 6 Cush. 82, 86, Dewey, J., says "possession here must be taken in its broadest sense," and "the excepted cases must be substantially cases of sales of the mere naked interest of persons having no possession, actual or constructive, and in such cases no warranty of title is implied;" and this language is quoted with approval in *Shattuck v. Green*, 104 Mass. 42, 45.

⁷⁴ *Raphael v. Burt*, Cab. & Ellis, 325; *Utey v. Donaldson*, 94 U. S. 29, 24 L. ed. 54; *Richardson v. Marshall County*, 100 Tenn. 346, 45 S. W. 440.

⁷⁵ *State v. R. R. Co.*, 34 La. Ann. 947; *Wood v. Sheldon*, 42 N. J. L. 421, 36 Am. Rep. 523.

⁷⁶ *Bank of St. Albans v. Farmers' Bank*, 10 Vt. 141, 33 Am. Dec. 188; *Thrall v. Newell*, 19 Vt. 202, 47 Am. Dec. 682. See also *Crawford, Negotiable Instrument Act*, § 115.

⁷⁷ *Gilchrist v. Hilliard*, 53 Vt. 592, 38 Am. Rep. 706.

⁷⁸ *Jamison v. Harbert*, 87 Iowa, 186, 54 N. W. 75.

⁷⁹ *Krumbhaar v. Birch*, 83 Pa. St. 426; *Costigan v. Hawkins*, 22 Wis. 74, 94 Am. Dec. 583.

⁸⁰ Section 9 (2). See *supra*, § 170.

⁸¹ *Hunt v. Sackett*, 31 Mich. 18; *Close v. Crossland*, 47 Minn. 500, 50 N. W. 694; *Patee v. Pelton*, 48 Vt. 182; *Byrnside v. Burdett*, 15 W. Va. 702.

⁸² *Supra*, § 131.

for the implied warranty that the seller has title means that he has a perfect title free from incumbrances.⁸³

§ 219. **Limitations on implied warranty of title.**—Whether the seller is in or out of possession there can be no doubt that by appropriate words he may sell simply such interest as he may have in the property.⁸⁴ The intent to limit the seller's undertaking to a mere quitclaim may be expressed not only by an agreement in terms to sell such interest as the seller has but otherwise, as by a refusal to warrant title.⁸⁵ The nature of the seller's right may also be known to the buyer and may be of such doubtful character that it must be assumed the parties intended to buy and sell only such title as the seller had.⁸⁶

⁸³ *Close v. Crossland*, 47 Minn. 500, 50 N. W. 694; *Hickman v. Dill*, 39 Mo. App. 246; *Hall v. Aitkin*, 25 Neb. 360, 41 N. W. 192; *Dresser v. Ainsworth*, 9 Barb. 619; *Hodges v. Wilkinson*, 111 N. C. 56, 15 S. E. 941, 17 L. R. A. 545; *Clevenger v. Lewis*, Okla., 95 Pac. 230. The decisions cited above related to property incumbered by a mortgage. The following decisions relate to patents depriving the purchaser of the right to use the property purchased: *Electro Dynamic Co. v. The Electron*, 74 Fed. Rep. 689, 45 U. S. App. 16, 21 C. C. A. 12; *Siegel v. Brooke*, 25 Ill. App. 207; *National Box Co. v. Gotham*, 111 N. Y. Suppl. 1132. Compare *American Electrical Co. v. Consumers' Gas Co.*, 47 Fed. Rep. 43 (C. C. A.); *Lowman v. Excelsior Pattern Co.*, 104 Ala. 367, 16 So. 17. In Benjamin, *Sale* (5th Eng. ed.), 674, however, it is said that there was no authority in the English common law for the provisions in the Sale of Goods Act, either as to warranty of quiet enjoyment or against incumbrances.

⁸⁴ *First National Bank v. Mass. Trust Co.*, 123 Mass. 330; *Croly v. Pollard*, 71 Mich. 612, 39 N. W. 853; *Gould v. Bourgeois*, 51 N. J. L. 361,

18 Atl. 64; *Krumbhaar v. Birch*, 83 Pa. St. 426; *Peuchen v. Imperial Bank*, 20 Ont. 325.

⁸⁵ *Miller v. Van Tassel*, 24 Cal. 458; *Porter v. Bright*, 82 Pa. St. 441.

⁸⁶ In *Morley v. Attenborough*, 3 Ex. 500, a sale of pledged property by a pawnbroker was held not to be accompanied by a warranty of title, though the property was sold by auction and it was not stated in the auctioneer's catalogue to be a forfeited pledge. Parke, B., threw out the suggestion that though there was no implied warranty of title, perhaps the purchaser might recover back the purchase money as on a consideration that failed, if it could be shown that it was the understanding of both parties that the bargain should be put an end to, if the purchaser should not have a good title. This of course would be very difficult to show unless there was an express agreement to that effect. In *Chapman v. Speller*, 14 Q. B. 621, the defendant at a sheriff's sale bought the goods from the sheriff for £18. The plaintiff was also at the sale and bought the defendant's bargain of him for £5 and paid him this together with the £18, the price of

§ 220. Sales by one not professing to be owner.—The commonest illustration of the principle referred to in the preceding section is found in sales by those who purport to sell by virtue of authority in fact or law. Such persons unless they expressly warrant title are not liable for the lack of title of the person who is supposed to own the goods. This principle is expressed in subsection (4) of the section of the Sales Act under consideration which states a well-settled doctrine. So in cases of sales by a sheriff, or other judicial officer,⁸⁸ or auctioneer,⁸⁹ or mortgagee,⁹⁰ or assignee in bankruptcy,⁹¹ or executor or adminis-

the goods. The defendant paid the sheriff the £18 and the latter began to deliver the goods to the plaintiff when they were claimed by the true owner as not the property of the execution debtor. It was held that there was no implied warranty by the plaintiff that he had title nor was there any failure of consideration, the plaintiff having paid the £23 to the defendant, not for the goods but for such right as the defendant had acquired by his purchase. In *Bagueley v. Hawley*, L. R. 2 C. P. 625, a boiler had been seized and sold under a distress for a poor rate due from the occupier of the premises, on which the boiler was set. It was bought at public auction by the defendant and before removal resold by him to the plaintiffs with notice of the circumstances under which the defendant had bought it, the plaintiffs by the bargain being required to remove the boiler at their own expense from the premises where it was still standing. The mortgagees of the premises prevented the plaintiffs from carrying it away and they brought this action on an alleged implied warranty. The court held, Willes, J., dissenting, that there was no evidence to justify a jury in finding a warranty. In *Hop-*

kins v. Grinnell 28 Barb. 533, the defendants had levied on property in the factory of their debtor. The plaintiff knowing these facts entered into a contract with the debtor for the purchase of the property covered by the levy. Thereupon the defendants gave him an order addressed to the sheriff who had levied upon the property directing him to deliver the plaintiff the goods which he had purchased. The sheriff refused to deliver the goods on account of the lien of junior executions in his hands. It was held there was no warranty of title. In this case, however, the plaintiff had only given a note for the price of the goods he purchased and this note was produced for cancellation at the trial.

⁸⁷ *Bassett v. Lockard*, 60 Ill. 164; *Neal v. Gillaspay*, 56 Ind. 451, 26 Am. Rep. 37.

⁸⁸ *The Monte Allegre*, 9 Wheat. 616, 6 L. ed. 174; *Robinson v. Cooper*, 1 Hill (S. C.), 286.

⁸⁹ *Mercer v. Leihy*, 139 Mich. 447, 102 N. W. 972.

⁹⁰ *Harris v. Lynn*, 25 Kans. 281, 37 Am. Rep. 253; *Cohn v. Ammidown*, 120 N. Y. 398, 24 N. E. 944.

⁹¹ *Johnson v. Laybourn*, 56 Minn. 332, 57 N. W. 933.

trator,⁹² or guardian,⁹³ or simply an agent.⁹⁴ If the seller either has authority in fact from a principal to make the sale, or if the principal is bound for any other reason by the agent's act in making the sale, there will be on well-known principles of agency the same obligation imposed upon the principal as if he had made the sale directly himself. The agent is not wholly free from implied obligation, but all that he warrants is his authority to act for the principal, and if he has not the authority which he assumes to have he will be liable.⁹⁵ If the seller's authority is conferred upon him by law, as in the case of a sheriff, there can, of course, be no implied warranty by the owner of the goods any more than by the officer who makes the sale. Moreover such officers, unlike agents whose power is derived from authority in fact, do not warrant the validity of the authority which they purport to exercise. They are, however, liable for actual representations, fraud, or negligence in the exercise of their duties.⁹⁶

§ 221. **When the cause of action arises.**—There is much difference of opinion upon the question when the right of action of a purchaser arises for breach of a warranty of title. On principle it would seem that if the seller did not have a good title when he sold the goods, there was then an immediate breach of his obligation and this view is supported by the English law as well as by some cases in this country.⁹⁷ This view is open to some practical objections, however. If the cause of action arises before eviction or claim made by the superior title, it may be that the Statute of Limitations will bar the buyer's right to recover on the warranty before he is aware that it has been broken. Moreover, if the buyer can sue at once it is very difficult to say

⁹² *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399; *Brandon v. Brown*, 106 Ill. 519; *Sparks v. Messick*, 65 N. C. 440.

⁹³ *Storm v. Smith*, 43 Miss. 497.

⁹⁴ *Irwin v. Thompson*, 27 Kan. 643.

⁹⁵ *Mechem, Agency*, §§ 541-554.

⁹⁶ *Mechem, Public Officers*, 809, 812; *Sexton v. Nevers*, 20 Pick. 451, 32 Am. Dec. 225.

⁹⁷ *Furnis v. Leicester*, Cro. Jac. 474; *Turner v. Moon*, 2 Ch. App.

825 (real estate); *Chancellor v. Wiggins*, 4 B. Mon. 201, 39 Am. Dec. 499; *Grose v. Hennessey*, 13 Allen, 389; *Perkins v. Whelan*, 116 Mass. 542; *Matheny v. Mason*, 73 Mo. 677, 680, 39 Am. Rep. 541. See also *Harper v. Dotson*, 43 Iowa, 232; *Pusey's Trustee v. Wathen*, 50 Ky. 473, 14 S. W. 418; *Sargent v. Currier*, 49 N. H. 310, 6 Am. Rep. 524; *Word v. Cavin*, 1 Head, 506.

what damages he ought to be given. If he is allowed the value of the property he may get not only its full value in this way but continue in undisturbed possession of the property itself. On the other hand if he is restricted to nominal damages his remedy will be of no practical value to him and will indeed work him this possible injury, that the judgment he recovers may prevent him from bringing a later suit when he has suffered substantial damage. Logically his recovery, if his action is tried before he has been evicted, should be based on the chance of his being subsequently deprived of the benefit of what he had bought. Such a measure of damage is, however, so speculative as to be difficult of practical application. For these reasons many States of this country deny the buyer a right of action until his possession has been interfered with.⁹⁸ "The vendee is not bound to await legal action against him. If satisfied of the insufficiency of his vendor's title, and that the true owner would recover the property in an action, he may surrender it, and recover its value in an action against his vendor, by affirmatively establishing that the vendor was without title; or the vendee may await the prosecution of an action. If the vendor be notified of the action and required to defend, a judgment, if obtained, would be conclusive as to his want of title; but if not notified, and judgment is obtained, the *onus* of showing want of title would rest upon the vendee, the same as if surrendered without action."⁹⁹ "If the property be surrendered to the true owner, then the vendee's loss and damage is established; but if a judgment be had against him, either with or without notice, the vendee's loss or damage

⁹⁸ *Johnson v. Oehmig*, 95 Ala. 189, 10 So. 430, 36 Am. Rep. 204; *Sumner v. Gray*, 4 Ark. 467, 38 Am. Dec. 39; *Gross v. Kierski*, 41 Cal. 111; *Barnum v. Cochrane*, 143 Cal. 642, 77 Pac. 656; *Terrell v. Stevenson*, 97 Ga. 570, 25 S. E. 352; *Linton v. Porter*, 31 Ill. 107; *Close v. Crossland*, 47 Minn. 500, 50 N. W. 694; *Wanser v. Messler*, 29 N. J. L. 256; *Burt v. Dewey*, 40 N. Y. 283, 100 Am. Dec. 482 (compare *McGiffin v. Baird*, 62 N. Y. 329; *Cahill v. Smith*, 101 N. Y. 355, 4 N. E. 739); *Krumbaar*

v. Birch, 83 Pa. St. 426; *Hull v. Caldwell*, 3 S. Dak. 451, 54 N. W. 100. See also *Randon v. Toby*, 11 How. 493, 13 L. ed. 784; *Joslin v. Caughlin*, 27 Miss. 852.

⁹⁹ *Burt v. Dewey*, 40 N. Y. 283, 286, 100 Am. Dec. 482, citing *Sweetman v. Prince*, 26 N. Y. 224, 232. See also *Bordwell v. Collie*, 45 N. Y. 494; *O'Brien v. Jones*, 91 N. Y. 193; *Johnson v. Oehmig*, 95 Ala. 189, 10 So. 430, 36 Am. St. Rep. 204; *Read v. Staton*, 3 Hayw. 159.

is not established without proofs of satisfaction or payment of the judgment.”¹ The burden is, of course, upon the buyer to establish that the seller had no title to the goods, and if the goods have been surrendered unreasonably to an adverse claimant against the buyer, this is no proof of the original seller’s defect of title in an action between him and the buyer unless the seller was requested to defend the action against the adverse claimant or at least had notice of that action.² The decisions allowing an immediate right of action hold; in effect, that the seller is subject to a warranty of title, strictly so-called. The other decisions limit the obligation of the seller in effect to a covenant of quiet enjoyment. The Sales Act, following the provisions of the English statute, provides that the seller impliedly warrants both title and quiet enjoyment. The effect of this provision would seem to be to give the buyer the right to proceed immediately though his possession was not disturbed, and if later his position was interfered with he could bring another action on the implied covenant of quiet enjoyment and recover the damages which he failed to recover in the first action. The same question arises in regard to covenants of warranty and quiet enjoyment in deeds of real estate.³

§ 222. **Rule of the civil law.**—By the classical Roman Law the seller was not bound to transfer a good title to the buyer. He was, however, bound to guarantee the purchaser undisturbed possession. This rule produces in effect the result reached by the American authorities referred to in the preceding section, which require some disturbance of the buyer’s possession as a condition precedent to any right of action by him.⁴ The modern French law preserves the rule of the Roman Law and goes beyond it so far as to compel the seller to restore the price even though the parties have agreed that there shall be no warranty unless the

¹ *Burt v. Dewey*, 40 N. Y. 283, 286, 100 Am. Dec. 482. And see cases cited in the preceding note.

² *Salle v. Light’s Exrs.*, 4 Ala. 700, 39 Am. Dec. 317; *Thurston v. Spratt*, 52 Me. 202; *Ryerson v. Chapman*, 66 Me. 557; *Fallon v. Murray*, 16

Mo. 168; *Barney v. Dewey*, 13 Johns. 224, 7 Am. Dec. 372; *Buchanan v. Kauffman*, 65 Tex. 235.

³ *Sedgwick, Damages*, § 956.

⁴ *Moyle, Contract of Sale in the Civil Law*, 110, 111.

sale expressly related to a disputed right or claim.⁵ The rule in Germany has also been that the seller warranted quiet enjoyment by the buyer and, therefore, that no cause of action arose until the vendor's possession has been interfered with.⁶ By the new German Civil Code, however, the seller is bound to make the buyer owner.⁷ Possibly this may affect the German law in this particular.

§ 223. Warranties implied in sales by description — Provisions of the Sales Act.

Sec. 14. IMPLIED WARRANTY IN SALE BY DESCRIPTION.— Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.⁸

⁵The provisions of the French Code are as follows: "1625. The warranty due by the seller to the buyer has two objects: first, the peaceful possession of the thing sold; secondly, the concealed defects of this thing, or its redhibitory vices. 1626. Although at the time of sale there has been no stipulation as to warranty, the seller is legally bound to warrant the buyer against suffering total or partial eviction from the thing sold, or from liens asserted on the thing (charges *prétendues sur cet objet*), and not mentioned at the time of the sale. 1627. The parties may, by special conventions, add to this legal obligation, or diminish its effect, and may even stipulate that the seller shall not be liable to any warranty. 1628. Although it be stipulated that the seller shall be liable to no warranty, he remains bound to a warranty against his own act; any contrary agreement is void. 1629. In the same case of a stipulation of no warranty, the seller,

in the event of eviction, remains bound to return the price, unless the buyer knew, when he bought, the danger of eviction, or unless he bought at his own risk and peril."

⁶Endemann, Einführung, 700.

⁷Bürgerliches, Gesetzbuch, § 433.

⁸This section is identical in meaning with section 13 of the English act and identical in language except for the use of the words "contract to sell" and "sale" instead of the English words "contract for the sale" and "sale;" and the substitution of the word "warranty" for "condition," which is used in the English act as including both condition proper and promise. The meaning of the word "condition" is restricted in the American act to condition proper see *supra*, § 179. As breach of warranty justifies rejection of the goods, and also an action for damages under this act see *infra*, § 603 *et seq.* The buyer's rights are at least as extensive as under the English law.

It is customary to call the warranty in a sale by description an implied warranty, and for that reason this nomenclature has been preserved in this section of the Sales Act. The warranty might more properly, however, be called express, since it is based on the language of the parties.⁹

§ 224. **What is meant by sale by description.**—The term “contract to sell or sale by description” is common, but there has been little attempt at exact definition of its meaning. It seems, however, the term should be confined to cases where the identification of the goods which are the subject-matter of the bargain depends upon the description. Such a case may occur either in a contract to sell or a sale. Where there is a contract to sell goods by describing them as of a certain kind, the goods require for their identification a determination of the question whether they are in fact of that kind. So, if parties agree to make a present sale of all the goods of a certain kind in the seller’s warehouse, title may pass at once to such goods, their identification depending upon the description. Cases of this sort, however, are not the only ones where description is important. The seller may contract to sell a specified horse, adding a description of him, or he may agree to make an immediate sale of him. In these cases the description is not necessary to fix the identity of the property sold; its purpose is rather to induce the buyer to purchase goods otherwise identified. In a recent English case,¹⁰ the court gave a wider meaning to the term “sale by description” than is here suggested as proper, including every case where the buyer has not seen the goods but relies solely on the description given by the seller. By this definition, even though there can be no question as to the identity of the goods in regard to which the parties were dealing, the sale is one by description if any attributes are ascribed to the property by the seller.¹¹ The distinction is artificial between such a case and a case where the buyer sees the goods and agrees to buy what he sees, relying on a description given by the seller the truth of which inspection cannot determine. Whether the buyer sees the goods or not, it is the des-

⁹ See *supra*, § 203.

¹⁰ *Varley v. Whipp*, [1900] 1 Q. B. 513. See also *Wallis v. Russell*, [1902] 2 Ir. 585, C. A.

¹¹ The case is criticized on this ground in *Benjamin, Sale* (5th Eng. ed.), 613.

cription which induces him to buy, but it is not the description which identifies the goods.¹² The question is important, however, only so far as the transfer of title is concerned. The words of description, if an inducement of the purchase, constitute an express warranty, whether the goods are identified otherwise or not.¹³

§ 225. **Warranty in sales by description.**—In case of a contract to sell goods by description, using that term in the narrower sense suggested in the preceding section, namely, where the description is all that fixes the identity of the goods bargained for, there is no doubt that the buyer may refuse to take goods tendered if they do not fulfill the description, for the goods are not within the terms of his promise to buy.¹⁴ It is for this reason that English writers and others refer to the stipulation in regard to description as a condition. It is, however, also a promise, and that the seller is liable if he fails to furnish goods of the kind described is clear.¹⁵ Whether acceptance of goods which do not

¹² In *Gage v. Carpenter*, 107 Fed. Rep. 886, 47 C. C. A. 39, the case disclosed a sale of all the ice in five icehouses. This ice could not be inspected at the time of the sale. Later it turned out that the ice was in large part snow ice and not merchantable. It was held that there was no warranty because the buyer did not rely on the seller's judgment. The court distinguished the case of *Murphy v. Cornell*, 155 Mass. 60, 29 N. E. 207, 14 L. R. A. 492, 31 Am. St. Rep. 526, on the ground that in one view of the evidence in that case which the court held possible, the bargain was a contract to sell unidentified ice. "The case decided nothing concerning a sale of specific ice like the sale here before us." The distinction seems sound, but *Gage v. Carpenter* is inconsistent with *Varley v. Whipp*. Compare also *Campion v. Marston*, 99 Me. 410, 59 Atl. 548.

¹³ See *supra*, § 203.

¹⁴ *Chanter v. Hopkins*, 4 M. & W.

399; *Bowes v. Shand*, 2 A. C. 455, 480; *Azemar v. Casella*, L. R. 2 C. P. 431; *Vigers v. Sanderson*, [1901] 1 K. B. 608; *Pope v. Allis*, 115 U. S. 363, 29 L. ed. 393; *Timken Carriage Co. v. Smith*, 123 Iowa, 554, 99 N. W. 183; *Morse v. Moore*, 83 Me. 473, 22 Atl. 362, 13 L. R. A. 224, 23 Am. St. Rep. 783; *Gould v. Stein*, 149 Mass. 570, 5 L. R. A. 213, 14 Am. St. Rep. 455; *Alden v. Hart*, 161 Mass. 576, 37 N. E. 742; *Day v. Mapes-Reeve Co.*, 174 Mass. 412, 54 N. E. 878; *Fullam v. Wright & Colton Co.*, 196 Mass. 474, 82 N. E. 711; *Northwestern Cordage Co. v. Rice*, 5 N. Dak. 432, 67 N. W. 298, 57 Am. St. Rep. 563; *Boothby v. Scales*, 27 Wis. 626; *Fairfield v. Madison Mfg. Co.*, 38 Wis. 346.

¹⁵ *Heilbutt v. Hickson*, L. R. 7 C. P. 438; *Munford v. Kevii*, 109 Ky. 246, 58 S. W. 703; *Lenz v. Blake*, 44 Or. 569, 76 Pac. 356. And see cases cited in the preceding note, and *supra*, § 203.

conform with the description discharges this liability of the seller will be hereafter considered.¹⁶ In case the parties attempt to make an executed sale by description, again using the term in the narrow sense previously suggested, the same principles apply. The property cannot pass if the description does not apply to the goods in question because there has been no assent to give or receive the property in goods other than those described. Further, as an attempted sale imposes on the seller the obligation of one who contracts to sell he is liable for failure to deliver the goods he agreed to sell.¹⁷ If the term "contract to sell or sale by description" is used in the broad sense suggested by the English court, a difference must be observed. It is entirely possible for the goods in regard to which the parties are dealing to be identified, although the buyer does not see them and relies on the description by the seller. In such a case the English court holds that the property in the goods does not pass.¹⁸ The English court was doubtless led to this result by its doctrine that the buyer of goods who has taken title cannot rescind the title for breach of warranty,¹⁹ and in jurisdictions where such a doctrine is held,²⁰ undoubtedly the buyer must be compelled to seek his remedy in damages against the seller unless the unnatural meaning which the English court has given to the term "sale by description" is adopted. In jurisdictions where rescission is allowed for breach of warranty as provided by the Sales Act,²¹ there is no necessity of adopting the strained nomenclature of the English court in order to reach the same result. If the goods are identified the property in them will pass if the parties so intended, but if a description of them was also given by the seller and relied on by the buyer, there

¹⁶ See *infra*, § 484 *et seq.*

¹⁷ *Supra*, § 137.

¹⁸ *Varley v. Whipp*, [1900] 1 Q. B. 513. In this case the parties were dealing in regard to a reaping machine which the defendant had never seen and which the plaintiff said was new the previous year, and had been used to cut only fifty or sixty acres. These statements were untrue, and though the machine was delivered it was held the title never passed. It

can hardly be fairly said, however, that the machine delivered to the buyer was not the machine in regard to which the parties bargained. The case was really one of false statements in regard to an identified machine rather than a failure to identify the subject-matter of the sale.

¹⁹ See *infra*, § 608.

²⁰ See *infra*, § 608.

²¹ See *infra*, §§ 603, 608.

will be a breach of warranty if the description is untrue and the buyer may rescind the transfer of title. Even if the broad definition of sales by description which the English court has adopted be accepted, there are still many cases where the seller describes the goods which cannot be called sales by description. Thus, if the goods are seen by the buyer and his agreement is to purchase those goods, it is not a case of sale by description though the buyer's inspection could reveal nothing because the defect in quality was latent, and the seller's description was the inducement to the sale. But as has already been seen,²² such a description amounts to a warranty. It is an advantage of the doctrine allowing rescission for breach of warranty that it will generally render unnecessary any nice distinction between cases where the description is the agreed means of identifying the goods sold and cases where the description is merely an assertion of qualities of goods otherwise identified. In either class of cases, where rescission is allowed, if the buyer has not received goods he need not take them unless they conform to the description, and if he has taken them he may promptly return them. He may also bring an action against the seller if he fails to deliver such goods as he agreed.

§ 226. **Sales by sample and description.**—The obligations imposed upon the seller who makes a contract to sell or a sale by sample will hereafter be considered.²³ It is enough to say here that by incurring such obligations a seller does not exclude the obligations of one who contracts to sell or sells by description if the terms of the bargain included a description as well as a sample.²⁴

²² *Supra*, § 203.

²³ *Infra*, § 249 *et seq.*

²⁴ A good illustration of this may be found in the case of *Drummond v. Van Ingen*, 12 A. C. 284. The defendants ordered of the plaintiffs goods described in the contract as "mixt worsted coatings" which were to be in quality and weight equal to certain numbered samples. The goods were furnished which, in point of fact, were exactly like the samples.

Both the samples and the bulk of the goods were so loosely woven that the cloth could not be properly used for coating. It was held the seller was liable as on breach of warranty for this failure of the goods. This case may be compared with *Meyer Drug Co. v. Puckett*, 139 Ala. 331, 35 So. 1019. There the plaintiff submitted samples of medicinal roots to the defendant and asked their value; the defendant named the samples "pink

§ 227. Implied warranties of quality — Provisions of the Sales Act.

Sec. 15. IMPLIED WARRANTIES OF QUALITY.

— Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

(1.) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

(2.) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

(3.) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

(4.) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

(5.) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(6.) An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith.²⁵

root" and offered to buy a quantity at a specified price. Roots were sent like the sample but the name given by the purchaser was erroneous. The seller, however, did not know this and it was held that there was no warranty that the root was pink root.

²⁵ This section follows section 14 of the English act. Where the American act uses the word "warranty" in subsections (1-3), how-

ever, the English act uses "condition." The American subsection (3) is a proviso of subsection (2) of the English act and the American subsection (4) a proviso of subsection (1). In subsection (1) after the word "judgment" the English act has the following words: "and the goods are of a description, which it is in the course of the seller's business to supply." The

Before considering the effect of these provisions it is desirable to consider the growth of the common law upon the subject.²⁶

§ 228. **No implied warranty of quality in the early law.**—A development in the law of implied warranty of quality is to be observed similar to that already noticed in regard to implied warranty of title. There are early cases making it clear that in the absence of knowledge by the seller that the article which he sold was of bad quality he was not liable.²⁷ If, however, the seller knew that the goods he was selling were not merchantable, at least if he were a dealer, he was liable.²⁸ These cases certainly express the limits of the law until the beginning of the nineteenth century.²⁹ The earliest case where a broader rule is suggested is a *Nisi Prius* decision of Lord Ellenborough in 1815.³⁰ Since

omission of these words seems to make the buyer's reliance the sole test. This doubtless means justifiable reliance, and whether the seller were a dealer would be important evidence.

²⁶ See further, *infra*, § 248.

²⁷ Rolle, Abr. 90, pl. 4.

²⁸ Rolle, Abr. 90, pl. 1, 2, 3. See also 3 Bl. Comm. 165.

²⁹ In *Stuart v. Wilkins*, 1 Doug. 18, 20, Lord Mansfield said: "Selling for a sound price without warranty may be a ground for an *assumpsit*, but in such a case it ought to be laid that the defendant knew of the unsoundness." In *Parkinson v. Lee*, 2 East, 314, in a sale of hops by sample with a warranty that the bulk corresponded to the sample, it was held that the law did not raise an implied warranty that the commodity should be merchantable though the price was a fair one for merchantable goods. Therefore, there being a latent defect unknown to the seller arising from the fraud of the grower from whom the seller purchased, the seller was not responsible though the goods turned out to be unmerchantable.

³⁰ *Gardiner v. Gray*, 4 Campb. 144.

In this case there was a bargain for the sale of twelve bags of waste silk, apparently specific bales not yet landed from the vessel in which they were imported. The bargain took place in London, but the silk was sent to the defendant at Manchester. On examination he found it unmerchantable. Lord Ellenborough ruled as follows: "I am of opinion, however, that under such circumstances, the purchaser has a right to expect a salable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He cannot without a warranty insist that it shall be of any particular quality of fineness, but the intention of both parties must be taken to be, that it shall be salable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill. The question then is, whether the commodity purchased by the plaintiff be of such a quality as can be reasonably brought into the market

then it has not been doubted that in some cases at least the seller of goods is under an obligation to furnish goods which are at least merchantable though no such agreement or representation was made. The question has resolved itself into this: In what cases is such a warranty implied and in what cases does the old maxim of *caveat emptor* still apply?

§ 229. **Classification in Jones v. Just.**—The classification most often adopted is borrowed from the opinion of Mellor, J., in *Jones v. Just*,³¹ as follows:

"First, where goods are *in esse*, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect which exists in them is latent, and not discoverable on examination, at least where the seller is neither the grower nor the manufacturer: *Parkinson v. Lee*, 2 East, 314. The buyer in such a case has the opportunity of exercising his judgment upon the matter; and if the result of the inspection be unsatisfactory, or if he distrusts his own judgment, he may if he chooses require a warranty. In such a case, it is not an implied term of the contract of sale that the goods are of any particular quality or are merchantable. So in the case of the sale in a market of meat, which the buyer had inspected, but which was in fact diseased, and unfit for food, although that fact was not apparent on examination, and the seller was not aware of it, was held that there was no implied warranty that it was fit for food, and that the maxim *caveat emptor* applied: *Emmerton v. Mathews*, 7 H. & N. 586, 31 L. J. Ex. 139.

"Secondly, where there is a sale of a definite existing chattel specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty: *Barr v. Gibson*, 3 M. & W. 390.

"Thirdly, where a known described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known, described,

to be sold as waste silk?" *A v. Fidgeon*, 4 Campb. 169, 6 Taunt. similar decision was made in the 108.
same year in the case of *Laing* "L. R. 3 Q. B. 197.

and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer: *Chanter v. Hopkins*, 4 M. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288.

“Fourthly, where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied: *Brown v. Edgington*, 2 Man. & G. 279; *Jones v. Bright*, 5 Bing. 533. In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment and not upon his own.

“Fifthly, where a manufacturer undertakes to supply goods, manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article: *Laing v. Fidgeon*, 4 Campb. 169, 6 Taunt. 108. And this doctrine has been held to apply to the sale by the builder of an existing barge, which was afloat but not completely rigged and furnished; there, inasmuch as the buyer had only seen it when built, and not during the course of the building, he was considered as having relied on the judgment and skill of the builder that the barge was reasonably fit for use: *Shepherd v. Pybus*, 3 Man. & G. 868.”

This classification, however, is not wholly satisfactory. In some respects at least, as will be seen, the English law has gone farther than the first rule quoted, at least, would indicate. In other respects some jurisdictions at least, in this country, do not go so far as the fourth and fifth of these rules. Instead of considering the matter in detail according to this classification, it will probably be better and more helpful to submit a different classification.

§ 230. **Executory and executed agreements.**—It is obvious that the question whether a seller is bound by an implied obligation that goods shall be of merchantable quality or fit for a particular purpose is somewhat different in the case of a contract to sell

goods by description and in the case of an executed sale of specified goods. If the seller contracts to sell goods by description it may well be argued that as matter of construction the contract means not any goods of that description but goods of fair or merchantable quality of that description. That is probably the actual meaning of the parties. On the other hand if the seller agrees to sell a specified article which the parties have before them, it is clear that if an obligation is imposed upon the seller it cannot be derived from the terms of the bargain but is superadded by the law. The obligation is *quasi-contractual*, rather than contractual. Because of the difference just alluded to, some courts have been willing to infer an obligation to furnish merchantable goods if the bargain was executory, but not if it was executed. It is to be observed, however, that an executory contract to sell may relate to a specified defined article and on the other hand an executed sale may relate to goods identified only by description. The distinction which the courts have in mind, therefore, is not properly described as between executory contracts to sell and executed sales, but rather between bargains relating to specified property and bargains relating to property specified only by description.³² It is almost always true, however, that an executory contract to sell relates to unspecified goods, and an actual sale still more generally relates to goods specified in some other way than by a description of their character. It is for this reason that courts have referred to the distinction as one

³² This is apparent from the language in some of the cases. Thus in *Deming v. Foster*, 42 N. H. 165, the court said: "In the case of executory contracts for the making or furnishing of goods or articles for a special use, the law implies a contract that the articles to be made or furnished shall be reasonably fit and proper for the use for which they are ordered. And when articles thus agreed to be made or furnished are delivered, the law implies a warranty that the articles are reasonably fit and proper for that use. But there is no implied warranty as to the

quality of an article sold, nor of its fitness for any particular use, where there is a present sale of a particular existing article, then open to the examination and inspection of the purchaser, and where he requires no express warranty." It will be noticed that the cases put by the court where there will and where there will not be a warranty do not cover all cases. An executed sale of an article not open to inspection is not touched upon. See also *Timken Carriage Co. v. Smith*, 123 Iowa, 554, 99 N. W. 183.

between executory contracts and sales rather than between bargains in regard to unspecified goods known only by description and goods otherwise identified. In whatever way the distinction be worded it is an important one. If the contract is for the sale of goods specified only by description, and there are various grades and qualities of goods fulfilling that description, it is a reasonable construction of the bargain that goods of merchantable quality are intended. Accordingly this construction is adopted unless something in the contract indicates a contrary intention. Nor is it material whether the seller is a manufacturer or a dealer or neither.³³ The terms of the contract may, however, be so specific that the contract itself marks out the extent of the seller's liability leaving nothing to implication.³⁴

§ 231. **Specified goods and unspecified goods.**—As has been shown in the preceding section, it is more than a liberal rule of construction, it is an imposition of liability irrespective of (though not contradicting) the positive contract of the parties, to hold that there is a warranty of quality in case of a sale or contract to sell specific goods. That such a warranty is imposed in some cases is now well settled.³⁵ The reason for imposing such

³³ *Laing v. Fidgeon*, 6 Taunt. 108; *Bunch v. Weil*, 72 Ark. 343, 80 S. W. 582, 65 L. R. A. 80; *McClung v. Kelley*, 21 Iowa, 508; *Russell v. Critchfield*, 75 Iowa, 69, 39 N. W. 186; *Atkins Bros. Co. v. Southern Grain Co.*, 119 Mo. App. 119, 95 S. W. 949; *Deming v. Foster*, 42 N. H. 165; *Hart v. Wright*, 17 Wend. 267; *Howard v. Hoey*, 23 Wend. 350, 35 Am. Dec. 572; *Hargous v. Stone*, 5 N. Y. 73; *Dounce v. Dow*, 64 N. Y. 411; *Hadley v. Clinton County Co.*, 13 Ohio St. 502; *Wilson v. Belles*, 22 Pa. Super. Ct. 477; *Fogel v. Brubaker*, 122 Pa. St. 7, 14, 15 Atl. 692; *Best v. Flint*, 58 Vt. 543, 5 Atl. 192, 56 Am. Rep. 570; *Hood v. Bloch*, 29 W. Va. 244, 11 S. E. 910.

³⁴ In *Rollins Engine Co. v. Eastern Forge Co.*, 73 N. H. 92, 59 Atl. 382, 68 L. R. A. 441, the defendant, pur-

suant to an order, agreed to procure the necessary steel and forge it into a specified shape with the required finish, to be used by the plaintiff for piston rod for an engine to be sold by the latter. It was held that the measure of the defendant's liability was ordinary care in selecting the material and forging it according to the specifications and it was not liable for either defects in the steel or in its manufacture which were not discoverable by such care. If this case is to be supported it must be on the ground that the full specifications excluded the ordinary rule. *Peoria Grape Sugar Co. v. Turney*, 175 Ill. 631, 51 N. E. 587. See further, § 236.

³⁵ The first decision to this effect, other than those cited in § 228, note, seems to be *Shepherd v. Pybus*, 3

a liability upon the seller is the justifiable reliance of the buyer upon the seller in the purchase of the goods.³⁶ This reliance does not exist in every case. The circumstances which must be considered in determining its existence may be thus summarized. Was the seller a manufacturer of the goods, and thus familiar with their construction? Or, if not a manufacturer, was he a dealer in goods of that kind and so a competent judge of their quality? Did the buyer inspect or have an opportunity to inspect the goods, and was the defect latent so that it could not be discovered by such inspection? Apart from opportunity to inspect, were there circumstances showing that the ~~seller~~ selected the goods relying on his own judgment or showing an intention that the buyer should take the risk of the quality? Varying weight is given in different jurisdictions to these circumstances, as will appear from the following sections.

§ 232. **The seller a manufacturer.**—Where the seller manufactured the goods which he sold, a warranty that the goods are merchantable is implied both in England and in this country, unless something in the terms of the bargain indicates a contrary intention, or unless the buyer had opportunity to inspect the goods

M. & G. 868. This was a contract for the sale of a barge by the builder. It was lying at the seller's wharf and was not quite finished. It was held that a warranty was implied that the barge was reasonably fit for use as such. In many cases subsequently it has been held that a warranty may be implied though the goods to which the bargain related were specified. *Jones v. Just*, L. R. 3 Q. B. 197; *Preist v. Last*, [1903] 2 K. B. 148; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 3 S. Ct. 537, 28 L. ed. 86; *Campion v. Marston*, 99 Me. 410, 59 Atl. 548; *Murchie v. Cornell*, 155 Mass. 60, 29 N. E. 207, 14 L. R. A. 492, 31 Am. St. Rep. 526; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Prentice v. Fargo*, 53 N. Y. App. Div. 608, 65 N. Y. Suppl. 1114;

Landreth v. Wyckoff, 73 N. Y. Suppl. 388 (compare *Bierman v. City Mills Co.*, 151 N. Y. 482, 45 N. E. 856, 37 L. R. A. 799, 56 Am. St. Rep. 636, where the court lay stress on the fact that the contract in question was executory); *Hood v. Bloch*, 29 W. Va. 244, 255. In Pennsylvania it is the fixed rule that there are no implied warranties in executed sales. *Fogel v. Brubaker*, 122 Pa. St. 7, 14, 15 Atl. 692. And perhaps in Illinois. *Telluride Power Co. v. Crane Co.*, 103 Ill. App. 647, 208 Ill. 218.

³⁶ Benjamin, *Sale* (5th Eng. ed.), 625; *Troy Grocery Co. v. Potter*, 139 Ala. 359, 36 So. 12; *Skinner v. Kerwin Glass Co.*, 103 Mo. App. 650, 77 S. W. 1011; *Omaha Coal Co. v. Fay*, 37 Neb. 68, 55 N. W. 211; *Hood v. Bloch*, 29 W. Va. 244.

and this inspection would have disclosed the defect.³⁷ If the seller holds himself out to the buyer as the manufacturer of the subject-matter of the bargain, the case is governed by the principles applicable to sales by manufacturers.³⁸ If there was opportunity for inspection there is no warranty implied as to defects which would have been obvious upon inspection.³⁹ Special cir-

³⁷ *Shepherd v. Pybus*, 3 M. & G. 868; *Jones v. Bright*, 5 Bing. 533; *Jones v. Padgett*, 24 Q. B. D. 650; *Frost v. Aylesbury Dairy Co.*, [1905] 1 K. B. 608 (C. A.); *Main v. Dear- ing*, 73 Ark. 470, 84 S. W. 640; *Main v. El Dorado Dry Goods Co.*, 83 Ark. 15, 102 S. W. 681; *Wells v. Gress*, 118 Ga. 566, 45 S. E. 418; *Elgin Jewelry Co. v. Estes*, 122 Ga. 807, 50 S. E. 939; *Chicago Packing Co. v. Tilton*, 87 Ill. 547; *Nixa Canning Co. v. Lehmann-Higginson Grocer Co.*, 70 Kans. 664, 79 Pac. 141, 70 L. R. A. 653; *Copas v. Anglo-American Provision Co.*, 73 Mich. 541, 41 N. W. 690; *Buick Motor Co. v. Reid Mfg. Co.*, 150 Mich. 118, 113 N. W. 591; *Pease v. Sabin*, 38 Vt. 432, 91 Am. Dec. 364; *Hood v. Bloch*, 29 W. Va. 244; *Leggett v. Young*, 29 N. B. 675.

³⁸ *Brown v. Edgington*, 2 M. & G. 279.

³⁹ *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 28 L. ed. 86; *National Cotton Oil Co. v. Young*, 72 Ark. 144, 85 S. W. 92; *Glasgow Milling Co. v. Burgher*, 122 Mo. App. 14, 97 S. W. 950; *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163; *Hooven & Allison Co. v. Wirtz*, 15 N. Dak. 477, 107 N. W. 1078. In *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 28 L. ed. 86, the court said: "The authorities to which we have referred, although differing in the form of stating the qualifications and limitations of the general rule, yet indicate with reasonable certainty the substantial grounds upon which the doctrine of implied warranty has been made to rest. According to the

principles of decided cases, and upon clear grounds of justice, the fundamental inquiry must always be whether, under the circumstances of the particular case, the buyer had the right to rely and necessarily relied on the judgment of the seller, and not upon his own. In ordinary sales the buyer has an opportunity of inspecting the article sold; and the seller not being the maker, and, therefore, having no special or technical knowledge of the mode in which it was made, the parties stand upon grounds of substantial equality. If there be, in fact, in the particular case any inequality, it is such that the law cannot or ought not to attempt to provide against; consequently, the buyer in such cases—the seller giving no express warranty and making no representations tending to mislead—is holden to have purchased entirely on his own judgment. But when the seller is the maker or manufacturer of the thing sold, the fair presumption is that he understood the process of its manufacture, and was cognizant of any latent defect caused by such process, and against which reasonable diligence might have guarded. This presumption is justified, in part, by the fact that the manufacturer or maker by his occupation holds himself out as competent to make articles reasonably adapted to the purposes for which such or similar articles are designed. When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless,

circumstances may indicate in particular cases that the risk either wholly or in part, as to the quality of the goods, is assumed by the buyer. When goods are sold at second-hand, for instance, even by a manufacturer, it cannot be supposed that a warranty is implied of the same sort that would be implied had the goods been new.⁴⁰ But though in such a sale it could not be implied that the goods were warranted equal in quality to new goods, it seems that there is a warranty that they were originally merchantable, and if the buyer relies on the seller's judgment, a warranty that they are still reasonably fit for the purpose for which they are intended should be implied. Where a manufacturer sells goods which are a waste product, as such, it will generally be true, that the buyer assumes the risk of the quality and value

it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects of which the latter, if he used due care, must have been informed during the process of manufacture. If the buyer relied, and under the circumstances had reason to rely, on the judgment of the seller, who was the manufacturer or maker of the article, the law implies a warranty that it is reasonably fit for the use for which it was designed, the seller at the time being informed of the purpose to devote it to that use."

⁴⁰ In *Morley v. Consolidated Mfg. Co.*, 196 Mass. 257, 81 N. E. 993, the plaintiff bought a second-hand automobile from an agent of the manufacturer. After two months' use the crank shaft broke and damaged the engine materially. The court held there was no implied warranty covering this damage, saying: "We are also of opinion that there was no implied warranty as to the length of time this crank shaft would stand the strain of use. The subject of sale was an automobile. Even if it be assumed that the plaintiff had the right to think the sale was made by the manufac-

turer, still the machine was not made specially for the plaintiff, but on the contrary was one which had been considerably used and was bought by him at what he knew was a sum below the usual price for a new machine of the same kind. If it be said that he had the right to suppose it was fit to run, the answer is that it was fit to run. Every part essential to the running of the machine was there at the time of the purchase—in other words the machine was an automobile in running order, and, after the purchase, was actually used by the plaintiff nearly, if not quite, two months before the shaft broke. If the shaft had been stronger it might have lasted for a longer time. There is no claim of fraud. Under these circumstances we think that there was no implied warranty as to the length of time the shaft would last, but that as to that the doctrine of *caveat emptor* is applicable. See *Wilson v. Lawrence*, 139 Mass. 318, 1 N. E. 278." See also *W. R. Colchord Mach. Co. v. Loy-Wilson Foundry Co.* (Mo. App.), 110 S. W. 630. But representations of the seller which are an inducement to the sale will amount to an express warranty, though the

of the goods.⁴¹ But if a manufacturer sells a by-product of his manufacture not as such, but simply as one of the things he manufactures, it would seem immaterial that the production of such goods was not the main purpose of his business.

§ 233. **The seller a dealer.**—According to the English law (and also under the American Sales Act) the seller impliedly warrants the merchantable character of the goods which he sells as fully when he is merely a dealer in goods of that description as when he is a manufacturer.⁴² In this country some jurisdictions adopt the English law and hold that the dealer may be liable upon an implied warranty in sales of specified goods,⁴³ but the majority of American decisions hold that no such warranty as exists where a manufacturer is the seller exists where the seller

goods are second-hand. *Walker, Evans & Cogswell Co. v. Ayer* (S. C.), 61 S. E. 557.

⁴¹ *Turner v. Mucklow*, 8 Jur. N. S. 870, 6 L. T. (N. S.) 690 (the seller sold "spent madder," the refuse product of his manufacture, and sold as such. It was held the buyer took the risk of its utility for producing garancine); *Listman Mill Co. v. Miller*, 131 Wis. 393, 111 N. W. 496 (a flouring mill sold "280 tons No. 2 screenings more or less," its output for a specified period. There was held to be no warranty implied that the screenings in future would be of the same quality as those produced at the time the contract was made).

⁴² *Jones v. Just*, L. R. 3 Q. B. 197; *Preist v. Last*, [1903] 2 K. B. 148 (C. A.); *Wallis v. Russell*, [1902] 2 Ir. 585. The two cases last cited were decided under the Sale of Goods Act, but the statute adopted in this particular the rule previously existing. A sale by a manufacturer or dealer of goods which he does not habitually sell contains no implied warranty.

⁴³ *Dushane v. Benedict*, 120 U. S. 630, 636, 7 S. Ct. 696, 30 L. ed. 810; *Oil Well Supply Co. v. Priddy* (Ind.

App.), 83 N. E. 623; *Campion v. Marston*, 99 Me. 410, 59 Atl. 548; *Murchie v. Cornell*, 155 Mass. 60, 29 N. E. 207, 14 L. R. A. 492, 31 Am. St. Rep. 526; *Skinner v. Kerwin Glass Co.*, 103 Mo. App. 650, 77 S. W. 1011; *Atkins Bros. Co. v. Southern Grain Co.*, 119 Mo. App. 119, 95 S. W. 949. The Georgia Civil Code, § 365, provides: "If there is no express covenant of warranty, the purchaser must exercise caution in detecting defects; the seller, however, in all cases (unless expressly or from the nature of the transaction excepted) warrants: 1. That he has a valid title and right to sell. 2. That the article is merchantable, and reasonably suited to the use intended. 3. That he knows of no latent defects undisclosed." It will be observed that the obligation of implied warranty is not even limited to dealers. On the construction of this provision, see *Elgin Jewelry Co. v. Estes*, 122 Ga. 807, 50 S. E. 939; *Wells v. Gress*, 118 Ga. 566, 45 S. E. 418. California Civil Code, § 1771, enacts that there is an implied warranty where merchandise is sold which is inaccessible to the buyer's examination. See *Moore v. McKinlay*, 5 Cal. 471. A

is merely a dealer.⁴⁴ The same qualification noticed in the preceding section in regard to manufacturers must also exist in regard to dealers; that is, such jurisdictions as allow an implied warranty in any case in a sale by a dealer must restrict it to cases where the goods are not accessible to inspection if examination would disclose the defect.⁴⁵ If the seller of specific goods is neither a manufacturer nor a dealer, generally no warranty of specific goods would be implied, but if the skill or judgment of the seller were evidently relied on, there seems no reason why the nature of the seller's occupation should make a difference, and the Sales Act has adopted this idea.⁴⁶

similar provision is contained in S. Dak. Comp. L., § 3635. See *Standard Rope Co. v. Olmen*, 13 S. Dak. 296, 23 N. W. 271. And in South Carolina, in the absence of circumstances, showing a contrary agreement any seller of personal property impliedly warrants it of value for the purpose to which such goods are ordinarily applied. *Walker, Evans & Cogswell Co. (S. C.)*, 61 S. E. 557.

"*Reynolds v. General Electric Co.*, 141 Fed. Rep. 551, 73 C. C. A. 23; *McCoa v. Elam Drug Co.*, 114 Ala. 74, 21 So. 479, 62 Am. St. Rep. 88; *Chicago Provision Co. v. Tilton*, 87 Ill. 547; *Borden & Selleck Co. v. Fraser*, 118 Ill. App. 655; *Ehrsam v. Brown*, 76 Kans. 206, 91 Pac. 179; *White v. Oakes*, 88 Me. 367, 34 Atl. 175, 32 L. R. A. 592; *Kernan v. Crook*, 100 Md. 210, 59 Atl. 753; *Howard Iron Works v. Buffalo Elevating Co.*, 113 N. Y. App. Div. 562, 99 N. Y. Suppl. 163; *affd.*, without opinion, 188 N. Y. 619, 81 N. E. 1166; *Pascal v. Goldstein*, 100 N. Y. Suppl. 1025; *Strauss v. Salzer*, 109 N. Y. Suppl. 734; *Hooven & Allison Co. v. Wirtz*, 15 N. Dak. 477, 107 N. W. 1078, citing N. Dak. Revised Codes (1899), §§ 3976, 3978. See also *Hight v. Bacon*, 126 Mass. 10, 30 Am. Rep. 639.

⁴⁴ See statutes referred to above of California and Georgia; *Carleton v. Jenks*, 80 Fed. Rep. 937, 47 U. S. App. 734, 26 C. C. A. 265. See also *Farrell v. Manhattan Market Co.*, 198 Mass. 271, 84 N. E. 481.

⁴⁵ Section 15 (1). *Wing v. Chapman*, 49 Vt. 33, was an action on the case for the false warranty of a yoke of oxen. After discussing the subject of the express warranty, the court said: "Even without any express warranty in this class of contracts, the law has now become pretty well settled, that where the special purpose of the buyer is made known to the seller, and the seller, with such knowledge, delivers the goods, the law implies that they are reasonably fit for the purpose specified. If the facts show that the buyer trusts to the judgment of the seller, the seller must see to it that he judges correctly. The question has been much discussed whether this doctrine applies in cases where the seller was not the manufacturer of the goods sold; but it is now settled that it applies generally to all sales of property for a special purpose, if the sale is made on the judgment and skill of the vendor." See also *Gage v. Carpenter*, 107 Fed. Rep. 886, 47 C. C. A. 39.

§ 234. **Inspection.**—It is rightly held that in any case where the buyer has an opportunity to inspect goods, there should be no warranty implied as to which the examination ought to disclose defects, for the basis of implied warranty is the justifiable reliance of the buyer upon the seller's judgment. In case of latent defects, however, there is no reason why the buyer's right of inspection should limit the implication of a warranty in regard to such defects. He may naturally and justifiably trust to the seller as to such matters if the seller has superior knowledge. Accordingly under the English law, opportunity of inspection and actual inspection will not necessarily preclude the buyer from asserting a warranty in regard to latent defects.⁴⁷ In this country, as has already been seen, where there is a contract to sell goods by description, there is an implied warranty that the goods shall be merchantable.⁴⁸ This warranty everywhere survives the inspection and acceptance of the goods where the defect is latent, and in some jurisdictions, or under some circumstances, even though the defect is obvious. This question is dealt with hereafter.⁴⁹ It is enough here to call attention to the fact that inspection is not held anywhere necessarily to destroy a promise or warranty created by a bargain previously made. But where inspection is had or may be had at the time the bargain itself is made, the tendency in this country seems to be to hold that at least, in the absence of guilty knowledge on the part of the seller, the inspection precludes the existence of any implied warranty,

⁴⁷ *Jones v. Bright*, 5 Bing. 533; *Priest v. Last*, [1903] 2 K. B. 148 (C. A.); *Wallis v. Russell*, [1902] 2 Ir. 585 (C. A.). The same question is involved in sales by sample where the sample contains a latent defect. It is well settled in England that the buyer is entitled not simply to goods conforming to the sample, but also to goods free from latent defects in the sample. In *Mody v. Gregson*, L. R. 4 Ex. 49, 53, Willes, J., said: "The

object and use of either inspection of bulk or sample alike are to give information, disclosing directly through the senses which any amount of circumlocution might fail to express." This was quoted with approval and followed in *Drummond v. Van Ingen*, 12 A. C. 284. See also *Heilbutt v. Hickson*, L. R. 7 C. P. 438.

⁴⁸ See *supra*, § 229.

⁴⁹ See *infra*, § 481 *et seq.*

regardless of whether the defect is latent.⁵⁰ In some cases, however, reliance is placed on the fact that inspection would reveal the defect.⁵¹ In the sale of drugs by a druggist to a customer, the Supreme Court of Texas has laid down the rule that opportunity of inspection or actual inspection does not make the doctrine of *caveat emptor* applicable, for in most cases it is obvious that inspection is useless and the druggist purports to have skill in regard to the nature of the goods he sells.⁵² The reasoning upon which this rule is based, however, would extend to sales of other things than drugs.

§ 235. **Fitness for a particular purpose.**—The warranty of merchantability is not the only warranty that may be implied on the sale of goods. Where the buyer buys goods for a particular purpose a warranty is sometimes implied that the goods shall be fit for that purpose. Here again a distinction must be taken between a bargain for goods by description (which will generally be an executory contract to buy and sell), and a bargain for specified goods (which will generally be an executed sale). If a seller contracts to furnish goods for a specified object it is often possible on a reasonable construction of the contract to hold that he has

⁵⁰ *Barnard v. Kellogg*, 10 Wall. 383, 19 L. ed. 987; *Dorsey v. Watkins*, 151 Fed. Rep. 340; Cal. Civil Code, § 1771; *Browning v. McNear*, 145 Cal. 272; *Martin v. Roehn*, 92 Ill. App. 87; *Horwich v. Western Brewery Co.*, 95 Ill. App. 162; *White v. Oakes*, 88 Me. 367, 34 Atl. 175, 32 L. R. A. 592; *Farrell v. Manhattan Market Co.*, 198 Mass. 271, 84 N. E. 481; *IVans v. Laury*, 67 N. J. L. 153, 50 Atl. 355; S. Dak. Comp. L., § 3635; *McQuaid v. Ross*, 85 Wis. 492, 55 N. W. 705, 22 L. R. A. 187, 39 Am. St. Rep. 864. This is also so stated in the first rule in *Jones v. Just*, L. R. 3 Q. B. 197, quoted *supra*, § 228. But the statement was based on an early decision and probably did not accurately express the English law when it was made. See the second rule and the end of the fifth rule, *ibid*.

It certainly does not express the present law of England. See cases cited in note 47.

⁵¹ In *Badger v. Whitcomb*, 66 Vt. 125, 28 Atl. 877, "the seller made no representation in respect to the boards sold. The defendants had an opportunity to inspect them, and were requested by the seller to inspect them, and by inspecting them they could have discovered the defect;" held that there was no implied warranty; *National Cotton Oil Co. v. Young*, 72 Ark. 144, 85 S. W. 92; *Brooks v. Camak*, 130 Ga. 213, 60 S. E. 456; *Doyle v. Parish*, 110 Mo. App. 470, 85 S. W. 646.

⁵² *Jones v. George*, 56 Tex. 149, 42 Am. Rep. 689, 61 Tex. 345, 48 Am. Rep. 280, a case involving the sale of paris green to kill cotton worms.

agreed to furnish something which will accomplish the object desired. On the other hand if the bargain relates to specified goods, it is more obviously an implication of law apart from the contract between the parties if the seller is held to warrant the fitness of the article for the purpose designed. It should be noticed also that fitness for a particular purpose may be merely the equivalent of merchantability. Thus the particular purpose for which a reaping machine is generally designed is reaping. If it will not fulfill this purpose it is not merchantable. The particular purpose, however, may be narrower; a reaping machine may be desired for operation on rough ground and though it may be a good reaping machine it may yet be impossible to make it work satisfactorily in the place where the buyer wishes to use it. The principle already laid down that a manufacturer impliedly warrants his goods to be merchantable includes, therefore, the doctrine sometimes stated in this way — that the manufacturer of goods impliedly warrants that they are reasonably fit for the general purpose for which they are manufactured.⁵³ Sometimes, however, a more extensive warranty exists by implication. The manufacturer is held to warrant not simply that the goods he sells are fit for the general purpose for which they are manufactured, but also are fit for some special purpose of the buyer's which will not be satisfied by mere fitness for the general purpose goods of that sort fulfill. The test here, as elsewhere, is whether the buyer justifiably relied upon the seller's judgment or whether relying on his own he ordered or bought what is frequently called,

⁵³ *Randall v. Newsom*, 2 Q. B. D. 102 (C. A.); *Union Iron Works v. Spottswood*, 141 Fed. Rep. 834, 72 C. C. A. 300; *The Nimrod*, 141 Fed. Rep. 215; *Troy Grocery Co. v. Potter*, 139 Ala. 359, 36 S. W. 12; *Murray Iron Works v. De Kalb Electric Co.*, 103 Ill. App. 78; *Telluride Power Co. v. Crane*, 103 Ill. App. 647, 208 Ill. 218; *Parsons Co. v. Mallinger*, 122 Iowa, 703, 98 N. W. 580; *Redhead v. Wyoming Cattle Co.*, 126 Iowa, 410, 102 N. W. 144; *Ideal Heating Co. v. Kramer*, 127 Iowa, 137, 102 N. W. 840; *Queen City Glass Co. v.*

Pittsburg Clay Pot Co., 97 Md. 429, 55 Atl. 447; *St. Louis Brewing Assoc. v. McEnroe*, 80 Mo. App. 429; *Moore v. Koger*, 113 Mo. App. 423, 87 S. W. 602; *Skinner v. E. F. Kerwin Glass Co.*, 103 Mo. App. 650, 77 S. W. 1011; *Beck & Corbet Co. v. Holbeck*, 109 Mo. App. 179, 82 S. W. 1128; *Rogers v. Beckrich*, 61 N. Y. Suppl. 725; *Southern Iron Co. v. Exeter Machine Works*, 109 Tenn. 67, 70 S. W. 614. But see *Rollins Engine Co. v. Eastern Forge Co.*, 73 N. H. 92, 59 Atl. 382, 68 L. R. A. 441.

"a known, described, and definite article." In the cases cited below it was held that the manufacturer was liable as a warrantor of fitness for a special purpose though it did not appear that the goods sold were not fit for some purposes for which goods of the sort are naturally adapted.⁵⁴ Even though inspection would not reveal the defect in the goods it is possible for the buyer to select them, relying upon his own judgment, and if he does this the seller at least, in the absence of guilty knowledge,⁵⁵ will not be liable on an implied warranty.⁵⁶ Inspection by the buyer

⁵⁴ *Marbury Lumber Co. v. Stearns Mfg. Co.*, 32 Ky. L. Rep. 739, 107 S. W. 200; *Queen City Glass Co. v. Pittsburg Clay Pot Co.*, 97 Md. 429, 55 Atl. 447 (in this case clay pots were purchased for annealing glass. For this use they were necessarily subjected to a very high temperature and some of them were unable to withstand so severe a test. The seller was held liable); *Ideal Heating Co. v. Kramer*, 127 Iowa, 137, 102 N. W. 840 (a heating plant purchased for a particular building was held impliedly warranted to heat the building. It was not enough that a merchantable and workmanlike plant was furnished which might have heated satisfactorily some other building. [Compare with this case. *Holt v. Sims*, 94 Minn. 157, 102 N. W. 386, and *Beggs v. James Hanley Co.*, 27 R. I. 385, 62 Atl. 373, 114 Am. St. Rep. 44]); *Strongitharm v. North Lonsdale Steel Co.*, 21 Times L. Rep. 357 (Limestone was bought of the plaintiff for use in the defendant's iron smelting works. This purpose was known to the sellers, and it was held they were bound to furnish limestone reasonably fit for such use, nor was the rule changed because the plaintiff's quarry was known to be a second-grade quarry, in which were beds of limestone of varying quality). See also *Jones v. Bright*, 5 Bing. 533; *Brown v. Edgington*, 2

M. & G. 279; *Redhead v. Wyoming Cattle Co.*, 126 Iowa, 410, 102 N. W. 144; *West Michigan Furniture Co. v. Diamond Glue Co.*, 127 Mich. 651, 87 N. W. 92; *Omaha Coal Co. v. Fay*, 37 Neb. 68, 55 N. W. 211; *Carleton v. Lombard*, 149 N. Y. 137, 43 N. E. 422; *Bierman v. City Mills Co.*, 151 N. Y. 482, 45 N. E. 856, 37 L. R. A. 799, 56 Am. St. Rep. 636; *Gold Ridge Mining Co. v. Tallmadge*, 44 Or. 34, 102 Am. St. Rep. 602; *Port Iron Co. v. Groves*, 68 Pa. St. 149; *Pease v. Sabin*, 38 Vt. 432, 91 Am. Dec. 364; *Leopold v. Van Kirk*, 27 Wis. 152; *Crompton & Knowles Works v. Hoffman*, 5 Ont. L. Rep. 554. A somewhat novel but sound application of the principle was made in *Haynor Mfg. Co. v. Davis* (N. C.), 61 S. E. 54. A manufacturer who sold a beverage to a dealer not licensed to sell intoxicants was held to warrant that the beverage was such as could be sold lawfully by such a dealer.

⁵⁵ Negligence would also render the seller liable in an action on the case if the defect were a dangerous one.

⁵⁶ *Farrell v. Manhattan Market Co.*, 198 Mass. 271, 84 N. E. 481. See also *Wallis v. Russell*, [1902] 2 Ir. 585 (C. A.); *Logeman Bros. Co. v. R. J. Preuss Co.*, 131 Wis. 122, 111 N. W. 64. The Sale of Goods Act has, perhaps, changed the law in England to some extent in this re-

is always a fact of importance in considering whether in fact he exercised his own judgment or relied on that of the seller. If the seller is not informed of the buyer's purpose, this also shows that there can be no warranty of fitness for that purpose.⁵⁷

§ 236. **Known, described, and definite articles.**—If the buyer either enters into an executory contract for the purchase of goods exactly described, or makes an executed purchase of such goods, while he may be able to assert an obligation on the part of the seller to furnish merchantable goods of that description, unless the description itself precludes merchantability, he cannot regard the seller, even though the seller be the manufacturer of the goods, as warranting that they are fit for any more special purpose than that which merchantable goods of the agreed description necessarily fulfill. By exactly defining what he wants the buyer has exercised his own judgment instead of relying upon that of the seller.⁵⁸ It is often difficult to determine when the seller's judg-

spect. In the case last cited the opinion was expressed that before the statute there was at least a presumption that a buyer who inspected the goods, bought on his own judgment, whereas under the statute the question is an open question of fact in every case. The provisions of the American Sales Act are not distinguishable from those of the English act.

⁵⁷ *Mark v. H. D. Williams Cooperage Co.*, 204 Mo. 242, 103 S. W. 20. It is also true that mere knowledge on the part of the seller that the buyer intends to make a particular use of the goods is not sufficient to establish a warranty that the goods are adapted to such use. *West End Mfg. Co. v. P. R. Warren Co.*, 198 Mass. 320, 84 N. E. 488; *W. R. Colchord Mach. Co. v. Loy-Wilson Foundry Co.* (Mo. App.), 110 S. W. 630.

⁵⁸ *Jones v. Just*, L. R. 3 Q. B. 197; *Olivant v. Bayley*, 5 Q. B. 288; *Chanter v. Hopkins*, 4 M. & W. 399; *Seitz v. Brewers Refrigerator Co.*, 141 U. S. 510, 12 S. Ct. 46, 35 L. ed. 837;

Pullman Car Co. v. Metropolitan Ry., 157 U. S. 94, 15 S. Ct. 503, 39 L. ed. 632; *Grand Ave. Hotel Co. v. Wharton*, 79 Fed. Rep. 43, 49 U. S. App. 108, 24 C. C. A. 441; *Frederick Mfg. Co. v. Devlin*, 127 Fed. Rep. 71, 62 C. C. A. 53; *Davis Calyx Drill Co. v. Mallory*, 137 Fed. Rep. 332, 69 L. R. A. 973, 69 C. C. A. 662; *People ex rel. Oil Creek Gold Mining Co. v. The Court of Appeals*, 32 Colo. App. 355, 74 Pac. 543; *Peoria Grade Sugar Co. v. Turney*, 175 Ill. 631, 51 N. E. 587; *Ehrsam v. Brown*, 76 Kans. 206, 91 Pac. 179; *Lombard Water Wheel Co. v. Great Northern Paper Co.*, 101 Me. 114, 63 Atl. 555; *City, etc., Ry. v. Basshor*, 82 Md. 397, 33 Atl. 635; *Cosgrove v. Bennett*, 32 Minn. 371, 30 N. W. 359; *Fairbanks v. Baskett*, 98 Mo. App. 53, 71 S. W. 1113; *Rollins Engine Co. v. Eastern Forge Co.*, 73 N. H. 92, 59 Atl. 382, 68 L. R. A. 441; *Gregg v. Page Belting Co.*, 69 N. H. 247, 46 Atl. 26; *Day v. Mapes-Reeve Co.*, 174 Mass. 412, 54 N. E. 878; *Franklin Mfg. Co. v. Lamson Mfg. Co.*, 189 Mass. 344, 75

ment is justifiably relied upon and when the description is so definite as to preclude that supposition. Extreme cases may be put on one side and the other which are easily decided, but the question finally resolves itself into one of degree. The line drawn by the courts can best be gauged by examination of the facts of some recent leading cases.⁵⁹

N. E. 624; *Albree v. Philadelphia Co.*, 201 Pa. St. 165, 50 Atl. 984; *American Bank Co. v. Guardian Trust Co.*, 210 Pa. St. 320, 59 Atl. 1108; *Beggs v. James Hanley Co.*, 27 R. I. 385, 62 Atl. 373, 114 Am. St. Rep. 44; *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120, 58 N. W. 232, 41 Am. St. Rep. 33; *Case Plow Works v. Niles*, 90 Wis. 590, 63 N. W. 1013; *H. McCormick Lumber Co. v. Winans*, 126 Wis. 649, 105 N. W. 945.

⁵⁹ In *Seitz v. Brewers Refrigerator Co.*, 141 U. S. 510, 12 S. Ct. 46, 35 L. ed. 837, the seller contracted to supply "a No. 2 size refrigerating machine as constructed by the seller, to be put up and put in operation in the brewery of the buyer, under the superintendence of a competent man furnished by the buyer." It was held that though the seller knew the buyer's object in obtaining the machine was to render unnecessary the purchase of ice for cooling his brewery, and that unless the machine would cool the brewery to about the same extent as the ice did it would be worthless for the buyer's purposes, there was no implied warranty that the machine would serve the buyer's purposes. The machine worked and operated as the refrigerating machine should, and as the contract specifically designated the kind of machine, and that machine was furnished, the only implication in regard to it was that it would perform the work a machine of that description was designed to do. In *Grand Ave. Hotel Co. v. Wharton*, 79

Fed. Rep. 43, 49 U. S. App. 108, 24 C. C. A. 441, the seller agreed to furnish "2 Harrison safety boilers of 150 horse power each and the services of an erector to set the same." Contract contained minute specifications of the material and construction of the boilers in all their parts. The sellers knew that the boilers were for use in a hotel in Kansas City, and that the only supply of water available there was from the Missouri river. The boilers could not be used satisfactorily with water from the Missouri river owing to the amount of mud in that water. It was held that there was no implied warranty protecting the buyer in this respect. The buyer got the exact thing he bargained for. In *Holt v. Sims*, 94 Minn. 157, 102 N. W. 386, the seller was to install in the buyer's dwelling-house "A No. 3 St. Paul boiler with rated capacity of 320 feet" and also "to supply for a bank building of the buyer a heating plant, using for that purpose an old boiler then in the building and furnishing all necessary piping and fitting and labor to complete the job." It was held that no warranty could be implied that the house or bank building would be adequately heated. In *Ideal Heating Co. v. Kramer*, 127 Iowa, 137, 102 N. W. 840, there was held to be an implied warranty of fitness for the contemplated use when heating apparatus was installed. In this case, however, the description was less definite than in the Minnesota case, and, therefore, the seller's

§ 237. **The seller's obligation is not based on negligence.**—The effect of an express warranty undoubtedly is to bind the seller absolutely for the existence of the warranted qualities. If an implied warranty is properly called a warranty, the consequences should be similar. It should make no difference, therefore, whether the seller was guilty of any fault in the matter. Such is the well-settled law of England.⁶⁰ Some jurisdictions in this country seem to follow the English rule.⁶¹ In New York, how-

judgment was at least to some extent relied upon. See also *J. A. Fay & Eagan Co. v. Dudley*, 129 Ga. 314, 58 S. E. 826. In *Tilton Safe Co. v. Tisdale*, 48 Vt. 83, the buyer gave the written order for "A No. 4 safe with combination lock." Such a safe was furnished but the buyer asserted that the lock could not be used. The court charged the jury that there was no implied warranty that a person of ordinary skill and capacity could operate the lock; that it was the duty of the plaintiffs, upon the receipt and acceptance of defendant's order, to ship, in accordance with such order, one of their No. 4 safes with combination lock that would be merchantable both as respected the lock and the safe. The buyer excepted to this charge and in overruling the exception the court *in banc* said: "The plaintiffs shipped a No. 4 safe with combination lock of their make to the defendant. This was so far a strict compliance with the defendant's order. It was the very thing the terms of the order called for. There was no implied warranty as to the merit or usability of the lock, but only that it should be answerable to the call of the order." This language is often quoted but it certainly is incorrect without qualification. It is submitted that the seller was bound not only to furnish a lock answering the description but a lock reasonably fit

for its purpose if any combination locks are. The instruction of the trial court in that it required the lock to be merchantable (and it would not be merchantable if it was not fit for the purpose of locking the safe) is not open to the same objection. See *Crankshaw v. Schweizer Mfg. Co.*, 1 Ga. App. 363, 58 S. E. 222.

⁶⁰ In *Randall v. Newson*, 2 Q. B. D. 102, the plaintiff bought from the defendant, a carriage manufacturer, a carriage pole which was made of defective wood. Owing to the defect the pole broke and the buyer's horses were badly injured. It was held that the seller was liable for the damage to the horses even though the defect in the pole was latent and could not have been guarded against by reasonable skill or care on the part of the seller. In *Frost v. Aylesbury Dairy Co.*, [1905] 1 K. B. 608 (C. A.), the defendant sold the plaintiff milk containing typhoid germs. The plaintiff's wife contracted typhoid fever and died. It was held that the defendant was liable for the expenses of her illness and other damages, although he was ignorant of the defect and apparently not negligent in allowing its existence, which could only have been discovered by prolonged investigation.

⁶¹ In *Rodgers v. Niles*, 11 Ohio St. 48, 56, 78 Am. Dec. 290, the court said: "If the sellers have failed through defect of material procured

ever, an elaborate decision limits the liability of a manufacturer to cases where the process of manufacture is improper or carelessly carried on, or where improper material is negligently or knowingly used.⁶² The rule laid down by the New York court has been followed in some other jurisdictions.⁶³ Logically it seems difficult to find any intermediate ground between basing the seller's liability ~~either~~ wholly on negligence ~~or~~ on an obligation imposed by the law entirely irrespective of negligence, an obligation analogous to that created by an express warranty. If

by themselves, or of workmanship, their contract is broken, whether such defect be latent or visible, and however honest their intention may have been." The same rule seems adopted in *Leopold v. Van Kirk*, 27 Wis. 152. Section 2651 of the Code of Georgia, and section 1771 of the Civil Code of California, also seem to impose an absolute liability upon the seller irrespective of any fault on his part. So in *Farrell v. Manhattan Market Co.*, 198 Mass. 271, 84 N. E. 481, 487, the court said: "If the selection is left to the dealer due care by him is no defense." See also *Tennessee River, etc., Co. v. Leeds*, 97 Tenn. 574, 37 S. W. 389.

⁶² *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163. To an action for the price of saws manufactured by the plaintiff, the defendant set up a breach of implied warranty. The court held that the basis of implied warranties was presumed knowledge of the defect and that while the seller must be presumed to know of defects caused by the manufacturer, he could not be disposed to know of latent defects in the material bought for manufacture. So in *Carleton v. Lombard*, 149 N. Y. 137, 153, where the seller contracted to deliver petroleum, the court said: "The defendant was bound to deliver an article of refined petroleum that was free from latent or hidden defects that

rendered it unmerchantable at the time and place of delivery, and that could have been guarded against in the process of refinement or in the selection of the raw material by reasonable care and skill." To the same effect is *Howard Iron Works v. Buffalo Elevating Co.*, 113 N. Y. App. Div. 562, 99 N. Y. Suppl. 163.

⁶³ *McKinnon Mfg. Co. v. Alpena Fish Co.*, 102 Mich. 221, 60 N. W. 472; *Wisconsin Brick Co. v. Hood*, 67 Minn. 329, 69 N. W. 1091, 64 Am. St. Rep. 418; *Bragg v. Morrill*, 49 Vt. 45, 24 Am. Rep. 102. In *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 3 S. Ct. 537, 28 L. ed. 86, also the court, in stating the rule of liability of the seller, inserted a qualification similar to that laid down in *Hoe v. Sanborn*, though it was not necessary for the decision of the case and no discussion of the matter occurs in the opinion. When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects of which the latter, *if he used due care*, must have been informed during the process of manufacture. See also *Archdale v. Moore*, 19 Ill. 565.

a manufacturer is not liable for the use of defective material, in the absence of negligence it is hard to see why any seller should be liable for selling unmerchantable goods in the absence of negligence. And indeed, the New Hampshire court seems to have gone to the full extent of resting the liability of the seller altogether upon negligence.⁶⁴ An alternative, the rule in force in the civil law, though intrinsically meritorious is so opposed to all common-law authorities that it can hardly be regarded as a

⁶⁴Rollins Engine Co. v. Eastern Forge Co., 73 N. H. 92, 59 Atl. 382, 68 L. R. A. 441 "the obligation implied 'from natural reason and the just construction of law' [3 Bl. Com. 162], of one who undertakes to perform service for another, is due care. He contracts to exercise the diligence and skill of the average man of the ability which he professes in like work. If he exercises such care, he is not liable, in the absence of express contract, merely because the expected result is not obtained; Leighton v. Sargent, 27 N. H. 460, 59 Am. Dec. 388; Spead v. Tomlinson, 73 N. H. 46, 59 Atl. 376, 68 L. R. A. 432. If the plaintiffs had taken to the defendants a steel billet, to be forged by them into a particular shape for a piston rod, the defendants' contract would have been to exercise the care and skill of average persons engaged in like work. Similarly, if the plaintiffs had employed the defendants to select for them a billet of steel suitable for such forging, the defendants would not be understood to warrant the correctness of their judgment merely because they undertook the commission. For failure to detect a defect which could not be found by ordinary care in the exercise of the skill they had or professed to have, they would not be liable. The fact that the plaintiffs by one order employed the defendants to select the steel and forge it into a specified shape for a certain

use does not make the measure of their liability different from what it would have been under the separate contracts suggested. The defendants' evidence that the defect in the steel was undiscoverable by ordinary care tends to establish the possibility of an undiscoverable, inherent defect in the material of which the plaintiffs stipulated the rod should be forged. Having relied upon their own judgment as to the material to be used in the manufacture, or desiring an article necessarily made of such material, they cannot hold the defendants responsible for a defect which the skill and care which the defendants professed to possess, and which they were bound to exercise, could not discover. Ordinary care is such care as persons of average prudence exercise under like circumstances; Nashua Iron & Steel Co. v. Railroad, 62 N. H. 159, 161. The defendants knew the forging was to be used for a piston rod for a steam engine. Merely purchasing the steel from a reputable manufacturer may not be due care in the selection of the material for such a purpose. It may be, and the evidence which the defendants offered indicates, that there are tests which can be applied to determine the character of steel. Whether the defendants did all that due care required was for the jury, and the question should have been submitted to them, as requested by the defendants".

possibility.⁶⁵ The English rule may seem somewhat harsh at first sight, but on grounds of policy it is probably superior to any modification of it based upon negligence. If the buyer is compelled to contest the question of negligence with the seller he will find it very difficult to recover. In the nature of the case the evidence will be chiefly in the control of the seller, and the expense of even endeavoring to make out a case of this sort will be prohibitive in cases involving small amounts. Moreover, if the buyer cannot recover from the seller he cannot recover from any one for the defective character of the goods which he has bought. The wrong done by the sale of defective materials to the manufacturer who later sold the goods cannot form the basis of action by the ultimate buyer.⁶⁶ Consequently, the real wrongdoer who has caused the ultimate injury escapes. On the other hand if the manufacturer is held to an absolute liability irrespective of negligence, it will unquestionably increase the degree of care which he will use and if in any case he is compelled to pay damages for breach of warranty where the real cause of the defect was inferior material which he himself innocently purchased, he will have a remedy over against the persons who sold him this inferior material, and his damages will include whatever he himself has had to pay for breach of warranty.⁶⁷ Thus the loss will be borne ultimately by the person who should be responsible.

§ 238. **Subsidiary warranties by manufacturer.**— Even though the goods supplied by a manufacturer have been so exactly defined as to preclude the existence of any warranty of fitness for the purpose for which they are desired, and probably even though because of inspection or the language of the bargain there is no warranty of fitness for any purpose or of merchantability, there is nevertheless a warranty that the manufacture of the goods shall have been properly done and that the material used shall have been reasonably proper, except in so far as the obvious character of the defects or the terms of the bargain show a different intent, or unless the rule in regard to inspection precludes a warranty.⁶⁸

⁶⁵ For the rule in the civil law, see *infra*, § 217.

⁶⁶ See *infra*, § 244.

⁶⁷ See *infra*, § 243.

⁶⁸ *Archdale v. Moore*, 19 Ill. 565; *Kohl v. Lindley*, 39 Ill. 195, 89 Am. Dec. 294; *Union Hide & L. Co. v. Reissig*, 48 Ill. 75; *Ricketts v. Sis-*

It has also been held that a manufacturer selling goods of the sort which he manufactures warrants that the goods were manufactured by him,⁶⁹ and are new.⁷⁰

§ 239. **Exclusion of implied warranty.**—Though the goods which form the subject of the bargain may be so described or identified as to preclude any implication of a warranty of fitness for a particular purpose, nevertheless, there may be, under the principles already considered a warranty that the goods are merchantable unless goods of the sort agreed upon necessarily cannot be.⁷¹ It must be, however, possible to sell unmerchantable goods even if the seller is a dealer or manufacturer, and though the buyer either does not inspect the goods or his inspection in the nature of the case can reveal nothing because the defects are latent. The ordinary way to do this is for the seller expressly to state that the buyer must take the goods as they are. Any words or conduct tending to show that this was the intention of the parties will prevent a warranty from being implied.⁷² The

son, 9 Dana, 358, 35 Am. Dec. 141; *Little v. Van Syckle*, 115 Mich. 480, 73 N. W. 554; *Cosgrove v. Bennett*, 32 Minn. 371, 20 N. W. 359; *Goulds v. Brophy*, 42 Minn. 109, 43 N. W. 834, 6 L. R. A. 392; *Waring v. Mason*, 18 Wend. 425; *Pease v. Sabin*, 38 Vt. 432, 91 Am. Dec. 364.

⁶⁹ *Johnson v. Raylton*, 7 Q. B. D. 438.

⁷⁰ *Grieb v. Cole*, 60 Mich. 397, 27 N. W. 579, 1 Am. St. Rep. 533.

⁷¹ See *supra*, § 229 *et seq.*

⁷² *Taylor v. Bullen*, 5 Ex. 779. This was a case involving the sale of a vessel which was expressly agreed to be "taken with all faults." *Curwen v. Quill*, 165 Mass. 373, 43 N. E. 203, seems to have been a case of this sort. The plaintiffs constructed a machine according to drawings made by the defendants. The machine would not work but the plaintiffs were held entitled to recover nevertheless. See also *Stamps v. Tennessee Marble Co.* (Tenn. Ch.),

59 S. W. 769. It is on this ground that the case of *Barnard v. Kellogg*, 10 Wall. 383, 19 L. ed. 987, must be rested. In this case the seller agreed to sell at a certain price provided that the buyers examined the wool and reported whether they would take it. The wool was, in fact, dishonestly packed and the interior of the bales was filled with inferior goods, and ordinary inspection of the bales would not reveal this. It was held there was no warranty. Compare *Prentice v. Fargo*, 53 N. Y. App. Div. 608, 65 N. Y. Suppl. 114, where the defendant in selling seed said that the plaintiff might have it at a certain price if he would take it "just as it is" or "just as it is without cleaning." It was held that these words related only to the uncleanness of the seed and did not excuse the buyer from an implied warranty that the seed was fit for sowing.

common illustration of this principle is where the seller expressly refuses to warrant. Such a refusal shows an intention that the buyer shall take the risk of the quality of the goods.⁷³ And a statement by the seller that he has no personal knowledge of the article sold also precludes reliance by the buyer on the seller's judgment.⁷⁴ In some cases it has been held that an express warranty in a contract to sell or sale necessarily excludes any implied warranty.⁷⁵ If express warranties in a contract are in their nature inconsistent with the warranties which would have been implied had none been expressed, it would indeed be violating the intention of the parties to imply warranties;⁷⁶ but the principle should extend no farther. An express warranty is generally exacted for the protection of the buyer, not to limit the liability of the seller. The fact that a seller expressly warrants a machine to be made of the best steel ought not to exclude an implied warranty that the machine is properly manufactured and will do the work such machines are designed to do, if such warranties would otherwise be implied. Excellent authority supports this view.⁷⁷ Though a contract is in writing and no warranty expressed, one may be implied; for the implied warranty is not

⁷³ *Tabor v. Peters*, 74 Ala. 90, 49 Am. Rep. 804; *Hartin Commission Co. v. Pelt*, 76 Ark. 177, 88 S. W. 929; *Fauntleroy v. Wilcox*, 80 Ill. 477; *Jones v. Quick*, 28 Ind. 125; *Figge v. Hill*, 61 Iowa, 430, 16 N. W. 339; *Monroe v. Hickox*, 144 Mich. 30, 107 N. W. 719; *Maxwell v. Lee*, 34 Minn. 511, 27 N. W. 196; *Lynch v. Curfman*, 65 Minn. 170, 68 N. W. 5; *Hardt v. Western Elec. Co.*, 84 N. Y. App. Div. 240, 82 N. Y. Suppl. 835; *Henson v. King*, 3 Jones L. 419; *Farr v. Gist*, 1 Rich. L. 68; *Boinest v. Leignez*, 2 Rich. L. 464.

⁷⁴ *Young v. Plattner Implement Co.*, 41 Colo. 65, 91 Pac. 1109.

⁷⁵ *De Witt v. Berry*, 134 U. S. 306, 10 S. Ct. 536, 33 L. ed. 896; *Thomas v. Thomas*, 146 Ala. 533, 41 So. 141; *Moultrie Repair Co. v. Hill*, 120 Ga. 730, 48 S. E. 143; *Springer v. Indianapolis Brewing Co.*, 126 Ga. 321, 55 S. E. 53; *Conant v.*

National State Bank, 121 Ind. 323, 22 N. E. 250; *Gaar v. Hodges*, 28 Ky. L. Rep. 889, 90 S. W. 580; *Guhy v. Nichols & Shepherd Co.*, Ky. L. Rep., 109 S. W. 1190; *McGraw v. Fletcher*, 35 Mich. 104; *Cosgrove v. Bennett*, 32 Minn. 371; *Fairbanks v. Baskett*, 98 Mo. App. 53, 71 S. W. 1113; *International Harvester Co. v. Smith*, 105 Va. 683, 54 S. E. 859; *La Crosse Plow Co. v. Helgeson*, 127 Wis. 622, 106 N. W. 1094.

⁷⁶ *Reynolds v. General Electric Co.*, 141 Fed. Rep. 551, 73 C. C. A. 23; *White v. Gresham*, 52 Ill. App. 399; *Dowagiac Mfg. Co. v. Mahon*, 13 N. Dak. 516, 101 N. W. 903; *Wasatch Orchard Co. v. Morgan Canning Co.*, 32 Utah, 229, 89 Pac. 1009.

⁷⁷ *Bigge v. Parkinson*, 7 H. & N. 955; *Elgin Jewelry Co. v. Estes*, 122 Ga. 807, 50 S. E. 939; *Hawley Furnace Co. v. Van Winkle Machine*

based on a supposed agreement of the parties, but is an obligation imposed by law.⁷⁸ The effect of the parol evidence rule upon the proof of express warranties not contained in a written bargain has already been considered.⁷⁹

§ 240. **Meaning of manufacturer.**—The word “manufacturer” is given a wide meaning in the law of implied warranty. All sellers who produce the article which they sell are classed in this category — thus a grower of plants or seeds,⁸⁰ and one who has bred horses or cattle⁸¹ are included.

§ 241. **Provisions; early law.**—There is considerable talk in the early law in regard to a special obligation of warranty in the sale of provisions more extensive than that arising in the sale of other articles. The old authorities seem to have been rested, in part at least, upon the language of an old statute.⁸² But whatever the basis of the doctrine it was laid down broadly

Works, Ga. App., 60 S. E. 1008; *Ideal Heating Co. v. Kramer*, 127 Iowa, 137, 102 N. W. 840; *Buick Motor Co. v. Reid Mfg. Co.*, 150 Mich. 118, 113 N. W. 591; *Aultman v. Hunter*, 82 Mo. App. 632; *Cooper v. Payne*, 103 N. Y. App. Div. 118, 93 N. Y. Suppl. 69; *Bell v. Mills*, 78 N. Y. App. Div. 42; *Hooen & Allison Co. v. Wirtz*, 15 N. Dak. 477, 107 N. W. 1078.

⁷⁸ *Elgin Jewelry Co. v. Estes*, 122 Ga. 807, 50 S. E. 939. See, however, *De Witt v. Berry*, 134 U. S. 306, 312, 10 S. Ct. 536, 33 L. ed. 896.

⁷⁹ *Supra*, § 215.

⁸⁰ *Shaw v. Smith*, 45 Kans. 334, 25 Pac. 886, 11 L. R. A. 681; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Landreth v. Wyckoff*, 73 N. Y. Suppl. 383; *Hoffman v. Dixon*, 105 Wis. 315, 81 N. W. 491, 76 Am. St. Rep. 916. The Pennsylvania rule denying the existence of any implied warranties in executed sales leads to an opposite result in case of such a sale in Pennsylvania. *Shisler v. Baxter*, 109 Pa. St. 443, 58 Am. Rep. 738.

⁸¹ *Edwards v. Dillon*, 147 Ill. 14, 35 N. E. 135, 37 Am. St. Rep. 199;

Merchants' Bank v. Frazee, 9 Ind. App. 161, 36 N. E. 378; *Redhead v. Wyoming Cattle Co.*, 126 Iowa, 410, 102 N. W. 144. Compare with these cases *Scott v. Renick*, 1 B. Mon. 63, 35 Am. Dec. 177; *Wood v. Ross* (Tex. Civ. App.), 26 S. W. 148; *White v. Stelloh*, 74 Wis. 435, 43 N. W. 99; *McQuaid v. Ross*, 85 Wis. 492, 55 N. W. 705, 22 L. R. A. 187, 39 Am. St. Rep. 864. In the cases last cited either the seller did not raise the animals which he sold or the circumstances showed an intention to buy a specified animal without reliance on the seller's judgment.

⁸² In *Burnby v. Bollett*, 16 M. & W. 644, Parke, B., thus summarized the early law: The argument for the plaintiff was, that the sale of victuals to be used as food for man differed from the sale of other commodities, and that the vendor of such, if they were unwholesome, was liable to the vendee, without fraud or warranty. This position is laid down, apparently in general terms, in *Keilway*, 91; but the cases there referred to, in the Year Books, 9 Hen. VI, 37, pl. 53, and 11 Ed. IV, Trin. 10, pl. 6, and other authorities,

by Blackstone,⁸³ that "in contracts for provisions it is always implied that they are wholesome, and if they be not, the same

when considered, lead to this conclusion, that there is no other difference between the sale of victuals for food, and other articles, than this, that victuallers, butchers, and other common dealers in victuals are not merely in the same situation that common dealers in other commodities are, and liable under the same circumstances as they are, so that, if an order be sent to them to be executed, they are presumed to undertake to supply a good and merchantable article; but they are also liable to punishment for selling corrupt victuals, by virtue of an ancient statute (certainly if they do so knowingly, and probably if they do not), and are, therefore, responsible civilly to those customers to whom they sell such victuals, for any special or particular injury by the breach of the law which they thereby commit. That they, the common dealers, not all persons, are liable criminally for selling corrupt victuals, is clear; for Lord Coke says, in 4 Inst. 261: "This court of the leet may inquire of corrupt victual, as a common nuisance, whereof some have doubted, both for that it is omitted in the statute of the leet, and of the weak authority of the book of the 9 Hen. VI, where Martyn saith that it is ordained that none should sell corrupt victual. And Cottismore held the opinion that it is *actio popularis*, whereupon it is collected that the consuance thereof belongeth to the leet; and Martyn and Neal (11 Hen. IV), agreeing with him, said truly; for, by the statute of 51 Hen. III. Stat. 'pillor', et tumbrel', et assiss' panis et cervis' and by the statute made in the reign of Edw. I, intituled Stat. 'de pistoribus et brasiatoribus, et aliis vitellariis,' it is ordained that

none shall sell corrupt victuals." The statute of 51 Hen. III, of the Pillory and Tumbrel, and Assize of Bread and Ale, applies only to vintners, brewers, butchers, and cooks. Amongst other things, inquiry is to be made of the vintners' names, and how they sell a gallon of wine, or if any corrupted wine be in the town, or such is not wholesome for man's body; and if any butcher sell contagious flesh, or that died of the murrain, or cooks that seethe unwholesome flesh, etc. Lord Coke goes on to say, that Britton, who wrote after the statute 51 Hen. III, and following the same, saith, "Puis soit inquire de ceux queux achatent per un manner de mesure, et vendent per meinder mesure faux, et ceux sont punis come vendors des vines, et auxi ceux que serront atteint de faux aunes, et faux poys, et auxi les macegrievies (*macellarii*, butchers), et les gents que de usage vendent a trespassants (passengers) mauvaise vians corrupus et wacrus, et autrement perillous a la sauntie de home, encountre le forme de nous statutes." This view of the case explains what is said in the Year Book, 9 Hen. VI, 53, that "the warranty is not to the purpose; for it is ordained that none shall sell corrupt victuals;" and what is said by Tanfield, C. B., and Altham, B., Cro. Jac. 197, "that if a man sells corrupt victuals, without warranty, an action lies, because it is against the Commonwealth;" and also explains the note of Lord Hale, in 1st Fitzherbert's *Natura Brevium*, 94, that there is diversity between selling corrupt wines as merchandise; for there an action on the case does not lie without warranty; otherwise, if it be for a taverner or victualler, if it prejudice any.

⁸³ 3 Comm. 165.

remedy (damages for deceit), may be had." This statement is frequently repeated and relied on as a ground for decision.⁸⁴

§ 242. **Provisions; modern law.**—It is doubtful, however, if it would now generally be held that there was such a warranty unless the seller was a dealer, and importance is also attached to the fact that the buyer was buying for immediate consumption.⁸⁵ So far as reliance on the seller's skill and judgment is essential to establish a warranty of provisions, the mere fact of purchase from a dealer for immediate consumption seems to have been regarded generally as sufficient evidence, but in England and Massachusetts it is held that such reliance is essential and is not to be assumed.⁸⁶ Accordingly it has been held in an elaborately considered case in Massachusetts that where the buyer at a shop selects provisions himself, the seller's warranty does not go beyond the implied assertion that the seller believes the food he is selling to be sound, and he is, therefore, not liable unless he knew that

⁸⁴ *Hoover v. Peters*, 18 Mich. 51; *Sinclair v. Hathaway*, 57 Mich. 60, 23 N. W. 459, 58 Am. Rep. 327; *Copas v. Anglo-American Provision Co.*, 73 Mich. 511, 41 N. W. 690; *Van Bracklin v. Fonda*, 12 Johns. 468, 7 Am. Dec. 339; *Divine v. McCormick*, 50 Barb. 116 (compare *Moses v. Mead*, 1 Denio, 378, 5 Denio, 617); *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. Rep. 753.

⁸⁵ *Burnby v. Rollett*, 16 M. & W. 644; *Emmerton v. Mathews*, 31 L. J. Ex. 139; *Smith v. Baker*, 40 L. T. (N. S.) 261; *Nelson v. Armour Packing Co.*, 76 Ark. 352, 90 S. W. 288; *Wiedeman v. Keller*, 171 Ill. 93, 49 N. E. 210; *Humphreys v. Comline*, 8 Blackf. 516; *Farren v. Dameron*, 99 Md. 323, 58 Atl. 367; *Giroux v. Stedman*, 145 Mass. 439, 14 N. E. 538, 1 Am. St. Rep. 472 (citing earlier Massachusetts cases); *Farrell v. Manhattan Market Co.*, 198 Mass. 271, 84 N. E. 481; *Ryder v. Neitge*, 21 Minn. 70; *Tomlinson v. Armour*, 74 N. J.

L. 274, 65 Atl. 883; *Houk v. Berg* (Tex. Civ. App.), 105 S. W. 1176; *Warren v. Buck*, 71 Vt. 44, 42 Atl. 979, 76 Am. St. Rep. 754. In Pennsylvania, by statute of May 4, 1889 (P. L. 87), in a sale of food it must correspond in kind or quality with the description given, and there is an implied warranty unless the parties otherwise agree that the goods are fit for household consumption.

⁸⁶ In *Bigge v. Parkinson*, 7 H. & N. 955, it was held that the rule in regard to provisions was like the rule as to other goods. So in the English Sale of Goods Act there is no separate rule established for provisions, and under the general rule of section 14 (1) reliance upon the seller's skill or judgment is essential. This provision has been copied in the American Sales Act, § 15 (1). See also *Farrell v. Manhattan Market Co.*, 198 Mass. 271, 84 N. E. 481; *Tomlinson v. Armour*, 74 N. J. L. 274, 65 Atl. 883.

the food sold was not fit to be eaten.⁸⁷ A manufacturer of food products on any theory impliedly warrants food which he sells to be free from latent defects, making it unfit for consumption.⁸⁸ In jurisdictions, therefore, which follow the English law in imposing an implied warranty in sales of goods of any kind by dealers in that kind of merchandise, the doctrine in regard to sales of provisions probably differs little, if at all, from the doctrine prevailing as to other kinds of goods, but in jurisdictions where manufacturers only are held to warrant impliedly the goods which they sell, the special rule as to provisions seems still to have importance. The rule does not extend to food for cattle.⁸⁹ But the seller of such food may be liable under the principles governing implied warranties of goods other than food.⁹⁰

§ 243. **What is meant by merchantable.**—The requirement when it exists that goods shall be merchantable does not require that the goods shall be of first quality or even that they shall be as good as the average of goods of the sort.⁹¹ In some cases it is indeed said that goods must be of "medium quality,"⁹² but this seems to go too far. On the one hand it is not enough that the article is such as would in ordinary parlance be called by the name which the buyer and seller used to describe it, but, on the other hand, if there is no warranty of fitness for a particular purpose the buyer cannot claim more than that the goods with

⁸⁷ *Farrell v. Manhattan Market Co.*, 198 Mass. 271, 84 N. E. 481.

⁸⁸ *Nixa Canning Co. v. Lehmann-Higginson Grocery Co.*, 70 Kan. 664; *Copas v. Anglo-American Provision Co.*, 73 Mich. 541, 41 N. W. 690; *Leggett v. Young*, 29 N. B. 675. But a purchaser from a dealer cannot sue the canner of food on the theory of warranty. *Tomlinson v. Armour*, 74 N. J. L. 274, 65 Atl. 883, 274.

⁸⁹ *National Cotton Oil Co. v. Young*, 72 Ark. 144, 85 S. W. 92; *Lukens v. Freund*, 27 Kans. 664, 41 Am. Rep. 429.

⁹⁰ *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440; *Provost v. Cook*, 184 Mass. 315, 68 N. E. 336; *Houk*

v. Berg (Tex. Civ. App.), 105 S. W. 1176.

⁹¹ Thus in *Gossler v. Eagle Sugar Refinery*, 103 Mass. 331, in a sale of "Manilla sugar" it was held the buyer had no cause to complain because the sugar contained a percentage of sand and was worse than the average Manilla sugar. It was not, however, claimed by the buyer that the sugar was not a salable article as Manilla sugar. So in *Wilson v. Lawrence*, 139 Mass. 318, 1 N. E. 278, a piano the case of which began to check, diminishing its value, was nevertheless treated as merchantable.

⁹² *Howard v. Hoey*, 23 Wend. 350, 35 Am. Dec. 572; *Rodgers v. Niles*, 11 Ohio St. 48, 78 Am. Dec. 290.

their defects known shall be salable as goods of the general kind which they were described or supposed to be when bought.⁹³

§ 244. **Warranty not available to subpurchaser.**— It is a general rule that one who has a right in contract may assign that right in effect by giving the assignee the power to enforce the right in the name and stead of the assignor. There seems no reason why a warranty should be an exception to this rule.⁹⁴ But however this may be it seems settled that the mere resale of a warranted article does not give the subpurchaser a right to sue the original seller for damages caused him by defects either in the title or quality of the goods.⁹⁵ Two reasons may be given for this result. In the first place the sale of the chattel does not indicate that the seller means to part with his right of action for damages against one who previously sold the article to him; on the contrary, it may be assumed, that if the original warranty has been broken, the original purchaser means to retain whatever right he may have.⁹⁶ Another reason is that a warranty must, it seems, like an insurance policy, be construed as a contract of personal indemnity. Therefore, though one who purchased goods with a warranty might assign a right of action already accrued on the warranty he could not enlarge its scope so as to make it include the indemnification of subpurchasers. The right would always remain a right to damages for the injury the first buyer suffered by the defective condition of the article. As stated in the previous section, however, it is generally held that a buyer who

⁹³ *Wieler v. Schilizzi*, 17 C. B. 619, 624. In *McClung v. Kelly*, 21 Iowa, 508, the principal was thus stated: "The article shall not have any remarkable defect." See also *Harris v. Waite*, 51 Vt. 481, 31 Am. Rep. 694.

⁹⁴ It is, however, said that a warranty is not negotiable in *Smith v. Williams*, 117 Ga. 782, 45 S. E. 394, 97 Am. St. Rep. 220. By this statement, however, the court merely meant that a buyer of goods with a warranty could not by reselling the goods with a warranty give the subpurchaser an action for his damages against the original seller.

⁹⁵ *Nelson v. Armour Packing Co.*, 76 Ark. 352, 90 S. W. 288 (quality); *Smith v. Williams*, 117 Ga. 782, 45 S. E. 394, 97 Am. St. Rep. 220 (title); *Prater v. Campbell*, 110 Ky. 23, 60 S. W. 918 (quality); *Lebourdais v. Vitriified Wheel Co.*, 194 Mass. 341, 80 N. E. 482; *Tomlinson v. Armour*, 74 N. J. L. 274, 69 Atl. 883 (quality). In *Childs v. O'Donnell*, 84 Mich. 533, 538, 47 N. W. 1108, however, the court said *obiter* of a warranty that it "runs with the goods."

⁹⁶ *Dukes v. Nelson*, 27 Ga. 457, 463.

has bought goods with a warranty may recover damages which he has been compelled to pay a subpurchaser to whom the goods were resold with a similar warranty. In this way the original warrantor is frequently in effect made liable in the same amount that he would have been had the warranty been held to run with the goods as a covenant of warranty runs with land.

§ 245. **Deterioration after shipment.**—It has been held in England that the risk of such deterioration as is necessarily incident to goods when shipped to the point of destination may be upon the buyer, although the title and, therefore, the risk of extraordinary loss is still with the seller;⁹⁷ and yet on the other hand that the risk of such deterioration in transit may be upon the seller though the title to the goods has passed to the buyer.⁹⁸ On the strength of the earlier decisions the English Sale of Goods Act provided in section 33: "Where the seller of goods agrees to deliver them at his own risk at a place other than where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit." This statutory rule is not happily expressed, and does not cover the whole matter. If some goods conforming to the description in the contract will bear transportation, and some goods though merchantable at the place and time of shipment will not, the question then should be dealt with according

⁹⁷ In *Bull v. Robison*, 10 Ex. 342, the action was by the seller against the buyer for not accepting twenty-five tons of iron. By the terms of the contract the iron was to be manufactured in Staffordshire and delivered at Liverpool to the defendant who selected the canal as the mode of conveyance. When shipped the iron was clean and bright but on its arrival was rusted. It was proved that new iron will always rust in transit, especially if by water, and on this particular occasion the usual deterioration was greatly increased by a long frost which detained the iron on the canal. The court held that it was error for the trial judge to leave it to the jury to say whether

the iron when tendered was in a merchantable condition, and held that if the iron was merchantable when shipped it must be accepted by the defendant if it had only so far deteriorated as all such iron must necessarily deteriorate in its transit from Staffordshire to Liverpool.

⁹⁸ In *Beer v. Walker*, 46 L. J. C. P. 677, the seller, a wholesale provision dealer, contracted to send weekly from London to a retail dealer in Brighton a quantity of rabbits. The cost of transportation being paid by the buyer, it was held that there was an implied warranty that the rabbits should be fit for food not only when delivered at the railroad station in London, but when in the ordinary

to the principles governing sales of goods for a particular purpose. The purpose of the buyer is to have the goods shipped to him, and if he justifiably relies on the judgment or skill of the seller to pick out such goods as will stand transportation, a warranty should be implied to this effect, even though title is to pass at the place of shipment,⁹⁹ but if the buyer relies upon his own judgment, no such warranty can be implied. On the other hand if all goods shipped as the contract directs and of the kind the contract calls for will necessarily deteriorate in transit, unless the seller has in some way represented that the goods will stand transportation, the contract must be construed as calling for goods subject to no greater deterioration than is necessarily incident to all goods of the kind that the contract calls for when shipped as the buyer ordered.¹ The provision of the English statute makes no clear distinction between a case where all goods of the kind called for by the bargain would deteriorate in transit and a case where some goods of the sort called for would bear transportation, but others would not, and it may be throws a heavier burden upon the buyer than is justifiable. What is a risk "necessarily incident to the course of transit?" Is the chance of wreckage a risk necessarily incident to shipment by sea? The provision was, therefore, omitted from the American Sales Act. In sales of specific goods, or contracts to sell goods of a "known, described, or definite" kind, cases will be exceptional where the buyer will be justified in relying on the seller's judgment as to the fitness of goods for transportation, though such cases doubtless may occur. So that generally if the property passes to the buyer on shipment and the goods are then merchantable, he has obtained all that he is entitled to.² If, how-

course of business they should reach the buyer at Brighton and until the buyer should have had a reasonable opportunity to deal with them in the usual course of business. *Bull v. Robison* was not cited.

⁹⁹ This is the ground of decision in *Beer v. Walker*, 46 L. J. C. P. 677. This also was made the test in *Bowden v. Little* (Australia), 4 Comm. 1364.

¹ This is the ground of decision in *Bull v. Robison*, 10 Ex. 342.

² English *v. Spokane Commission Co.*, 57 Fed. Rep. 451, 15 U. S. App. 218, 6 C. C. A. 416; *Leggat v. Sands Brewing Co.*, 60 Ill. 158; *Charles v. Carter*, 96 Tenn. 607, 36 S. W. 396. In *English v. Spokane Commission Co.*, defendant in *Spokane Falls* telegraphed plaintiffs in Omaha: "Wire price car strictly fresh eggs, new cases." Plaintiffs replied: "Car fresh eggs, 16. Track here for immediate acceptance." Defendant answered: "If eggs strictly fresh,

ever, there is a warranty implied because the buyer justifiably relies on the seller to select goods suitable for shipment, the seller does not thereby assume the risk of deterioration in transit; he merely warrants that the goods are fit for shipment at the time

14 cents. Answer if accepted." Plaintiffs replied: "Offer eggs accepted." The court said: "What was the contract in relation to eggs? We are of opinion that the warranty expressed in the telegrams related to the condition of the eggs placed on board the cars at Omaha. The plaintiffs would not be liable for any deterioration of quality rendering them unmerchantable at Spokane, where they were delivered to the defendant, if such deterioration resulted necessarily from the transit. *Bull v. Robison*, 10 Ex. 342; *Mann v. Everston*, 32 Ind. 355; *Leggat v. Sands' Brewing Co.*, 60 Ill. 158; 2 Schouler, Pers. Prop., § 355; 2 Benj., Sales (8th Am. ed.), § 944, note 15; *Id.*, § 991. It was, therefore, erroneous to instruct the jury that plaintiffs 'were obliged by the terms of their contract that the eggs should be strictly fresh at the place of delivery.' The telegrams referred to the price at Omaha by the carload. The eggs were to be strictly fresh. Defendants first asked the price of 'car strictly fresh eggs, new cases,' wishing of course, to know at what price the plaintiffs were willing to sell a carload of strictly fresh eggs at Omaha. The answer to this inquiry gave the price at sixteen cents per dozen. Then came the offer from the defendant that if the eggs were strictly fresh he would give fourteen cents. This offer was accepted. The only controversy was as to the price. The words 'track here for immediate acceptance,' found in one of the telegrams, may be considered somewhat obscure and indefinite. They were

perhaps intended to imply that the plaintiffs had the goods then on hand in cars on the track at Omaha, for immediate acceptance; but, be that as it may, the words have no special significance as to the meaning of the contract between the parties. It is perfectly clear that the warranty, as expressed by the plaintiffs and as understood by defendant, had reference to the condition of the eggs in the car at Omaha. In the very nature of things, this must have been the intention and understanding of both parties. Eggs transported by rail, however fresh when placed upon the cars, are liable to deteriorate to some extent upon the journey. The plaintiffs contracted to ship a carload of 'strictly fresh eggs' from Omaha, the eggs to be properly packed in new cases, and placed in the car to be safely transported to the defendant at Spokane; and for any breach in this respect, if there was any, they would be liable in damages. They cannot be held liable for any loss in the quality of the eggs except such as arose by a breach of their contract. They are not liable for the ordinary and necessary shrinkage in quality incident to the handling of the eggs, and the deterioration which would naturally occur in their transportation to the place of delivery." In *Bull v. Robison*, *supra*, the court said: "A manufacturer who contracts to deliver a manufactured article at a distant place must, indeed, stand the risk of any extraordinary or unusual deterioration; but we think that the vendee is bound to accept the article if only deteri-

and place of the sale.³ The fact that the goods did not successfully bear transportation may be evidence that they were not fit for shipment, but it is not conclusive, as the delays and special circumstances of the actual trip may have been unusual. On the other hand if the contract on the part of the seller is not to ship goods but to deliver them at their destination, so that the property is not to pass until the latter time, the case will be unusual where the very requirement of the contract that the goods shall be shipped and delivered will not of itself necessitate the delivery of merchantable goods at the point of destination. Unless the contrary is the necessary effect of the contractual requirements, the seller must tender merchantable goods at the place where the property is to pass.

§ 246. **Usage.**—Attempt is sometimes made to qualify the rules in regard to warranty by evidence of a particular usage. Sometimes the attempt is to attach a warranty to a sale where no warranty would otherwise exist, sometimes to establish that no warranty exists, though the circumstances are such that apart from custom a warranty would be implied, and sometimes the attempt is to limit a warranty which in terms is general. It was held by the Supreme Court of the United States that evidence of usage was not admissible for the first purpose,⁴ and the same rule has been adopted by other courts in this country.⁵ In England, how-

orated to the extent that it is necessarily subject to in its course of transit from the one place to the other; or, in other words, that he is subject to and must bear the risk of the deterioration necessarily consequent upon the transmission." "In *Mann v. Everston*, *supra*, which was an action for breach of warranty in the sale of a quantity of kiln-dried corn meal, for shipment from Indiana to New Orleans, the court sustained an instruction given to the jury, that if the meal was sold for shipment to a southern market, a warranty would be implied that it was properly packed and fit for such shipment, and such as was contemplated by the purchase, but not that it

would continue sound for any particular or definite length of time."

³ *Mann v. Everston*, 32 Ind. 355; *Fruit Dispatch Co. v. Sturges*, 73 Ohio St. 35, 78 N. E. 1125; *Leopold v. Van Kirk*, 27 Wis. 1152.

⁴ *Barnard v. Kellogg*, 10 Wall. 383, 19 L. ed. 987. In this case evidence was offered of a usage that a warranty was to be implied that bales of wool were not dishonestly packed.

⁵ *Dickinson v. Gay*, 7 Allen, 29, 83 Am. Dec. 656; *Thompson v. Ashton*, 14 Johns. 316; *Beirne v. Dord*, 5 N. Y. 95, 55 Am. Dec. 321; *Wetherill v. Neilson*, 20 Pa. St. 448, 59 Am. Dec. 741, overruling *Snowden v. Warder*, 3 Rawle, 101; *McKinney v. Fort*, 10 Tex. 220.

ever, evidence of the usage was allowed before the enactment of the Sale of Goods Act,⁶ as it is also in New Hampshire.⁷ This seems to be the better rule. The reason given for not admitting evidence of the usage is that to do so contradicts a rule of law. But if usage is ever to be given any effect it necessarily changes the rule of law applicable to the case. It does this, not by denying the rule, but by showing by usage, instead of express words, an intent to bring the case under another rule. This is all that is desired in the case under consideration. The usage relied on is for the purpose of showing the intention of the parties. If parties intend to warrant unquestionably, they may; the law does not forbid it. If there is no usage, parties would naturally express this intention. If a well-recognized usage exists, instead of expressing their intention, they may properly take it for granted.⁸ The same reasoning is applicable where it is sought to show by custom that the bargain was not intended to be accompanied by a warranty.⁹ It should be noticed, however, that a custom in order to bind both parties must be known to both; or, if unknown to one, the other must be justified in assuming knowledge on the part of the man with whom he is dealing.¹⁰ The propriety of allowing the introduction of usage for the purpose of limiting the effect of a warranty expressly given is not so clear. Usage should be admitted to explain the meaning of the language used by the parties,¹¹ but it ought not to be allowed to

⁶ *Jones v. Bowden*, 4 Taunt. 847; *Syers v. Jonas*, 2 Ex. 111; *Harnor v. Groves*, 24 L. J. C. P. 53, 56. The express provision of section 14 (3) of the English Sale of Goods Act was doubtless based on the authority of these cases.

⁷ *Sumner v. Tyson*, 20 N. H. 384.

⁸ See 4 Wigmore, Evidence, § 2440.

⁹ Evidence of such a custom was held inadmissible in *Chicago Provision Co. v. Tilton*, 87 Ill. 547.

¹⁰ The decision in *Barnard v. Kellogg*, 10 Wall. 383, 19 L. ed. 987, may be rested on the concluding sentence in the opinion. "The conduct

of the parties shows clearly that they did not know of this custom and could not, therefore, have dealt with reference to it." To the same effect is *Van Hoesen v. Cameron*, 54 Mich. 609, 20 N. W. 609.

¹¹ Thus in *Schnitzer v. Oriental Print Works*, 114 Mass. 123, on a sale of berries in bags, by sample, evidence was held admissible of a usage that the sample was intended to represent the average quality of the whole lot, not the contents of each bag separately.

¹² In *Marshall v. Perry*, 67 Me. 78, it was held that usage was not ad-

contradict it. It must be assumed that the parties meant what they said, and though words may be shown to have an unusual meaning, under special circumstances, there is a limit to the possibilities of interpretation in this direction. It cannot be supposed that when parties plainly said one thing they really meant a diametrically opposite thing, and the purpose of a rule of law is to enable the court with the greatest certainty to get at the real intention of the parties as expressed to or understood by one another.¹²

§ 247. **Civil law.**—The Roman Law did not make the close analogy between express warranties and implied warranties that is made in our law. Either a promise on the part of the seller in regard to the goods or fraud imposed an obligation upon the seller similar to that imposed in our law; that is—the buyer could recover damages for the injury caused by the seller's wrong. Moreover, as is also everywhere the rule of the common law, the buyer could rescind the sale because of fraud. Unlike the rule of the English law, however, but like the rule in many of the United States,¹³ the buyer could also rescind a contract of sale for breach of a promise of warranty. In applying these rules, it was held to be a fraud if the seller knew at the time of the contract of defects in the goods which would impair their usefulness for the purpose for which they were designated, and deliberately refrained from apprising the purchaser of the defects. If the seller was innocent of fraud and made no express representation or promise in regard to the goods, he was never liable in damages; but as it seemed unjust that a seller who, even innocently had sold an unsound article for the price of a sound

missible to defeat an express warranty of the quality of butter if the buyer did not examine the butter immediately on receiving it and, if defective, return it or give notice of the fact immediately. In *Rice v. Codman*, 1 Allen, 377, it was held that usage was not admissible to show that a warranty of a certain invoice weight of cloth was to be interpreted as meaning the actual

weight. In *Van Hoesen v. Cameron*, 54 Mich. 609, 20 N. W. 609, usage was held inadmissible to limit an express warranty of the soundness of a horse so that it should not cover latent defects. *Yates v. Pym*, 6 Taunt. 446. See also as to the general principle involved, *Menage v. Rosenthal*, 175 Mass. 358, 56 N. E. 579.

¹³ See *infra*, § 608.

one should retain the price, the buyer was allowed the right of rescission. Such defects in the goods as would justify the buyer in returning the goods were called rehibitory defects. It was necessary to constitute such a defect that it could not readily have been observed by the buyer by inspection at the time of the sale.¹⁴ The modern civil law universally follows the general principle established by the Roman Law.¹⁵ The only State in this country, where the civil law is in force is Lousiana.¹⁶ But in South Carolina the fundamental theory of the civil law that a bargain to sell goods for the price of sound goods implies a representa-

¹⁴ The details of the Roman law are more fully stated in Moyle, *Contract of Sale in the Civil Law*, 188-216.

¹⁵ The French Civil Code provides in substance: Art. 1641. The seller is bound for latent defects which make the goods unfit for the use for which they were designed or so diminish their usefulness that the buyer would not have bought them, or would only have bought them at a lower price. Art. 1642. The seller is not bound for patent defects. Art. 1643. The seller is bound for latent defects though he did not know of them, unless the contrary is expressly stipulated. Art. 1644. The buyer has the chance of returning the goods or of keeping them and paying part of the price to be fixed by arbitration. Art. 1645. If the seller knew of the defects he is also liable for damages. Art. 1648. The buyer must bring a redhibitory action within a reasonable time. Owing to the wide influence of the French Civil Code, its provisions being largely adopted in Italy, Spain, Belgium, Netherlands and most countries of Central and South America, it may safely be assumed that a rule substantially similar prevails in these countries. The German Civil Code provides: § 459. The seller is bound

that the thing sold has not defects which will impair its value or usefulness for ordinary purposes or for purposes provided for by the contract. § 460. The seller is not bound for defects known to the buyer or for defects which would have been known had it not been for gross negligence of the buyer unless the seller promised that the defects did not exist or fraudulently conceal their existence. § 462. In case of default by the seller, the buyer may have rescission or diminution of the price. § 463. If the thing sold lacks a quality expressly represented by the seller, or if the seller fraudulently concealed the defect, he is liable for damages as an alternative to rescission or diminution of the price.

¹⁶ See *George v. Shreveport Cotton Oil Co.*, 114 La. 498, which shows that the rules of the civil law are still in force in Louisiana and also lays down the principle that a manufacturer is presumptively bound to know the qualities of articles of his manufacture which he sells. This doctrine is particularly important under the rule of the civil law that a seller who knows of defects in the things which he sells, but omits to declare them, is liable in damages. See also *McLellan v. Williams*, 11 La. Ann. 721.

tion that they are sound has also been in force from an early date, and the principle of *caveat emptor* rejected.¹⁷

§ 248. **Effect of the provisions of the Sales Act.**—The provisions of the Sales Act are copied from the English statute and the English statute was intended to express the common law of England as it existed at the time the act was passed. It may, therefore, be supposed that the liability of a seller under the Sales Act will be somewhat greater than that imposed by the common law of many jurisdictions in this country. Subsection (2) relates only to goods bought by description and expresses, therefore, a well-settled rule.¹⁸ Though the terms of this subsection are confined to dealers, it is not to be supposed that one who is not a dealer and who contracts to sell goods by description to be furnished in the future, can perform his contract by tendering unmerchantable goods. It is only where the goods are actually bought that subsection (2) is applicable. Subsection (3) expresses the better view in regard to inspection. As to defects which inspection ought to reveal, the inspection prevents any implied warranty as to such defects, but otherwise inspection is unimportant.¹⁹ In one respect, however, this subsection changes the law. The subsection refers only to examination and says nothing of opportunity to examine. The fact that the buyer has an opportunity to examine will as such be unimportant under the act.²⁰ It will, however, be important evidence upon the general question raised in subsection (1), whether the buyer relies on the seller's skill or judgment. Instead of making a right to inspect conclusive either as to obvious defects or as to latent defects and instead of making actual inspection as to latent defects conclude the buyer the act reverts to the general principle which gives inspection, or a right of inspection, its importance; namely, the reliance on the seller's skill instead of on the

¹⁷ *Timrod v. Shoolbred*, 1 Bay, 324, 1 Am. Dec. 620; *Bulwinkle v. Cramer*, 27 S. C. 376, 3 S. E. 225, 13 Am. St. Rep. 645.

¹⁸ See *supra*, §§ 225, 229, 230.

¹⁹ See *supra*, § 234.

²⁰ *Benjamin, Sale*, (5th Eng. ed.), 626, 628; *Wallis v. Russell*, [1902] 2

Ir. 585, 596, 597. In this case crabs were bought which the buyer could and did inspect, but the defects were latent, at least to one who was not expert, and it was evident that the buyer relied on the seller's skill or judgment.

buyer's own judgment. Subsection (4) is a restatement of the rule in regard to a known, described, and definite article. Subsection (5) though laying down a rule contrary to some decisions in this country should commend itself,²¹ and the same may be said in regard to subsection (6).²² In regard to subsection (1) some difficulty of construction has been felt. This is the only subsection under which a warranty of a specific chattel can be implied and the question has been raised — do the words of this subsection justify the implication of a warranty of merchantability, or must the words “particular purpose” be held to indicate that the section is not aimed at general merchantability but only at more specific purposes? It would be unfortunate if the section should be narrowly construed, and had it not already received a liberal construction in England, a construction which it may be assumed American courts would follow, it would be undesirable to copy the English legislation in this matter. The last edition of Benjamin on Sale^{22a} thus summarizes the results of the English decisions: “A ‘particular purpose’ is not some purpose necessarily distinct from a general purpose; for example, the general purpose for which all food is bought is to be eaten, and this would also be the particular purpose in any specific instance.²³ A particular purpose is, in fact, the purpose, expressly or impliedly communicated to the seller, for which the buyer buys the goods; and it may appear from the very description of the article, as, for example, ‘coatings,’²⁴ or a ‘hot-water bottle.’²⁵ But where an article is capable of being applied to a variety of purposes the buyer must particularize the specific purpose he has in view.²⁶ The purpose for which the goods are required need not necessarily appear in the contract itself, but may be proved by evidence of matters *ab extra* the contract, even when it is in writing, if such evidence does not contradict the contract.

²¹ See *supra*, § 245.

²² See *supra*, § 215.

^{22a} 5th Eng. ed., pages 625, 626.

²³ *Wallis v. Russell*, [1902] 2 Ir. K. B. 585 (C. A.); *Preist v. Last*, [1903] 2 K. B. 148 (C. A.).

²⁴ *Drummond v. Van Ingen*, [1887] 12 A. C. 284.

²⁵ *Preist v. Last*, [1903] 2 K. B. 148 (C. A.).

²⁶ Per Collins, M. R., *Ibid.*, at 153; per Lord Herschell in *Drummond v. Van Ingen*, [1887] 12 A. C. 293; *Jones v. Padgett*, [1890] 24 Q. B. D. 650 (C. A.).

The purpose intended 'may be gathered from the course pursued by the parties, and from their conduct and acts and writings antecedent, but leading up to the contract itself.'"²⁷ The omission from subsection (1) of the words "and the goods are of a description which it is the seller's business to supply" which occur in the English act and the insertion in both acts of the words "whether he be the manufacturer or not" tends to make every case turn on the reliance of the buyer on the seller's skill.

§ 249. Warranties in sales by sample — Provisions of the Sales Act.—

Sec. 16. IMPLIED WARRANTIES IN SALE BY SAMPLE.— In the case of a contract to sell or a sale by sample —

(a.) There is an implied warranty that the bulk shall correspond with the sample in quality.

(b.) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in section 47 (3).

(c.) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

This section of the Sales Act follows, with slight changes, section 15 of the English act. The English act inserts at the beginning a definition which seems somewhat too narrow and was omitted.²⁸ The English act also uses the word "condition" instead of the word "warranty." As will be seen in the next section, if the English distinction between condition and warranty were adopted,

²⁷ Per Lord Russell of Killowen, C. J., in *Gillespie v. Cheney*, [1896] 2 Q. B. 59, 63. See also per Tindal, C. J., in *Shepherd v. Pybus*, [1842] 3 M. & G. 868. So the House of Lords in *Jacobs v. Scott*, [1899] 2 Fraser, Sc. 70, especially per Lord Halsbury, p. 76. There is direct decision to the contrary in America, viz., *Warren Glass Works Co. v.*

Keystone Coal Co. (1886), 65 Md. 547.

²⁸ Sale of Goods Act, § 15 (1). "A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect." This definition could hardly include cases considered *infra*, § 252.

the obligation of the seller would sometimes be properly classed as a condition and sometimes as a warranty. According to the definition of warranty in the American Sales Act, however, and the remedies there allowed the buyer, there is no occasion to distinguish between a warranty and a promissory condition. In the American act the exception at the end of (b.) is not found in the English statute because section 47 (3.), also (to which reference is made), is not contained in the English act. In subsection (c.) the qualification has been inserted in the American act, "if the seller is a dealer in goods of that kind." The English act in regard to sales by sample seems to go beyond the previous section relating to implied warranties of quality, in fastening upon the seller an obligation to furnish merchantable goods; for the English section here under consideration imposes such an obligation upon the seller irrespective of whether the buyer was justified in relying upon the seller's judgment because the seller was a manufacturer or dealer, or for any other reason. It may frequently happen that the buyer who examines the sample is quite as competent to detect defects in the sample, which are not obvious, as the seller. It seemed reasonable, therefore, to restrict the obligation of the seller to furnish merchantable goods to cases where he was a dealer, which will also include, necessarily, cases where he is a manufacturer. As in the case of a warranty in a sale by description, the warranty is here called an implied warranty because that usage is common, but as was previously said²⁹ in regard to warranties in sales by description, the warranty might more properly be called express.³⁰

§ 250. **There may be a contract to sell or a sale by sample.**—It is common to speak of sales by sample rather than contracts to sell by sample, and in New York apparently, the term "sale by sample" is restricted to cases where "the goods are *in esse*" and

²⁹ *Supra*, § 223.

³⁰ It was so called in *Bradford v. Manly*, 13 Mass. 139, 7 Am. Dec. 122, where the court said: "A sale by sample is tantamount to an express warranty that the sample is a

true representative of the kind." The warranty is also called "express" in *Gurney v. Atlantic, etc., Ry. Co.*, 58 N. Y. 358, and in *Vanderhorst v. MacTaggart*, 1 Brev. 269, 2 Am. Dec. 667.

"the sample is taken from the bulk,"³¹ but this usage is not the common one, and there seems no reason why a contract to produce goods like a pattern should not be called a contract to sell by sample.³² In truth, a sample is simply a way of describing the subject-matter of the bargain, and the principles which are

³¹ *Gurney v. Atlantic, etc., Ry. Co.*, 58 N. Y. 358; *Smith v. Coe*, 55 N. Y. App. Div. 585, 170 N. Y. 162, 612, 63 N. E. 57; *Ideal Wrench Co. v. Garvin Mach. Co.*, 92 N. Y. App. Div. 187, 87 N. Y. Suppl. 41; *affd.*, 181 N. Y. 573, 74 N. E. 1118. The importance of this distinction lies in the fact that in New York most obligations of the seller, in the case of executory contracts, cease if the buyer accepts the goods. It is not doubted in New York that in the case of an executory contract to furnish goods like a sample, the seller is liable if he fails to tender such goods, but if the goods tendered are accepted and the defect in them is not latent, the buyer is held to have accepted the goods in complete satisfaction of the seller's obligation; whereas, if the sale had related to goods *in esse* the buyer would not thus lose his right by acceptance of the goods. See cases cited, *supra*; *Hardt v. Western Electric Co.*, 84 N. Y. App. Div. 249, 82 N. Y. Suppl. 835.

³² The following cases apparently related to unspecified goods. The seller contracted to furnish goods in the future of a kind like a sample. *Heilbutt v. Hickson*, L. R. 7 C. P. 438; *Jones v. Padgett*, 24 Q. B. D. 650; *Drummond v. Van Ingen*, 12 A. C. 284; *Meyer Drug Co. v. Puckett*, 139 Ala. 331, 35 So. 1019; *Worcester Mfg. Co. v. Waterbury Brass Co.*, 73 Conn. 554, 48 Atl. 422; *Love v. Barnesville Mfg. Co.*, 3 Pennewill, 152, 50 Atl. 536; *Home Lighting Rod Co. v. Neff*, 60 Iowa, 138,

14 N. W. 216; *Whitmore v. South Boston Iron Co.*, 2 Allen, 52; *Pike v. Fay*, 101 Mass. 134; *Wood v. Michaud*, 63 Minn. 478, 65 N. W. 963; *Boothby v. Plaisted*, 51 N. H. 436, 12 Am. Rep. 140; *Hargous v. Stone*, 5 N. Y. 73; *Hardt v. Western Electric Co.*, 84 N. Y. App. Div. 249; *Washington Brick Co. v. Sinnott*, 92 N. Y. Suppl. 504; *Dayton v. Hooglund*, 39 Ohio St. 671; *Hume v. Sherman Cotton Co.*, 27 Tex. Civ. App. 366, 65 S. W. 390. In the following cases the decisions apparently related to a sale of specified goods: *Tye v. Fynmore*, 3 Campb. 462; *Gardiner v. Gray*, 4 Campb. 144; *Russell v. Nicolopulo*, 8 C. B. (N. S.) 362; *Webster v. Granger*, 78 Ill. 230; *Bradford v. Manly*, 13 Mass. 139, 7 Am. Dec. 122; *Atwater v. Clancy*, 107 Mass. 369; *Gould v. Stein*, 149 Mass. 570, 22 N. E. 47, 5 L. R. A. 213, 14 Am. St. Rep. 455; *Texas Fruit Co. v. Lane*, 101 Mo. App. 712, 74 S. W. 100; *Bernstein v. Loomis*, 87 N. Y. Suppl. 134; *Abel v. Murphy*, 43 N. Y. Misc. Rep. 648, 88 N. Y. Suppl. 256. In *Heyworth v. Hutchinson*, L. R. 2 Q. B. 447, 451, a case where goods were warranted "about equal to sample," Blackburn, J., says: "Generally speaking, when the contract is as to any goods such a clause is a condition going to the essence of the contract, but when the contract is as to specific goods the clause is only collateral to the contract, and is the subject of a cross-action, or matter in reduction of damages."

applicable to contracts to sell and sales by description are applicable here.³³ As has been seen,³⁴ description may be used as a means of identifying existing goods or as a means of describing existing goods which are otherwise identified; and again, as a means of describing nonexistent goods. The same principles are applicable where the description is by means of a sample. In the first case where the description or sample is itself the means provided for identifying the goods which are the subject of the bargain, if the goods are not like the description or sample, the means of identification fails and no title can pass, though the parties purported to make an executed sale.³⁵ In the second case, however, if the parties purport to make an executed sale and the goods are clearly identified as being the goods in regard to which the bargain related, there seems no reason why title should not pass though the goods be not equal to sample.³⁶ In case

³³ Thus in *Drummond v. Van Ingen*, 12 A. C. 284, 295, Lord Macnaghten said: "After all, the office of a sample is to present to the eye the real meaning and intention of the parties with regard to the subject-matter of the contract, which, owing to the imperfection of language, it may be difficult or impossible to express in words. The sample speaks for itself." Where, as in *Parker v. Palmer*, 4 B. & Ald. 387, an agreement that goods shall conform to sample has been said not to amount to a description, the court has had in mind the old rule, criticized *infra*, § 203, that words of description imposed no obligation upon the seller.

³⁴ *Supra*, § 224.

³⁵ Thus, in *Azemar v. Casella*, L. R. 2 C. P. 431, the plaintiff sold 128 specific bales of cotton, to arrive to the defendants, guaranteeing them equal to a sealed sample. The sample was of "long staple Salem." The bales were "Western Madras," which require different machinery to make it up. The defendants refused to accept the bales, and it was held they

were not bound to. In spite of a clause in the contract "should the quality prove inferior to the guarantee, a fair allowance to be made," the court held that there was an essential difference of the species of the sample and the cotton tendered. See also *Varley v. Whipp*, [1900] 1 Q. B. 513; *Gill v. McDowell*, [1903] 2 Ir. K. B. 463; *Gardner v. Lane*, 12 Allen, 39; s. c., 9 Allen, 492, 85 Am. Dec. 779, 98 Mass. 517; *Abel v. Murphy*, 43 N. Y. Misc. Rep. 648, 88 N. Y. Suppl. 256. These decisions go farther than the text in that in all of them there were other means of identifying the goods than the sample or description, so that in fact there could be no doubt that the goods in question were the goods as to which the parties had been bargaining, although not possessing the nature or quality guaranteed. See also *supra*, §§ 224, 225.

³⁶ As to what constitutes sufficient identification, see *Holmes*, *Common Law*, 310, commenting on *Gardner v. Lane*, 12 Allen, 39; s. c., 9 Allen, 492, 85 Am. Dec. 779, 98 Mass. 517.

the goods in regard to which parties are dealing are not specified, the bargain is necessarily executory, and even though the goods are specified, the bargain may, nevertheless, be executory if the parties so intend. But these cases need not be distinguished, so far as the obligation of the seller is concerned, his obligation is the same. If he does not deliver goods equal to the sample, whether the bargain was a sale or a contract to sell, he will be liable. The buyer's remedies may, however, vary and the acceptance of the goods may have an effect in destroying this liability and the difference in this respect, if any, in the several cases, will be hereafter considered. Risk of loss and other incidents of title will also be affected if the sale is executed.

§ 251. **A sample is a term of the contract.**—In the typical case of a contract to sell or a sale by sample, the seller expressly agrees or guarantees that the bulk of the goods are, or shall be, equal to the sample. There can be no question of his obligation to furnish such goods or of his liability in case he fails to do so. This has often been decided.³⁷ In Pennsylvania alone a narrower obligation was formerly placed upon the seller. He was held bound to furnish goods of the same kind as the sample, but not of the same quality.³⁸ But the Pennsylvania law has been corrected

In this case the purchaser was held to have no title as against the seller's creditors to specific barrels pointed out to the buyer, but erroneously stated to contain No. 1 mackerel, whereas in fact some contained No. 3 mackerel and some contained salt. The subject-matter of the sale was here identified both as being the contents of specific barrels and also by description. The primary intention of the buyer was probably not to take title to those specific barrels, but rather to take title to No. 1 mackerel.

³⁷ *Parkinson v. Lee*, 2 East, 314 (Lawrence, J., said of such a bargain, that the contract was "no more than that the bulk should agree with the sample"); *Parker v. Palmer*, 4 B. & Ald. 387 (Chief Justice Abbott said: "The words 'per sample' in-

troduced into this contract may be considered to have the same effect as if the seller had in express terms warranted that the goods sold should answer the description of a small parcel exhibited at the time of the sale"); *Love v. Barnesville Mfg. Co.*, 3 Pennw. 152, 50 Atl. 536; *Imperial Portrait Co. v. Bryan*, 111 Ga. 99, 36 S. E. 291; *Gunther v. Atwell*, 19 Md. 157; *Whitmore v. South Boston Iron Co.*, 2 Allen, 52; *Atwater v. Clancy*, 107 Mass. 369; *Texas Fruit Co. v. Lane*, 101 Mo. App. 712, 74 S. W. 100.

³⁸ In *Boyd v. Wilson*, 83 Pa. St. 319, 24 Am. Rep. 176, canned corn was sold to a buyer who had been first given three sample cans; the bulk, after delivered, was found to be bad though the samples had been good. The seller sued for the price

by³⁹ a statute providing that there shall be a warranty in a sale by sample that the bulk is of the same quality as the sample.⁴⁰ It is also settled that if the goods do not correspond with the sample, the buyer may refuse to receive them.⁴¹ The English Sale of Goods Act by calling the obligation of the seller a condition implies that in every case the seller may thus refuse to receive the goods, making no exception in case the goods are specific goods identified in some other way than by the sample. The American Sales Act, though it calls the obligation a warranty, produces the same result because rescission is allowed as a remedy for breach of warranty. To permit the buyer to reject the goods in every case if not up to sample seems in conformity with justice,

and the lower court ruled that a sale by sample was not a warranty and the decision for the plaintiff was upheld. The court said: "The seller did not agree or say that the remainder should be of the same quality as the sample, and the purchaser did not order the corn to be delivered to be of the same quality as the sample; nothing was said or done on either side to give character to the sample cans as a standard of the quality. This being the nature of the sale, the sample became a standard only of the kind, and the goods were simply merchantable. So long as the commodity is salable, its different degrees of quality from good to bad are not the subject of an implied warranty; if it be wholly unmarketable, such as cannot be considered merchantable, probably a different conclusion would be reached, because an unmarketable article is substantially different in kind from one that is salable in the market." This decision is in line with the Pennsylvania decisions in regard to sales by description. *Fraley v. Bisphan*, 10 Pa. St. 320, 51 Am. Dec. 486. And generally in regard to representations inducing a sale. See *supra*, 199. On the whole subject,

the Pennsylvania law is open to criticism.

³⁹ Act of April 13, 1887 (P. L. 21, § 1).

⁴⁰ See *Cox v. Andersen*, 194 Mass. 136, 80 N. E. 236.

⁴¹ *Hibbert v. Shee*, 1 Campb. 113 (Lord Ellenborough said in regard to a sale by sample: "If I buy a commodity wholly discordant to that which is promised me, I am not bound to accept of a compensation for the dissimilarity. 'This is not a performance of the contract'"): *Wells v. Hopkins*, 5 M. & W. 7; *Azemar v. Casella*, L. R. 2 C. P. 431, 466; *McGee v. Billingsley*, 3 Ala. 679; *Penn v. Smith*, 93 Ala. 476, 9 So. 609, 98 Ala. 560, 12 So. 818, 104 Ala. 445, 18 So. 38; *Merriman v. Chapman*, 32 Conn. 146; *Worcester Mfg. Co. v. Waterbury Brass Co.*, 73 Conn. 554, 48 Atl. 422; *Love v. Barnesville Mfg. Co.*, 3 Pennw. 152, 50 Atl. 536; *Gill v. Kaufman*, 16 Kans. 571; *Home Lightning Rod Co. v. Neff*, 60 Iowa, 138, 14 N. W. 216; *Gunther v. Atwell*, 19 Md. 157; *Pike v. Fay*, 101 Mass. 134; *Boothby v. Plaisted*, 51 N. H. 436, 12 Am. Rep. 140; *Washington Brick Co. v. Sinnott*, 92 N. Y. Suppl. 504; *Hume v. Sherman Cotton Co.*, 27 Tex. Civ. App. 366, 65 S. W. 390.

and if, as under the American Sales Act, rescission is allowed of an executed sale for breach of warranty, there is entire consistency in the law. But where rescission of an executed transfer of title is not allowed, as in England, an absolute right given in the case of a sale by sample seems inconsistent⁴² with the general rule whether a buyer who has received and accepted the goods although not conforming to the sample, has assented to receive those specific goods as full satisfaction of the seller's obligation will be hereafter considered.⁴³ But if the acceptance of the goods does not thus operate, the buyer, as an alternative remedy to those already referred to, may recoup from the contract price the difference in value of the goods received and those promised.⁴⁴ The seller's obligation to deliver goods not simply conforming to the sample, but also conforming to any description given of the goods, has been already considered.⁴⁵

§ 252. **The sample as a representation as to the bulk.**— In many cases it has been held that the mere fact that a sample is exhibited does not make the transaction a sale by sample. It has even been said that there must be an intention to contract that the bulk shall be equal to the sample or the seller is not liable as warranting that fact. The question here, however, is precisely the same as that

⁴² This has been observed by the learned editors of the fifth English edition of Benjamin, Sale, who make the following comment on page 642, note 3: "Whether, however, the word 'condition' should not, in the case of a contract for the sale of specific goods, be interpreted as 'stipulation,' having regard to the provisions of s. 11 (1) (c), is doubtful. If the Legislature intended to declare the common law, as laid down in *Street v. Blay*, [1831] 2 B. & Ad. 456, under which the buyer of specific goods, in whom the property is vested, cannot treat the breach of a stipulation as to quality as the breach of a condition, it seems doubtful whether this intention has been carried out. See *ante*, 567. See as to sales of specific goods according to sample per Cur. in *Dawson v.*

Collis, [1851] 10 C. B. 523; and per Cur. in *Heyworth v. Hutchinson*, [1867] L. R. 2 Q. B. 447." The English decisions prior to the Sale of Goods Act had, as already observed, gone very far in holding that a difference in the bulk of specified goods was such a difference of species as to prevent a transfer of title. *Azemar v. Casella*, L. R. 2 C. P. 431. See also §§ 224, 225, 250.

⁴³ See *infra*, § 481 *et seq.*

⁴⁴ *McGee v. Billingsley*, 3 Ala. 679; *Graff v. Foster*, 67 Mo. 512; *Washington Brick Co. v. Sinnott*, 92 N. Y. Suppl. 504; *Dayton v. Hooglund*, 39 Ohio St. 671; *Brantley v. Thomas*, 22 Tex. 270, 73 Am. Dec. 264; *Hume v. Sherman Cotton Co.*, 27 Tex. Civ. App. 366, 65 S. W. 390.

⁴⁵ *Supra*, § 226.

considered in connection with express warranties.⁴⁶ If, as was urged, an affirmation in regard to goods to induce the buyer to enter into a bargain is an express warranty irrespective of an intention to contract, no difference of principle can be found if a sample is used as a means of making such a representation instead of words. As might be expected, the authorities are somewhat divided.⁴⁷ The actual decisions, however, are not so conflicting as some of the language used might lead one to suppose. By regarding a representation as evidence of a promise by the seller, courts which hold that it is necessary that the seller should contract that the goods are like the sample are enabled to cover most cases where the seller exhibits a sample and represents that the bulk corresponds with the sample.⁴⁸

⁴⁶ See *supra*, § 197 *et seq.*

⁴⁷ In the following cases the view was expressed that the parties must have manifested an intention to contract that the bulk should be like the sample: *Browning v. McNear*, 145 Cal. 272, 78 Pac. 722; *Imperial Portrait Co. v. Bryan*, 111 Ga. 99, 36 S. E. 291; *Gunther v. Atwell*, 19 Md. 157; *Day v. Raguet*, 14 Minn. 273; *Wood v. Michaud*, 63 Minn. 478, 65 N. W. 963; *Hargous v. Stone*, 5 N. Y. 73; *Beirne v. Dord*, 5 N. Y. 95, 55 Am. Dec. 321; *Burrowes Co. v. Rapid Safety Filter Co.*, 97 N. Y. Suppl. 1048; *Proctor v. Spratley*, 78 Va. 254. On the other hand excellent authorities uphold the view, which it is submitted is the better one, that an exhibition of a sample under circumstances which make it tantamount to a representation that the bulk of the goods is, or will be, equal to the sample, amounts to a warranty if a bargain is induced thereby. *Bradford v. Manly*, 13 Mass. 139, 7 Am. Dec. 122; *Atwater v. Clancy*, 107 Mass. 369; *Gould v. Stein*, 149 Mass. 570, 22 N. E. 47, 5 L. R. A. 213, 14 Am. St. Rep. 455; *Bernstein v. Loomis*, 87 N. Y. Suppl. 134; *Abel v. Murphy*, 43 N. Y. Misc. Rep. 648,

88 N. Y. Suppl. 256. See also *Russell v. Nicolopule*, 8 C. B. (N. S.) 362; *Weston v. Barnicoat*, 175 Mass. 454, 56 N. E. 619, 49 L. R. A. 612; *Dayton v. Hooglund*, 39 Ohio St. 671.

⁴⁸ Thus in *Browning v. McNear*, 145 Cal. 272, 279, the court said: "The sale by sample contemplated by the law is one the circumstances of which indicate something in the way of representation by the vendor, to the effect that a sample exhibited fairly represents the bulk." But immediately followed this by saying: "To constitute a sale by sample it must appear that the parties 'contracted solely in reference to the sample exhibited, that they mutually understood that they were dealing with the sample as an agreement or understanding that the bulk of the commodity correspond with it.' *Beirne v. Dord*, 5 N. Y. 95, 55 Am. Dec. 321, and note; *Benjamin, Sale*, American note (7th ed.), p. 685; 15 Am. & Eng. Encyc. of Law (2d ed.), p. 1227." These two sentences lay down inconsistent tests. The same inconsistency is found in two successive sentences in *Tiedeman, Sales*, § 188, quoted in *Imperial Portrait Co. v. Bryan*, 111 Ga. 99. A representation is first sug-

§ 253. **The sample not always a representation as to the bulk.—**

Though a representation express or implied on the part of the seller that the bulk is, or will be, equal to the sample, should amount to a warranty regardless of whether this representation formed part of the contract or merely induced it, it must not be assumed that in every case where a sample is shown a warranty of this sort arises. Thus the seller may take a sample of the goods, being himself ignorant as to their quality, and may represent to the buyer merely that the sample which he exhibited was fairly taken from the bulk. If this representation is true and the seller neither represents nor promises that the goods shall be equal to the sample, he would not be liable if the bulk proved, in parts, not to be equal to the sample.⁴⁹ Whether a seller who exhibits a sample does represent that the bulk is like the sample, or merely that the sample

gested as the test and then an intention to contract. But a representation need not be part of the contract. Thus, in *Weston v. Barnicoat*, 175 Mass. 454, 56 N. E. 619, 49 L. R. A. 612, an order was given for a monument "the same to be made of first-class Westerly granite." Prior to the formation of the contract, samples had been exhibited. The court held the sale was by description and not by sample, but added: "Possibly the fact that the sample had been exhibited might have some bearing on the meaning of 'white Westerly granite,' and of 'first class,' so far as it applied to the quality of the stone, but the letter made the test of performance conformity to the words of description used, not conformity to the piece of stone previously shown." It is submitted that if the seller had represented the sample to be a fair sample of "first quality white Westerly granite," he would have been held to the truth of that representation as of any other affirmation of fact made to induce the sale, though the words could hardly be said to form part of the contract. In *Dayton v. Hooglund*, 39 Ohio St. 671, a

foreign manufacturer of iron, who had sold some to a customer in this country, advised another customer, known to be a manufacturer of bolts and nuts, to buy of the first customer "a ton or two for sample." The latter having acted upon the advice, and having found the iron satisfactory for his purpose, ordered twenty tons of the foreign manufacturer. It was held that there was a warranty that the twenty tons should be like the sample.

⁴⁹ See *Gardiner v. Gray*, 4 Campb. 144. Samples of waste silk were exhibited. Lord Ellenborough said: "The sample was not produced as a warranty that the bulk corresponded with it, but to enable the purchaser to form a reasonable judgment of the commodity." That is, the seller submitting a fairly taken sample as such to the buyer's inspection and judgment does not necessarily represent anything more than that the sample was honestly and properly taken. See also *Gunther v. Atwell*, 19 Md. 157; *Hargous v. Stone*, 5 N. Y. 73; *Bortwick v. Young*, 12 Ont. App. 671.

was honestly and properly taken, and that the buyer must take his own risk as to the bulk, is a question of fact in each case.⁵⁰ So a sample may be shown which is confessedly not identical with the goods which form the subject of the bargain, merely to give an idea of the general kind of goods.⁵¹ Again, though the seller may exhibit a sample, he may expressly require the buyer to examine the goods and make the purchase on the basis of such inspection.⁵² Sometimes the buyer himself takes the sample. It is evident in such a case that unless the seller makes some express representations he cannot be held to warrant that the goods are, or shall be, like the sample.⁵³ Sometimes the sample is taken by an official,

⁵⁰ *Atwater v. Clancy*, 107 Mass. 369; *Gould v. Stein*, 149 Mass. 570, 22 N. E. 47, 5 L. R. A. 213, 14 Am. St. Rep. 455; *Beirne v. Dord*, 5 N. Y. 95, 55 Am. Dec. 321.

⁵¹ In *Wood v. Michaud*, 63 Minn. 478, 65 N. W. 963, a contract was made for the sale of canned corn. A sample was shown of the seller's manufacture of the previous year. The court held this was not a sale by sample because it was matter of common knowledge that corn grown in one year was not precisely like that grown in another year, and, therefore, the corn of the ensuing year when canned would not be precisely the same as canned corn of the past year. It is submitted, however, that in this case, though there was no warranty that the goods should be just like the sample, there was a warranty that the goods furnished should be similar in methods of preparation and general appearance. See also *Cox v. Andersen*, 194 Mass. 136, 80 N. E. 236; *Beirne v. Dord*, 5 N. Y. 95, 55 Am. Dec. 321 (a decision the correctness of which may be doubted. There seems to have been ground for finding that there was a representation that the bulk was like the sample); *Smith v. Coe*, 55 N. Y. App. Div. 585, 170 N. Y. 162, 612, 63 N. E. 57.

⁵² *Barnard v. Kellogg*, 10 Wall. 383, 19 L. ed. 987, illustrates this. The buyer requested the seller to furnish samples of a certain wool and the seller did so. The buyer thereupon offered to take the wool if equal to the samples furnished and the seller replied accepting, provided Kellogg & Co. examined the wool. The buyer did so and bought it. It proved to be falsely packed, the interior of the bales being made up of inferior wool and foreign matter. The seller was ignorant of the defect. It was held the seller was not liable, the court saying: "That the wool was not sold by sample clearly appears, and it is equally clear that both sides understood that the buyer if he bought was to be his own judge of the quality of the article he purchased." See also *Salisbury v. Stainer*, 19 Wend. 159, 32 Am. Dec. 437; *Hargous v. Stone*, 5 N. Y. 73.

⁵³ The seller may, however, adopt the action of the buyer in taking the sample and virtually represent the sample to represent the bulk. *Abel v. Murphy*, 43 N. Y. Misc. Rep. 648, 88 N. Y. Suppl. 256. In *Ames v. Jones*, 77 N. Y. 614, though the buyer bought on the faith of the sample, the seller did not even know that it had been taken. Of course no warranty would be found.

as both parties know.⁵⁴ As the warranty in a sale by sample, like other warranties, requires for its existence a reliance by the buyer upon the statement or representation of the seller, if the buyer

⁵⁴ In the leading case of *Gunther v. Atwell*, 19 Md. 157, the court's remarks are instructive (pp. 169, 170): "In cases where both buyer and seller deal with a specific article or lot of merchandise by sample, and the buyer knows, or from the usage of the trade or circumstances in the case, is authorized to presume that the seller has no knowledge of the bulk, other than that afforded by an inspection of the sample, an obligation for a correspondence of the bulk could not reasonably be implied as a part of the contract, for the buyer could not, in such a case, assume the exhibition or use of the sample to be a representation of quality by the seller. The fact that the seller's ignorance of the quality of the bulk is known to the buyer is sufficient to put him on his guard and enable him to protect himself by an actual inspection of the bulk, if that be possible, or by an express stipulation. With a knowledge of the bulk equal to that of the seller there would seem to be but little or no reason for permitting the buyer to hold the seller, whom he knows to be ignorant of the actual quality and condition of the bulk, as contracting by implication for a correspondence of it with the sample. Strictly speaking, a sale by sample would seem to imply an obligation on the part of the seller for correspondence in condition and quality only when the buyer knows, or is justified in assuming that the seller, or some one acting for him, or for whose act, in that respect, the seller could be held responsible, has exercised a discretion in selecting the sample. In cases where the sample is drawn and prepared, without the exercise of such a

discretion, in a mode prescribed by law, the reason against the implication of an obligation for a correspondence of the bulk with the sample is still stronger, for both buyer and seller are presumed to have a knowledge of the mode of drawing the sample and of the fact that from the mode of drawing it may not truly represent the condition and quality of the bulk. The samples of the tobacco sold in this case were drawn and prepared by a State inspector in the mode prescribed by the statutes regulating tobacco inspections, and although the appellants are not shown to have had other knowledge of the tobacco than that derived from the samples, the custom of dealers in buying and selling by such samples was clearly proved. Upon this statement of facts we must presume that the appellants had no knowledge of the true quality of the tobacco at the time it was sold, and that they, as did the appellee, dealt with the bulk upon the credit of the samples alone. The samples were prepared by the State inspector, and his agency, in performing that duty, was as much in behalf of the buyer as the seller; and neither buyer or seller has cause of complaint nor right of redress, either from the other, for any mistake as to condition or quality, if, with mutual knowledge and good faith, they buy and sell upon the credit of samples thus obtained. We think the appellants' first prayer should have been granted, as, in our opinion, there was no implied obligation or warranty on the part of the appellants that the bulk of the tobacco sold should correspond in quality with the samples exhibited by them in making the sale to the appellee."

refuses to rely upon the sample and makes an examination of the bulk for himself, upon which he places his sole reliance, the idea of warranty is excluded.⁵⁵ It is not necessary, however, that the buyer should place his sole reliance upon the sample; it is enough if the representation made by the sample is part of the inducement which leads him to make the bargain.

§ 254. **Parol evidence.**—The same question in regard to parol evidence that arises in regard to warranties generally, arises in the case of sales by sample. If a written contract is made which makes no mention of a sample, is parol evidence admissible to show that the contract was made with reference to a sample? The same principles which have been laid down in regard to warranties, generally,⁵⁶ should govern here also. If the writing purports to state the whole contract between the parties, the parol evidence rule would seem to forbid the buyer to show that it was in fact part of the contract that the goods should correspond with a sample.⁵⁷ But if a written contract for goods is procured by representing that the goods described in the writing are like a sample which is exhibited, it seems that parol evidence should be admitted to prove these representations and that the seller should be liable as warranting the truth of them. They are not part of the contract, but the law should impose a *quasi*-contractual obligation upon one who makes such statements.⁵⁸

§ 255. **Burden of proof.**—If the seller contracts to deliver goods like a sample, he cannot recover upon the contract without showing the buyer is in default in refusing the goods, and this cannot be shown without proof that the goods correspond to the sample. The burden of proof, therefore, is upon the seller to establish that fact.⁵⁹ If, however, the seller did not actually promise to sell

⁵⁵ See *Barnard v. Kellogg*, 10 Wall. 383, 19 L. ed. 987, stated in note 52; *Salisbury v. Stainer*, 19 Wend. 159, 32 Am. Dec. 437.

⁵⁶ See *supra*, § 214.

⁵⁷ *Meyer v. Everth*, 4 Campb. 22; *Harrison v. McCormick*, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469; *Imperial Portrait Co. v. Bryan*, 111 Ga. 99, 36 S. E. 291; *Wiener v. Whipple*, 53 Wis. 298, 10 N. W. 433.

⁵⁸ In *Pike v. Fay*, 101 Mass. 134,

there was a written order for willow cuttings. Parol evidence was held admissible to show that the sale was induced by the exhibition of samples.

⁵⁹ *Penn v. Smith*, 93 Ala. 476, 9 So. 609, 98 Ala. 560; 12 So. 818, 104 Ala. 445, 18 So. 38; *Merriman v. Chapman*, 32 Conn. 146; *Hollender v. Koetter*, 20 Mo. App. 79. But see *contra*, *Brigham v. Retelsdorf*, 73 Iowa, 712, 36 N. W. 715.

goods like a sample, but asserted that they were, and thereby induced the buyer to enter into a contract not in terms specifying the sample, the obligation of the seller, in regard to the sample, would there seem collateral and the defendant, as in other cases of collateral obligations, would have the burden of pleading and proving a breach of the warranty arising from the affirmation as an excuse for nonperformance. If the buyer accepts delivery of the goods other than for the mere purpose of inspection, he thereupon becomes liable for the price. Any right that he may have to refuse to pay the price in whole or in part, whether given effect to by recoupment or otherwise, is in its nature a cross right on the part of the buyer. He, therefore, in such a case has the burden of establishing that the goods are not equal to sample if the existence of his cross right depends upon that fact.⁶⁰

§ 256. **Buyer's right of inspection.**—It is a general principle of the law of sales that unless the terms of the contract necessarily imply the contrary, the buyer shall not be obliged to pay the price unless and until he has had an opportunity to inspect the goods.⁶¹ The effect of the provision in regard to inspection in section 16 of the Sales Act is that the mere fact that a contract to sell or a sale is made by sample does not exclude the operation of the general rule, and that, therefore, the buyer need not take the goods or pay the price until he had a chance to see them, and the seller is bound to give him a chance.⁶²

§ 257. **Merchantability.**—As a general rule all the buyer is entitled to, in case of a sale or contract to sell by sample, is that the goods shall be like the sample. He has no right to have the

⁶⁰ *Gachet v. Warren*, 72 Ala. 288; *Penn v. Smith*, 93 Ala. 476, 9 So. 609, 98 Ala. 560, 12 So. 818, 104 Ala. 445, 18 So. 38.

⁶¹ See *infra*, § 470 *et seq.*

⁶² The provision of the English act from which the American act is copied is based on *Lorymer v. Smith*, 1 B. & C. 1. The defendant, having bought by sample two lots of wheat, asked to see the bulk; permission was given him to inspect one lot, but the seller refused to show the other,

whereupon the buyer repudiated the bargain. Some days later the seller offered to give the buyer an opportunity to inspect all the wheat and make delivery, and on refusal of the latter brought suit. The buyer was held justified in refusing to take the wheat. See also *Heilbutt v. Hickson*, L. R. 7 C. P. 438, 456; *Magee v. Billingsley*, 3 Ala. 697, 695; *McNeal v. Braun*, 53 N. J. L. 617, 624, 23 Atl. 687, 26 Am. St. Rep. 441.

goods merchantable if the sample is not.⁶³ The reason upon which this rule is based is identical with that which denies an implied warranty generally to a buyer who has inspected the goods which he buys.⁶⁴ As should be the case, however, where the buyer inspects or has opportunity to inspect the bulk, but the defect in the goods is of such a character that inspection will not reveal it, so in the case of a sale by sample, if the sample is subject to a latent defect, and the buyer reasonably relies on the seller's skill or judgment, the buyer is entitled not simply to goods like the sample, but to goods like those which the sample seems to represent, that is merchantable goods of that kind and character. As has already been said,⁶⁵ it was thought in drawing the Sales Act that this wider obligation should be restricted to the case of dealers in goods of the kind in question, but as to dealers of that character, the provision is clearly sound.⁶⁶ It has already been seen that where goods are sold by description as well as sample the goods must conform to the description as well as to the sample.⁶⁷

⁶³ *Mody v. Gregson*, L. R. 4 Ex. 49, 53; *Sayers v. London Glass Co.*, 27 L. J. Ex. 294; *Meyer Drug Co. v. Puckett*, 139 Ala. 331, 35 So. 1019; *Worcester Mfg. Co. v. Waterbury Brass Co.*, 73 Conn. 554, 48 Ala. 422; *Chicago House Wrecking Co. v. Durand*, 105 Ill. App. 175.

⁶⁴ See *supra*, § 234.

⁶⁵ See *supra*, § 249.

⁶⁶ *Mody v. Gregson*, L. R. 4 Ex. 49. This was a contract to manufacture gray shirting like a sample. The goods were made and accepted as according to sample, but they contained china clay put in for the purpose of increasing the weight of the goods. The court held the seller liable irrespective of whether the sample did or did not contain the same foreign substance. So in *Heilbutt v. Hickson*, L. R. 7 C. P. 438,

the plaintiff agreed to buy 30,000 pairs of shoes as per sample, to be inspected and quality approved before shipment. The plaintiffs appointed an inspector and many shoes were rejected and many approved. Some of the shoes were afterward found to contain paper in the soles which could not be detected by inspection without opening the sole. It was found that the sample shoe also contained paper; nevertheless, the court held the seller liable for damages because the defect in the sample was a hidden one. See also *Drummond v. Van Ingen*, 12 A. C. 284; *Leggett v. Young*, 29 N. B. 675; *Bierman v. City Mills Co.*, 151 N. Y. 482, 45 N. E. 856, 37 L. R. A. 799, 56 Am. St. Rep. 636.

⁶⁷ See *supra*, §§ 223-225.

PART II.

TRANSFER OF PROPERTY AND TITLE.

CHAPTER VII.

TRANSFER OF PROPERTY AS BETWEEN BUYER AND SELLER.

- Section 258.** Unascertained property cannot be transferred — Provisions of the Sales Act.
259. Property transferred when parties so intend — Provision of the Sales Act.
260. Importance of intention in early law.
261. Intention is now the governing principle.
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264. Rule 1. Property is presumed to pass on making the contract.
265. Rule 2. Something to be done by the seller to put the goods into a deliverable state.
266. Unascertained price — Provision of English Sale of Goods Act.
267. Unascertained price — Origin of the rule.
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270. Rule 3. Sale or return, or sale on approval.
271. Rule 3 — Continued. How title is avoided when the property has passed.
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273. Varying consequences of sale or return and sale on approval.
274. Rule 4. (1) Subsequent appropriation.
275. Rule 4. (1) Continued. Subsequent appropriation, examination of decisions.
276. Rule 4. (1) Continued.—Subsequent appropriation, materials furnished by the seller.
277. Rule 4. (1) Continued.—Incorrect or partial appropriation and delivery.
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280. Rule 5. Effect of an obligation of the seller to deliver at a particular place.
281. Reservation of possession or property by means of documents of title — Provisions of the Sales Act.

- Section 282. Effect of form of bill of lading upon appropriation.
283. The property is retained where the seller or his agent is consignee.
284. The seller's title may be only for the purpose of security.
285. Retention of bill of lading to the order of the buyer.
286. Effect of bill of lading where a third person is consignee.
287. Effect of direction in bill of lading to notify purchaser.
288. Effect of bill of lading in other form.
289. Bill of lading sent forward with bill of exchange.
290. Whether a draft attached to a bill of lading must be paid or only accepted before surrender of the bill of lading.
291. Effect of intention at variance with form of the bill of lading.
292. Effect of buyer's obtaining possession of bill of lading without accepting draft.
293. Recognition of mercantile custom in regard to bills of lading in the civil law.

§ 258. Unascertained property cannot be transferred — Provisions of the Sales Act.—

Sec. 17. NO PROPERTY PASSES UNTIL GOODS ARE ASCERTAINED.— Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in section 6.¹

As to this rule there can be no question. It is a rule rather of logic than of law that transfer of ownership cannot be predicated of unspecified property. The rule is clearly recognized in the civil law,² and has been settled in the common law from very early

¹This section follows section 16 of the English act, except for the addition of the clause beginning "but," etc., and except for the substitution of the words "contract to sell" for the words "contract for the sale of." The reason for adding the final clause has been stated in connection with section 6. See *supra*, § 146 *et seq.* The word "property" is used as in the English act, as meaning title as between the parties. In portions of the act which deal with the rights of third persons, *c. g.*, *c. X, infra*, § 310, the word "title" is used as meaning ownership good

against world. The word "title" is in most American cases used broadly to express both meanings.

²As the contract of sale in the civil law was not a transfer of property but a contract to transfer the possession of property with a guarantee against eviction, a contract to sell a certain quantity of unspecified goods might fairly come within the definition of a sale. See Moyle, *Sale in the Civil Law*, 29. But there could be no *emptio perfecta* until the goods were specifically determined and the risk did not pass to the buyer until then. *Ibid.* 83.

times.³ It is unquestioned to-day.⁴ It is not often difficult to determine when the goods are identified if the dispute already considered in regard to a sale of an undivided portion of a mass of fungible goods is excluded.⁵ If the bargain sufficiently describes the goods to enable them to be identified they are specific although mere observation would not be sufficient to apply the description.⁶

§ 259. Property transferred when parties so intend — Provisions of the Sales Act.—

SEC. 18. PROPERTY IN SPECIFIC GOODS PASSES WHEN PARTIES SO INTEND.—

(1.) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2.) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the case.⁷

³ Y. B., 18 Ed. IV, 14, per Brian, C. J., "But if I have a black deer amongst others in my park, I can grant him, and the grant is good; and if I have two amongst the others known, and I grant one or both of them, the grant is good, for this, that it is ascertained what thing is granted."

⁴ *Dixon v. Yates*, 5 B. & Ad. 313, 340; *Aldridge v. Johnson*, 26 L. J. Q. B. 296, 297; *Heilbutt v. Hickson*, L. R. 7 C. P. 438, 449; *Mirabita v. Imperial Bank*, 3 Ex. Div. 164, 172; *Schreiber v. Butler*, 84 Ind. 576, 583; *Gardner v. Lane*, 12 Allen, 39; s. c., 9 Allen, 492, 85 Am. Dec. 779, 98 Mass. 517; *Blanchard v. Low*, 164 Mass. 118, 121, 41 N. E. 118; *Robinson v. Stricklin*, 73 Neb. 242, 102 N. W. 479; *La Vie v. Crosby*, 43 Or. 612, 74 Pac. 220; *Barber v. Andrews* (R. I.), 69 Atl. 1; *Parlin, etc., Co. v. Kittrell* (Tex. Civ. App.), 95 S. W. 703; *American Hide & Leather Co. v. Chalkley*, 101 Va. 458, 44 S. E. 705; *Buskirk v. Peck*, 57 W. Va. 380, 50 S. E. 432. See also cases cited *supra*, § 146 *et seq.*

⁵ See *supra*, § 146 *et seq.*

⁶ In *Barber v. Andrews*, R. I., 69 Atl. 1, there was an agreement to sell twenty tons of hay in the seller's barn, and the price was paid. There was a large quantity of hay in the barn and it was agreed that the buyer might leave the twenty tons which he had bought with the rest; but it was further agreed that 500 cubic feet should be conclusively estimated as a ton, and that the 10,000 cubic feet belonging to the buyer should be ascertained by measuring from the east end of the mow, taking the entire width of the barn. It was held that the property had passed, and an officer who seized the hay as the property of the seller was held liable for conversion. See also *supra*, § 158.

⁷ This follows section 17 of the English act, except for the substitution of the phrase "contract to sell" in the first subsection for the words "contract for the sale of" in the English act.

§ 260. **Importance of intention in early law.**—As early law concerns itself almost wholly with forms, it is obvious that the statement of the modern rule given in the previous section cannot be consistent with the theories of our early law, and historical investigation has shown this to be the fact. It may be assumed safely that when the law was first much developed in England, the rule of the Roman Law requiring delivery in order to effect a transfer of the property was accepted.⁸ But it was not long before payment of the price was also regarded as sufficient to effect the transfer of the property. Professor Ames has traced this development.⁹ “Detinue would also lie against a seller upon a bargain and sale. Here it was the payment of the purchase money that as a rule constituted the *quid pro quo* for the seller’s duty to suffer the buyer to take possession of the chattel sold. If the bargain was for the reciprocal exchange of chattels, the delivery of the chattel by the one party would be as effective a *quid pro quo* as payment of purchase money to support an action of detinue against the other party. It was hardly an extension of principle to treat the delivery of the buyer’s sealed obligation for the amount of the purchase money as equivalent to actual payment of money, or delivery of a chattel, and accordingly we find in Y. B. 21 Edward III, 12–2, the following statement by Thorpe (Chief Justice of the Common Bench in 30 Edward III): ‘If I make you an obligation for £10 for certain merchandise bought of you, and you will not deliver the merchandise, I cannot justify the detainer of the money; but you shall recover by a writ of debt against me, and I shall be put to my action against you for the thing bought by a writ of detinue of chattels.’ But it was a radical departure from established traditions to permit a buyer to sue in detinue when there was merely a parol bargain of sale without the delivery of a physical *res* of any sort to the seller. But this striking change had been accomplished by the time of Henry VI. The new doctrine may be even older, but there seems to be no earlier expression of it in the books than the following statement by Fortescue, C. J.: ‘If I

⁸ See an article by Prof. Richard Brown, 15 Juridical Review, 391, 395. This rule has persisted in regard to gifts, for the validity of

which delivery is still essential. *Cochrane v. Moore*, 25 Q. B. D. 57.

⁹ 8 Harv. L. Rev. 252, 258.

buy a horse of you, the property is straightway in me, and for this you shall have a writ of debt for the money, and I shall have detinue for the horse on this bargain.’¹⁰ From the mutuality of the obligations growing out of the parol bargain without more, one might be tempted to believe that the English law had developed the consensual contract more than a century before the earliest reported cases of *assumpsit* upon mutual promises.¹¹ But this would be a misconception. The right of the buyer to maintain detinue, and the corresponding right of the seller to sue in debt were not conceived of by the medieval lawyers as arising from mutual promises, but as resulting from reciprocal grants,—each party’s grant of a right forming the *quid pro quo* for the corresponding duty of the other.” The law of so remote a period, however, need not affect a discussion of existing law. It is clear that before the seventeenth century it was possible for the seller to transfer the property not only without delivery, but without payment of the price or earnest money. This could probably only be done, however, if credit was expressly given by the seller.¹²

§ 261. **Intention is now the governing principle.**—As late as the beginning of the nineteenth century it seems to have been supposed that mere assent of the parties to a contract to buy and sell goods was insufficient to transfer the property, unless a term of credit was expressly agreed upon.¹³ But now the rule has become clearly recognized that in the case of an agreement for consideration, whether the consideration consists in some actual performance as payment of the price, or in a promise, express or implied, the trans-

¹⁰ Y. B., 20 Hen. VI, 35-4; Y. B., 21 Hen. VI, 55-12. See, to the same effect, 37 Hen. VI, 8-18, per Prisot, C. J.; Y. B., 49 Hen. VI, 18-23, per Choke, J., and Brian, J.; Y. B., 17 Ed. IV, 1-2. See also Blackburn, Contract of Sale, 190-196.

¹¹ Pecke v. Redman, [1555] Dy. 113, appears to be the earliest case of mutual promises.

¹² See Noy’s Maxims, [1641] c. XLII. See further, *infra*, § 341.

¹³ In the leading cases of *Hanson v.*

Meyer, 6 East, 614, [1805] Lord Ellenborough said of the bargain before the court, that there were “two things in the nature of condition or preliminary acts” which “necessarily preceded the absolute vesting” of title. “The first of them is one which does so according to the general received rule of law in contracts of sale, viz., the payment of the agreed price or consideration for the sale.” See also *Welsh v. Bell*, 32 Pa. St. 12.

fer of the property depends upon the intention of the parties, however indicated.¹⁴

§ 262. **The question of intention is one of fact.**—The question is essentially one of fact; and though if the whole contract of the parties is reduced to writing this question is determined by the court,¹⁵ as also if the facts are so clear as to justify but one conclusion,¹⁶ yet the question is always one of fact, subject only to the rules of presumption for the ascertainment of intention given in the following section. In a doubtful case the question is appropriate for the jury, evidence being admitted which is calculated to show the intention of both parties as indicated to each other.¹⁷ Not too great stress must be laid upon the use of the word-

¹⁴ *Shepherd v. Harrison*, L. R. 5 H. L. 116, 127; *Seath v. Moore*, 11 A. C. 350, 370, 380; *McEntire v. Crossley*, [1895] A. C. 457, 463; *O'Neal v. Richardson*, 78 Ark. 132, 92 S. W. 1117; *Flanders v. Maynard*, 58 Ga. 56; *Callaghan v. Myers*, 89 Ill. 566; *Gibson v. Chicago Packing Co.*, 108 Ill. App. 100; *Hamilton v. Schlitz Brewing Co.*, 129 Iowa, 172, 105 N. W. 438; *Kneeland v. Renner*, 2 Kans. App. 451, 43 Pac. 95; *O'Farrell v. McClure*, 5 Kans. App. 880, 47 Pac. 160; *Cox v. Jackson*, 6 Allen, 108; *Towne v. Davis*, 66 N. H. 396, 22 Atl. 450; *Burt v. Dutcher*, 34 N. Y. 493; *St. Anthony Elevator Co. v. Cass County*, 14 N. Dak. 601, 106 N. W. 41; *Rea v. Schow* (Tex. Civ. App.), 93 S. W. 706; *Morgan v. King*, 28 W. Va. 1; *Buskirk v. Peck*, 57 W. Va. 360, 50 S. E. 432; *Hoeffler v. Carew* (Wis.), 116 N. W. 241.

¹⁵ *Leonard v. Davis*, 1 Black (U. S.), 476, 17 L. ed. 222; *First Nat. Bank v. Reno*, 73 Iowa, 145, 34 N. W. 796; *Rail v. Little Falls Lumber Co.*, 47 Minn. 422, 50 N. W. 471; *Ruthrauff v. Hagenbuch*, 58 Pa. St. 103. Compare *Massey v. Dixon*, 81 Ark. 337, 99 S. W. 383.

¹⁶ *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291; *Wigton v. Bowley*, 130

Mass. 252; *Smalley v. Hendrickson*, 29 N. J. L. 371; *Kerr v. Henderson*, 62 N. J. L. 724, 42 Atl. 1073; *Buskirk v. Peck*, 57 W. Va. 360, 50 S. E. 432.

¹⁷ See *Young v. Matthews*, L. R. 2 C. P. 127; *Ogg v. Shuter*, L. R. 10 C. P. 159, 162; *Flanders v. Maynard*, 58 Ga. 56; *Graff v. Fitch*, 58 Ill. 373, 11 Am. Rep. 85; *Bogy v. Rhodes*, 4 Greene (Iowa), 133; *Hamilton v. Schlitz Brewing Co.*, 129 Iowa, 172, 105 N. W. 438; *Kneeland v. Renner*, 2 Kans. App. 451, 43 Pac. 95; *Riddle v. Varnum*, 20 Pick. 280; *Lingham v. Eggleston*, 27 Mich. 324; *Byles v. Colier*, 54 Mich. 1, 19 N. W. 565; *Wheelock v. Starkweather*, 146 Mich. 53, 108 N. W. 1085; *Cunningham v. Ashbrook*, 20 Mo. 553; *Towne v. Davis*, 66 N. H. 396, 22 Atl. 450; *Bates v. Conkling*, 10 Wend. 389; *Olyphant v. Baker*, 5 Denio, 379; *St. Anthony Elevator Co. v. Cass County*, 14 N. Dak. 601, 106 N. W. 41. In *Foster v. Ropes*, 111 Mass. 10, the court said: "The intention of the parties as to the time when the title is to pass can be ascertained only from the terms of the agreement, as expressed in the language and conduct of the parties, and as applied to known usage and the subject-matter. It must be manifested at the time

“sell” or “buy” by the parties. These words are constantly used as meaning or including contract to sell or contract to buy.¹⁸

§ 263. Rules for ascertaining the intention of the parties—Provisions of the Sales Act.—

Sec. 19. RULES FOR ASCERTAINING INTENTION.—Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

Rule 1.—Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

Rule 2.—Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.

Rule 3.—(1.) When goods are delivered to the buyer “on sale or return,” or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.

(2.) When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer—

the bargain is made. The rights of the parties under the contract cannot be affected by their undisclosed purposes, or by their understanding of its legal effect.”

¹⁸ *Frazier v. Simmons*, 139 Mass. 531, 2 N. E. 112. In this case though the words “we have purchased” were used, other terms “payable and deliverable, buyer’s option, 60 days” were held to show that a present transfer of title was not intended. So in *Mebius & Drescher Co. v. Mills*, 150 Cal. 229, 88 Pac. 917, though the

memorandum stated the plaintiff “had bought,” the bargain was held executory, because of other circumstances. So in *Martin v. Hurlbut*, 9 Minn. 142, though the memorandum recited that the seller “sold” to the buyer certain logs, the fact that all the logs had not been cut at the time when the contract was made showed that the bargain was executory. See also *Re Schujahn*, 120 Fed. Rep. 938, 57 C. C. A. 228; *M’Donald v. Hewett*, 15 Johns. 349, 8 Am. Dec. 241; *Decker v. Furniss*, 14 N. Y. 611.

(a.) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction,

(b.) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 4.—(1.) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

(2.) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section 20. This presumption is applicable, although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words *Collect on Delivery* or their equivalents.

Rule 5.—If a contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.

These rules are borrowed mainly from section 18 of the English act, but some changes have been made both in the way of omissions and additions. These will most conveniently be referred to as the several rules are separately considered.

§ 264. **Rule 1.—**Property is presumed to pass on making of the contract.—What was said in regard to the early law¹⁹ indicates that this presumption is directly contrary to the old law. Indeed,

¹⁹ *Supra*, § 260. See also *infra*, § 341.

Blackburn states²⁰ that the difference between the old law and the modern law is simply this; that in the earlier books it is assumed that all agreements are intended to be cash sales; that is, that the property is not expected to pass until payment is made. Undoubtedly this distinction exists, but probably the difference is deeper, as it may be doubted whether evidence of intention to transfer the property would have been admitted unless credit was expressly given, or some payment made. However this may be, the law is now well settled in accordance with the rule of the Sales Act, that the property is presumed to pass when the contract is made if the goods are identified, and nothing remains to be done other than delivery of the goods and payment of the price.²¹ A word of warning is necessary, however, in regard to cash sales, where the property does not pass until payment of the price unless the condition is waived.²²

²⁰ Contract of Sale (2d ed.), 171.

²¹ This seems to have been first clearly stated in *Tarling v. Baxter*, 6 B. & C. 360. In that case Holroyd, J., said: "Now, in the case of a sale of goods, if nothing remains to be done on the part of the seller, as between him and the buyer before the thing purchased is to be delivered, the property in the goods immediately passes to the buyer, and that in the price to the seller; but if any act remains to be done on the part of the seller, then the property does not pass until that act has been done." To similar effect, see *Dixon v. Yates*, 5 B. & Ad. 313, 340; *Martindale v. Smith*, 1 Q. B. 389, 395; *Gilmour v. Supple*, 11 Moo. P. C. 551, 566; *Joyce v. Swann*, 17 C. B. (N. S.) 84, 102; *Sweeting v. Turner*, L. R. 7 Q. B. 310, 313; *Bill v. Fuller*, 146 Cal. 50, 79 Pac. 592; *Crug v. Gorham*, 74 Conn. 541, 51 Atl. 519; *England v. Forbes*, 7 Houst. 301, 31 Atl. 895; *Warner v. Warner*, 28 Ind. App. 578, 66 N. E. 760; *Willis v. Willis' Adm.*, 6 Dana, 48; *Wing v. Clark*, 24 Me. 366; *Gardner v. Howland*, 2 Pick. 599; *Shumway v. Rutter*, 8 Pick. 443, 19 Am. Dec. 340; *Parsons*

v. Dickinson, 11 Pick. 352; *Kessler v. Veio*, 142 Mich. 471, 106 N. W. 73; *Day v. Gravel*, 72 Minn. 159, 162, 75 N. W. 1; *Allen v. Rushfort*, 72 Neb. 907, 101 N. W. 1028; *Baker v. McDonald*, 74 Neb. 595, 104 N. W. 923, 1 L. R. A. (N. S.) 474; *State v. Fuller*, 5 Ired. 26; *McArthur v. Mathis*, 133 N. C. 142, 45 S. E. 530; *Richardson v. Insurance Co.*, 136 N. C. 314, 48 S. E. 733 (compare *Hughes v. Knott*, 138 N. C. 105, 50 S. E. 586); *Hooban v. Bidwell*, 16 Ohio St. 509, 47 Am. Dec. 386; *Commonwealth v. Hess*, 148 Pa. St. 98, 23 Atl. 977, 17 L. R. A. 176, 33 Am. St. Rep. 810; *Cleveland v. Williams*, 29 Tex. 204, 94 Am. Dec. 274; *Fromme v. O'Donnell*, 124 Wis. 529, 532, 102 N. W. 18. A careless remark inconsistent with this principle is still sometimes found. In *Barber v. Andrews*, R. I., 69 Atl. 1, the court said: "When the vendor retains possession it is *prima facie* proof that the transaction is an executory sale." This remark was *obiter*, however, as the court held that the property passed.

²² As to such sales, see § 340 and following.

§ 265. **Rule 2.—Something to be done by the seller to put the goods into a deliverable state.**—The basis of the presumption stated in this rule, the substance of which was taken by the draughtsman of the English Sale of Goods Act from Blackburn's classic treatise,²³ is the natural inference that the parties do not intend an immediate transfer of title if the seller has yet to expend labor upon the goods before they are in the state contemplated by the bargain. The presumption is based on reason and it is well settled both in England and this country.²⁴ The rule, however, is but one of presumption and if the parties intend that the property shall pass and clearly manifest that intention, their in-

²³ 2d ed. 175.

²⁴ The earliest decision on the point is *Rugg v. Minett*, 11 East, 210. Twenty-seven lots of turpentine in casks were sold at auction. The casks, in twenty-five lots, were, by the terms of the sale, to be filled from the remaining two lots, which were then to be paid for according to the quantity left in them. The plaintiff bought the last two lots and twenty-two others. The casks in the three lots which had been bought by other persons had been filled and removed. Most of the casks bought by the plaintiff had also been filled, but not all. The plaintiff sued to recover money paid on account of his purchases. For the casks which had been filled no recovery was allowed as title was held to pass as soon as the goods were put in a deliverable condition. But the plaintiff was held entitled to recover the price paid for the lots of which the casks had not been filled as well as for the last two lots from which those casks should have been filled. The same principle is illustrated by many American cases. *Elgee Cotton Cases*, 22 Wall. 180, 22 L. ed. 863 (cotton to be baled); *Deutsch v. Dunham*, 72 Ark. 141, 78 S. W. 767, 105 Am. St. Rep. 21 (timber to

be sawed and piled); *Screws v. Roach*, 22 Ala. 675 (cotton to be gathered and ginned); *Frost v. Woodruff*, 54 Ill. 155 (wood to be chopped and measured); *Orient Ins. Co. v. McKnight*, 96 Ill. App. 525; *affd.*, 197 Ill. 190, 64 N. E. 339 (corn to be shelled and hauled); *Strauss v. Ross*, 25 Ind. 300 (wool to be bagged, taken to town, and weighed); *Lester v. East*, 49 Ind. 588 (hogs to be fattened, weighed, and delivered); *Caywood v. Timmons*, 31 Kans. 394, 2 Pac. 566 (wheat to be threshed, weighed, and delivered); *Jennings v. Flanagan*, 5 Dana, 217, 30 Am. Dec. 683 (tobacco to be prepared); *Herrman v. Whitescarver's Adm.*, 89 Ky. 633, 13 S. W. 103 (logs to be cut and rafted); *Foster v. Ropes*, 111 Mass. 10 (fish to be dried); *Wesoloski v. Wysoski*, 186 Mass. 495, 71 N. E. 982 (onions to be screened); *Martin v. Hurlbut*, 19 Minn. 142 (timber to be cut and measured); *Malone v. Minnesota Stone Co.*, 36 Minn. 325, 31 N. W. 170 (stone to be kept until demanded and storage to be paid in the meantime by the seller); *Restad v. Engemoen*, 65 Minn. 148, 67 N. W. 1146 (cattle to be fattened); *Day v. Gravel*, 72 Minn. 159, 75 N. W. 1 (logs to be driven, landed, and scaled); *Smith v. Sparkman*, 55

tention will be effectual.²⁵ Various circumstances may have weight as indicating an intention to transfer the property immediately though something remains to be done. Delivery of the goods to the buyer would almost certainly indicate such an intention, if it were not expressly stated that the property was retained.²⁶ Payment of the whole price or of a considerable part of it

Miss. 649, 30 Am. Rep. 537 (cotton to be ginned and baled); *Groff v. Belche*, 62 Mo. 400 (oats to be threshed); *Halterline v. Rice*, 62 Barb. 593 (an unfinished cutter to be completed and delivered); *Allman v. Davis*, 2 Ired. L. 12 (a wagon to be altered); *Backhaus v. Buells*, 43 Or. 558, 73 Pac. 342 (hops to be prepared and packed); *Kitson Machine Co. v. Holden*, 74 Vt. 104, 52 Atl. 271 (machines to be set up and put in running order).

²⁵ Thus in *Young v. Matthews*, L. R. 2 C. P. 127, where title was held to pass of certain clumps of unfinished bricks, although the seller was still to furnish them, in this case it is to be noticed that the object of the buyer, as the seller knew, was to obtain an immediate security, and with this in mind the buyer's agent said: "Are all these appropriated to my principal?" and the seller replied, "Yes." So in *Paine v. Young*, 56 Md. 314, and *Butterworth v. McKinly*, 11 Humph. 206, title was held to pass, though the seller was still to put the goods into condition for delivery. And in *Martz v. Putnam*, 117 Ind. 392, 20 N. E. 270, though the seller was to load the goods on the cars. In *Paine v. Young*, the intention to transfer title immediately was indicated by a bill of sale; in the other two cases by payment of the price or a large part of it by the buyer. See also *Augustine v. McDowell*, 120 Iowa, 401, 94 N. W. 918; *Barber v. Thomas*, 66 Kans. 463, 71 Pac. 845; *Glass v. Blazer*, 91 Mo. App. 564; *Andrews v.*

Grimes, N. C. , 62 S. E. 519; *Barker v. Freeland*, 91 Tenn. 112, 18 S. W. 60.

²⁶ Indeed the presumption is not strictly applicable if there is delivery, for by the words of the presumption it exists only where something is to be done to put the goods in a deliverable state. Liability of the seller to pay storage on the goods after delivery was held not to prevent the property from passing. In *Hammond v. Anderson*, 1 B. & P. N. R. 69, and *Greaves v. Hepke*, 2 B. & Ald. 131. So in *Bank of Huntington v. Napier*, 41 W. Va. 481, 23 S. E. 800, title to logs was held to pass when measured, branded, and delivered at a place designated by the contract, though the seller had agreed further to transport the logs for the purchaser to another place. See also *Trigg Co. v. Bucyrus Co.*, 104 Va. 79, 51 S. E. 174. Benjamin adds, the illustration of other familiar cases, as "If a seller should engage to keep in good order for a certain time after the sale a watch or clock sold, or to do certain repairs to a ship after the sale and delivery." (5th Eng. ed.) 323. But in *Kitson Machine Co. v. Holden*, 74 Vt. 104, 52 Atl. 271, the fact that the seller was to set up and put in running order the machines which were the subject of the sale was held by the court sufficient reason for holding title did not pass on delivery. It is to be noticed here that though delivery had been made, the goods could not be used by the buyer until the seller had fulfilled his contract.

would also seem some evidence of an intention to make an immediate transfer since it is not very common for buyers to pay in advance.²⁷ But this reasoning is inapplicable if the payment is small, and apparently intended merely to bind the bargain.²⁸ The question, however, is purely one of fact in each case.²⁹ The presumption is not applicable where something remains to be done by the buyer.³⁰ When the seller has completed any act remaining to be done by him, the property will thereupon pass without further expression of assent by the parties.³¹ This seems to accord with rule 4, which provides for the transfer of the property in unspecified goods by subsequent appropriation. As will be seen,³² appropriation by the seller in accordance with prior authority immediately transfers the property without notice, and without further expression of assent; so here, as by the terms of the bargain, the seller is to do something further to the goods, and as the property would presumably pass at once were it not for this circumstance, the buyer must be assumed to assent not only to the goods being prepared as the bargain provides, but also that the property shall pass when they are so prepared. Nevertheless the English act has altered the rule previously prevailing in England by adding at the end of section 18, rule 2, the words "and the buyer has notice thereof." This change in the English law was made in compliance with a suggestion from Scotland

²⁷ *Martz v. Putnam*, 117 Ind. 392, 20 N. E. 270; *Butterworth v. McKinly*, 11 Humph. 206.

²⁸ See the *Elgee Cotton Cases*, 22 Wall. 180, 22 L. ed. 863; *Straus v. Ross*, 25 Ind. 300; *Jennings v. Flanagan*, 5 Dana, 217, 30 Am. Dec. 683; *Nesbit v. Burry*, 25 Pa. St. 208.

²⁹ See *supra*, § 262.

³⁰ Compare *Wheeler v. Walton & Whann Co.*, 64 Fed. Rep. 664. This case presented a question upon a contract for the purchase of "the sulphur contents" of a quantity of ore, the remaining product of burning the ore to remain the property of the seller and to be removed by him. It was held that ore delivered to the buyer in its natural state did not

become his property before burning. It is to be noticed in this case that not simply something remained to be done to put the goods, which were the subject of sale, in a deliverable condition, but property of the seller was to be separated from the property of the buyer. For this reason title could not be held to pass to the whole mass unless such intention were plainly indicated.

³¹ *Rugg v. Minett*, 11 East. 210; *Martz v. Putnam*, 117 Ind. 392, 20 N. E. 270; *Groff v. Belche*, 62 Mo. 400; *Thompson v. Conover*, 32 N. J. L. 466; *Bond v. Greenwald*, 4 Heisk. 453.

³² See *infra*, § 274.

“that it was unfair that the risk should be transferred to the buyer without notice.”³³ It is to be observed that under rule 5 of the same section, relating to subsequent appropriation, risk may pass to the buyer without notice. There seemed no sufficient reason for changing the existing law, and in the American Sales Act the final words of the English rule under consideration, requiring notice to the buyer, have been omitted.

§ 266. **Unascertained price — Provision of English Sale of Goods Act.**— In the English Sale of Goods Act, after the rule just considered, is the following rule: “Rule 3. Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.”³⁴ The final clause of this rule requiring notice to the buyer was an innovation made by the statute. The rest of the rule, however, states a principle, which, either in the form stated in the rule, or in some analogous form, has been regarded in England as a settled principle of the law of sales for a century. As will appear from the following discussion, however, the rule was originally founded on a mistake, has no principle behind it, and has already been abolished in some States in this country without the aid of legislation. The English rule, therefore, was not adopted in the American act.

§ 267. **Unascertained price — Origin of the rule.**— Lord Ellenborough was the first judge who seems to have definitely stated the doctrine in the English law, that if something remained to be done in the way of weighing or measuring to determine the total price of goods, the property would not pass even though the goods were specified and the rate at which they were to be paid for fixed by the bargain.³⁵ There can be little doubt that Lord

³³ Chalmers, *Sale of Goods Act* (5th ed.), p. 46.

³⁴ Chalmers, *Sale of Goods Act*, p. 44.

³⁵ *Hanson v. Meyer*, [1805] 6 East, 614. This was an action of trover, to recover the value of starch, brought by the assignees in bankruptcy of the buyer against the seller.

It appeared that there was an agreement to sell a specified lot of starch at £6 per cwt. The quantity had not been ascertained. Portions of the starch were weighed and delivered, from time to time, the rest had not been weighed at the time of the bankruptcy of the buyer, and was thereupon removed by the seller. The

Ellenborough was led to the opinion which he expressed by the analogy of the rule of the civil law requiring the price to be fixed. Pothier's work on the Contract of Sale was well known in England at the time and the authority of that great writer fully recognized. But as has already been observed, the reasons which required the price to be fixed in the Roman Law have no application in the common law.³⁶ The question in the Roman Law and the question with which Pothier³⁷ was concerned was whether a certain bargain is properly called a sale. This is of no consequence in American or English law. The essential question is whether the property passed, and there is no different rule as to when property passes in the case of a bargain technically called a sale, and in the case of any other contract made for value. Aside from the rule of the civil law, there is no reason to suppose merely because goods have not been weighed or measured, if they have been specified and the terms of the bargain exactly fixed, that the parties do not intend to transfer the property in the goods. Still less is there reason to suppose that if the parties intend to transfer the property that they cannot do so. The criticism in this section was originally made by Blackburn in his well-known treatise.³⁸

Kings Bench held that the property in the starch which had not been weighed had not passed. It will be noticed that the actual decision of the case is clearly right on the ground that even though the property had passed, the seller's lien would enable him to retain the undelivered starch which was still stored in the seller's name at the time of the bankruptcy. The court noticed this point but preferred to rest its decision on the ground that the property had not passed.

³⁶ See *supra*, § 170.

³⁷ Contract of Sale, § 309.

³⁸ The first edition was published in 1845. Blackburn says of the rule in question (2d ed.), p. 175: "The second rule seems to be somewhat hastily adopted from the civil law, without

adverting to the great distinction made by the civilians between a sale for a certain price in money, and an exchange for anything else. The English law makes no such distinction, but, as it seems, has adopted the rule of civil law, which seems to have no foundation except in that distinction. (See *post*, p. 242, for further remarks on this point, and p. 252.) In general, the weighing, etc., must, from the nature of things be intended to be done before the buyer takes possession of the goods, but that is quite a different thing from intending it to be done before the vesting of the property; and as it must in general be intended that both the parties shall concur in the act of weighing, when the price is to depend upon the weight, there seems

§ 268. **Unascertained price to be fixed by the buyer — English law.** — As the rule was originally stated by Lord Ellenborough, it seems to have been regarded not as a rule of presumption for discovering the intention of the parties, but as an absolute rule of logic or law, making transfer of the property impossible until the price was fixed. In this form, however, the rule has not persisted. Following *Hanson v. Meyer*^{38a} came several decisions in which the property was held not to pass because the price was not exactly fixed, because the goods had not been weighed or measured,³⁹ but at least it was not denied that the property might have passed had the parties so intended. In all of these cases the seller was to do the necessary weighing or measuring, or at least to take part in it. But in *Turley v. Bates*,⁴⁰ by the terms of the bargain the buyer was to take the clay, which formed the subject-matter of the sale, and have it weighed. The court decided the case on the ground that in any event intention to transfer the property, if sufficiently clear, would be sufficient to effect a transfer, and intimated also that the rule of *Hanson v. Meyer* was not applicable where the remaining thing to be done was to be done by the buyer. The case was soon followed,⁴¹ and the Sale of Goods Act has fixed in the English law both the doctrine that if something is to be done by the seller to determine the price, the presumption is that the property will not pass, and also, in view of the general presumption in rule 1, that if nothing remains to be done except weighing or measuring to fix the price, and that is to be done by the buyer, the presumption is that the parties intend an immediate transfer of the property.

little reason why, in cases in which the specific goods are agreed upon, it should be supposed to be the intention of the parties to render the delay of that act, in which the buyer is to concur, beneficial to him. Whilst the price remains unascertained, the sale is clearly not for a certain sum of money, and, therefore, does not come within the civilian's definition of a perfect sale, transferring the risk and gain of the thing sold; but the English law does not require that

the consideration for a bargain and sale should be in moneys numbered, provided it be of value."

^{38a} 6 East, 614.

³⁹ *Zagury v. Furnell*, 2 Campb. 240; *Simmons v. Swift*, 5 B. & C. 857; *Logan v. Le Mesurier*, 6 Moo. P. C. 116; *Acraman v. Morrice*, 8 C. B. 449.

⁴⁰ 2 H. & C. 200.

⁴¹ *Kershaw v. Ogden*, 3 H. & C. 717. See also *Gilmour v. Supple*, 11 Moo. P. C. 551.

§ 269. **Unascertained price in America.**—The rule of *Hanson v. Meyer* has been generally adopted in this country,⁴² and as no especial stress had been laid in the early English cases, upon the fact that the weighing or measuring was to be done by the seller, it was natural that some States should have applied the rule without regard to the question whether the weighing or measuring was to be done by the buyer or the seller.⁴³ In

⁴² *Elgee Cotton Cases*, 22 Wall. 180, 22 L. ed. 863; *Hays v. Pittsburgh Co.*, 33 Fed. Rep. 552; *Mobile Savings Bank v. Fry*, 69 Ala. 348; *Jones v. Pearce*, 25 Ark. 545; *Frost v. Woodruff*, 54 Ill. 155; *Home Ins. Co. v. Heck*, 65 Ill. 111; *Lester v. East*, 49 Ind. 588; *Commercial Bank v. Gillette*, 90 Ind. 268, 46 Am. Rep. 222; *McClung v. Kelley*, 21 Iowa, 508; *Jennings v. Flanagan*, 5 Dana, 217, 30 Am. Dec. 683; *Gibson v. Ray*, 28 Ky. L. Rep. 444, 89 S. W. 474; *Tingle v. Kelly*, 29 Ky. L. Rep. 24, 92 S. W. 303; *Abat v. Atkinson*, 21 La. Ann. 414 (civil law); *Riddle v. Varnum*, 20 Pick. 280; *Sherman v. Mudge*, 127 Mass. 547; *Wesoloski v. Wysoski*, 186 Mass. 495, 71 N. E. 982; *Lingham v. Eggleston*, 27 Mich. 324; *Byles v. Colier*, 54 Mich. 1, 19 N. W. 565; *Tyler Lumber Co. v. Charlton*, 128 Mich. 299, 87 N. W. 268, 55 L. R. A. 301; *Grand Rapids Lumber Co. v. Inland*, 136 Mich. 121, 98 N. W. 980; *Restad v. Engemoen*, 65 Minn. 148, 67 N. W. 1146; *Gilman v. Hill*, 36 N. H. 311; *Smart v. Batchelder*, 57 N. H. 140; *Devane v. Fennell*, 2 Ired. 36; *Rosenthal v. Kahn*, 19 Or. 571, 24 Pac. 989; *Hamilton v. Gordon*, 22 Or. 577, 30 Pac. 495; *Nicholson v. Taylor*, 31 Pa. St. 128, 72 Am. Dec. 728; *Miller v. Seaman*, 176 Pa. St. 291, 35 Atl. 134; *Smith v. Evans*, 36 S. C. 69, 15 S. E. 344; *Gibbs v. Benjamin*, 45 Vt. 124; *Pacific, etc., Co. v. Bravinder*, 14 Wash. 315, 44 Pac. 544; *Bank of Huntington v. Napier*, 41 W. Va. 481, 23 S. E. 800;

Pike v. Vaughn, 39 Wis. 499; *Galloway v. Week*, 54 Wis. 604, 12 N. W. 10; *Robertson v. Strickland*, 28 U. C. Q. B. 221; *O'Neil v. McIlmoyle*, 34 U. C. Q. B. 236; *Wilson v. Shaver*, 1 Ont. L. Rep. 107. These decisions recognize that the rule is one of presumption, but in some cases insufficient effect seems to be given to circumstances indicating an intention to transfer the property immediately. Thus in the leading case of *Lingham v. Eggleston*, 27 Mich. 324, Cooley, J., in his opinion states the rule as one of presumption, and notices justly that if there is delivery it is strong if not conclusive evidence of intention that the property shall vest in the buyer, but he fails to consider the effect of payment of the price or part of it as indicating a similar intention. Though about a quarter of the price had, in fact, been paid in that case, the court held that the trial judge should have given an absolute direction to the jury to find that the property was still in the seller.

⁴³ In the following cases the presumption was applied although the weighing or measuring was to be done by the buyer: *McFadden v. Henderson*, 128 Ala. 221, 29 So. 640; *Ballantyne v. Appleton*, 82 Me. 570, 20 Atl. 235; *Pinkham v. Appleton*, 82 Me. 574, 20 Atl. 237; *Ward v. Shaw*, 7 Wend. 404; *Andrew v. Dieterich*, 14 Wend. 31. See also *Hoffman v. Culver*, 7 Ill. App. 450; *Pittsburgh, etc., R. R. Co. v. Noel*, 77 Ind. 110.

other States, however, the modern English modification of the rule has been adopted and the general presumption that the property passes when all terms of the bargain are fixed is applicable although the buyer is subsequently to weigh or measure the goods in order to complete the calculation of the price.⁴⁴ In a few States the presumption of retention of the property because weighing or measuring remains to be done seems practically done away with.⁴⁵ Where the rule exists that the property presumably does not pass if something remains to be done to ascertain the price, the rule is everywhere merely one of presumption which will yield to evidence showing an intent to transfer the property immediately.⁴⁶ The most noticeable circumstance tending to show an intent to transfer the ownership is delivery of the goods to the buyer. It has already been observed⁴⁷ that even though something remains to be done to put

⁴⁴ *Graff v. Fitch*, 58 Ill. 373, 11 Am. Rep. 85; *Hagins v. Combs*, 102 Ky. 165, 43 S. W. 222; *Burke v. Shannon*, 19 Ky. L. Rep. 1170, 43 S. W. 223; *Gibson v. Ray*, 28 Ky. L. Rep. 813, 29 Ky. L. Rep. 813; *Day v. Gravel*, 72 Minn. 159, 162, 75 N. W. 1.

⁴⁵ *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, 218, 18 Pac. 248, 9 Am. St. Rep. 199; *Lassing v. James*, 107 Cal. 348, 40 Pac. 534; *Farmers' Phosphate Co. v. Gill*, 69 Md. 537, 16 Atl. 214, 1 L. R. A. 767, 9 Am. St. Rep. 443; *Crofoot v. Bennett*, 2 N. Y. 258; *Groat v. Gile*, 51 N. Y. 431; *Sanger v. Waterbury*, 116 N. Y. 371, 22 N. E. 404; *Bayne v. Hard*, 77 N. Y. App. Div. 251; *affd.*, without opinion, 174 N. Y. 534, 66 N. E. 1104; *Cleveland v. Williams*, 29 Tex. 204, 94 Am. Dec. 274; *Boaz v. Schneider*, 69 Tex. 128, 6 S. W. 402; *Williams v. Blum Land Co.* (Tex. Civ. App.), 55 S. W. 374. Many of these cases suggest that the rule deferring the time of the transfer of title until goods are weighed or measured is applicable only to

contracts to sell goods which only become specific when weighed or measured. But in fact the requirement that the goods must be specified is a wholly different rule. *Hanson v. Meyer*, 6 East, 614, was itself a case where the goods were specified yet title was held not to have passed.

⁴⁶ See cases in this section *passim*. Also see *Thomas v. Thomas*, 46 Ala. 533, 41 So. 141; *Flask v. Tindall*, 39 Ark. 571; *Gans v. Holland*, 37 Ark. 483; *St. Louis, etc., R. Co. v. Wynne Cooperage Co.*, 81 Ark. 373, 99 S. W. 375; *Massey v. Dixon*, 81 Ark. 337, 99 S. W. 383; *Jenkinson v. Monroe*, 61 Mich. 454, 28 N. W. 663; *Edward Hines Lumber Co. v. Wells Township*, 142 Mich. 366, 105 N. W. 872; *Wheelock v. Starkweather*, 146 Mich. 53, 108 N. W. 1085; *Wadhams v. Balfour*, 32 Or. 313, 51 Pac. 642; *Buskirk v. Peck*, 57 W. Va. 360, 50 S. E. 432; *Fromme v. O'Donnell*, 124 Wis. 529, 102 N. W. 18.

⁴⁷ See *supra*, § 265.

the goods in a deliverable condition, actual delivery of the goods would indicate, in the absence of express retention of ownership, an intent to transfer it immediately. This is still more clearly true where nothing remains to be done but weighing or measuring to fix the price.⁴⁸ It will be noticed that where delivery is made to the buyer if anything remains to be done to fix the price, it will generally be the buyer who is to do it, so that under the modern English rule the presumption of retention of ownership would be inapplicable. But whether there be a presumption in such a case or not, delivery is strong evidence of intention to transfer the property unless by the terms of the bargain it is expressly retained. Further, as was observed in regard to the presumption that the property does not pass where something is to be done by the seller to put the goods in a deliverable state, so here, it may be said if the buyer pays the price or a large portion of it, it is evidence not so strong as delivery, but still entitled to great weight that immediate transfer of the property is intended.⁴⁹ The weight to be given such evidence will be diminished if the portion of the price paid is not large. It is to be observed that though payment of the price is important evidence of an intention to transfer the property immediately, nonpayment of the price is little or no evidence of an intention to retain the ownership. This is because cases where the buyer pays in advance and trusts the seller to perform his contract later are unusual, but cases

⁴⁸ *Shealy v. Edwards*, 73 Ala. 175, 49 Am. Rep. 43; *Francis Co. v. Gray*, 104 Ala. 236, 15 So. 911, 53 Am. St. Rep. 37; *Chamblee v. McKenzie*, 31 Ark. 155; *King v. Jarman*, 35 Ark. 190, 37 Am. Rep. 11; *Callaghan v. Myers*, 89 Ill. 566; *Velmeyer v. Earl*, 22 Ill. App. 522; *Ballantyne v. Appleton*, 82 Me. 570, 20 Atl. 235; *Sumner v. Hamlet*, 12 Pick. 76; *Macomber v. Parker*, 13 Pick. 175; *Colwell v. Keystone Iron Co.*, 36 Mich. 51; *Cunningham v. Ashbrook*, 20 Mo. 553; *Ober v. Carson's Exr.*, 62 Mo. 209; *Scott v. Wells*, 6 W. & S. 357; *Williams v. Adams*, 3 Sneed, 359; *Baldwin v. Doubleday*, 59 Vt. 7,

8 Atl. 576; *Haxall v. Willis*, 15 Gratt. 434; *Izett v. Stetson & Post Co.*, 22 Wash. 300, 60 Pac. 1128; *Buskirk v. Peck*, 57 W. Va. 360, 50 S. E. 432. If possession is taken by the buyer without the seller's knowledge, this of course does not strengthen the buyer's title. See *Parcher v. Holmes*, 68 N. H. 166, 44 Atl. 101.

⁴⁹ *Young v. Matthews*, L. R. 2 C. P. 127; *Shelton v. Franklin*, 68 Ill. 333; *Penley v. Bessey*, 87 Me. 530, 33 Atl. 21; *Edward Hines Lumber Co. v. Wells Township*, 142 Mich. 366, 105 N. W. 872; *Morgan v. Perkins*, 1 Jones L. 171.

where the seller transfers the property and gives the buyer credit for the price are so common that it is not a safe assumption that such a transaction was not intended. Another feature of a bargain, which may show an intention to transfer the property immediately, is an express term of the contract giving credit to the buyer. This shows that the seller does not intend to reserve either title or a lien as security until the price is paid. Therefore the buyer is entitled to demand immediate delivery and this right is inconsistent with any delay in the transfer of the property.⁵⁰ Other circumstances as various as the terms of bargains made by the parties may show an intention to transfer the property though the price is not yet ascertained.⁵¹ The cases under consideration, it must be borne constantly in mind, are cases of specific goods. Where something remains to be done in order to select or identify the goods, an entirely different question is presented.⁵² This caution is needed, for not infrequently in the cases the rule in regard to weighing and measuring is joined to or confused with the rule requiring selection or identification. An intermediate case may also be noticed. The goods may be

⁵⁰ *Allen v. Elmore*, 121 Iowa, 241, 96 N. W. 769. This was a case of an auction sale of hay in the seller's barn. It was agreed that the hay might be allowed to remain there until the barn was needed for storing the next crop. The buyer paid part of the price in cash and was to have time for the payment of the balance. The hay was destroyed accidentally by fire before removal or payment of the rest of the price. McClain, J., in his opinion evidently did not favor the rule of presumption under consideration, but added that in any event the lower court had properly found an intent by the parties to transfer title immediately.

⁵¹ Thus in *Boswell v. Green*, 1 Dutch 390, the fact that the seller gave the buyer a written order on the bailee, who had possession of the property, to deliver it, was held to show such an intent. In *Edward*

Hines Lumber Co. v. Wells Township, 142 Mich. 366, 105 N. W. 872; *Morrow v. Reed*, 30 Wis. 81; *Morrow v. Campbell*, 30 Wis. 90, and *Pike v. Vaughn*, 39 Wis. 499, the agreement contained an express provision that the property should pass to logs although they were still to be scaled by the seller. In *Rosenthal v. Kahn*, 19 Or. 571, 24 Pac. 989, the wood which was the subject of the bargain was to be measured by a third person. It was held that title did not pass until so measured, although part of the price had been previously paid. The remainder by the terms of the bargain was to be paid when wood had been measured.

⁵² See *supra*, § 146 and following; § 258; also *Home Insurance Co. v. Heck*, 65 Ill. 111; *Herman v. Whitecarver's Adm.*, 89 Ky. 633, 13 S. W. 103.

identified but, nevertheless, subject to the approval of the buyer. The fact that the buyer has a right of inspection before paying the price is no evidence of an intent not to transfer the property until the examination is had.⁵³ Where, however, inspection involves more than such examination as may be necessary to see if the goods are such as are described in the contract; for instance, where the buyer may exercise choice or judgment in taking or rejecting part or the whole, it would seem as if there were quite as much reason for presuming the transfer of the property did not take place until after inspection, as where weighing or measuring is necessary to fix the price.⁵⁴

§ 270. **Rule 3.—Sale or return, or sale on approval.**—It is evidently possible for the parties to agree that the buyer shall temporarily take the goods into his possession to see whether they are satisfactory to him, and that if they are not he may refuse to become owner. It is clear also that the same object may be obtained by an agreement that the property shall pass to the buyer on delivery, but that he may return the goods if they are unsatisfactory. The first kind of bargain is called in the Sales Act a sale “on approval,” or, “on trial,” or, “on satisfaction.” The second kind is called a bargain “on sale, or return.” It is

⁵³ *Kuppenheimer v. Wertheimer*, 107 Mich. 77, 64 N. W. 952, 61 Am. St. Rep. 317. In this case goods were shipped in accordance with the buyer's order under an agreement that the buyers were to have the privilege of examining them and if found like the samples was to pay for them. It was held that the property passed on delivery of the goods to the carrier. To the same effect is *Haxall v. Willis*, 15 Gratt. 434. Compare *Kein v. Tupper*, 52 N. Y. 550.

⁵⁴ *Gilman v. Hill*, 36 N. H. 311; *Outwater v. Dodge*, 7 Cow. 85; *Devane v. Fennell*, 2 Ired. 36; *Pike v. Vaughn*, 39 Wis. 499.

⁵⁵ Section 18, rule 4 of the English act provides “When goods are delivered to the buyer ‘on approval’

or ‘on sale or return’ or other similar terms, the property therein passes to the buyer:” and then follows the same provision as in rule 3 (2) (a and b) stated *supra*, § 263. Judge Chalmers comments as follows: “When goods are sent on trial, or on approval, or on sale or return, the clear general rule is that the property remains in the seller, till the buyer adopts the transaction, but it is quite competent to the parties to agree that the property shall pass to the buyer on delivery, but that, if he does not approve the goods, the property shall then revert in the seller. To use the language of the continental lawyers, the condition on which the goods are delivered may be either suspensive or resoluteive.” Chalmers, *Sale of Goods Act* (5th ed.) 48.

immaterial, however, what language the parties use; their intention in the matter must be sought. The English Sale of Goods Act does not distinguish between these two kinds of bargains, though the draughtsman of the act suggests the possibility of the transaction being carried out in either way.⁵⁵ In view of this possibility, it seems desirable to make express statement of the two possibilities. The English cases lean very strongly toward the view that the property does not pass until the buyer is finally bound.⁵⁶ On principle, however, there seems no reason to suppose why parties should adopt one form of transaction rather than the other; both are common. Such is the doctrine of the American cases.⁵⁷ The question is one of fact in every case

⁵⁵ *Swain v. Shepherd*, 1 M. & R. 223; *Head v. Tattersall*, L. R. 7 Ex. 7; *Elphick v. Barnes*, 5 C. P. D. 321; *Kirkham v. Attenborough*, [1897] 1 Q. B. 201. See also an article by Prof. Richard Brown on "The Contract of Sale or Return" in 17 *Juridical Review*, 221. In *Head v. Tattersall*, it seems probable that the property was intended to pass at once. These cases warrant the conclusion of the draughtsman so far as the English law is concerned, that the general rule is that property remains in the seller until the buyer adopts the transaction. It should be noticed also that this is the rule of the French law. Civil Code, Art. 1588, provides that a sale made on trial is always presumed to be made under a condition precedent. The French writers agree, however, that by express agreement the condition may be subsequent.

⁵⁷ See the following cases where the court either holds that the property would not pass until approval, or comments upon the possibility of such a bargain. *Weiner v. Gill*, [1905] 2 K. B. 172; *Re Froehlich Rubber Co.*, 139 Fed. Rep. 201; *O'Donnell v. Wing*, 121 Ga. 717, 49 S. E. 720; *Allyn v. Burns*, 37 Ind. App. 223, 76 N. E.

636; *Mowbray v. Cady*, 40 Iowa, 604; *Hunt v. Wyman*, 100 Mass. 198; *Wartman v. Breed*, 117 Mass. 18; *State v. Betz*, 207 Mo. 589, 106 S. W. 64; *Glasscock v. Hazell*, 109 N. C. 145, 13 S. E. 789; *Dando v. Foulds*, 105 Pa. St. 74; *Hall & Brown Mach. Co. v. Brown*, 82 Tex. 469, 17 S. W. 715; *James Smith Mach. Co. v. Holden*, 73 Vt. 396, 51 Atl. 2; *Fairfield v. Madison Mfg. Co.*, 38 Wis. 346. And see the English decisions cited in the preceding note. In the following cases the court either held the sale subject to a condition subsequent or commented upon the possibility of such a bargain: *Allen v. Maury*, 66 Ala. 10; *Robinson v. Fairbanks*, 81 Ala. 132, 1 So. 552; *Foley v. Felrath*, 98 Ala. 176, 13 So. 485, 39 Am. St. Rep. 39; *Wells v. Mc-Nerney*, 74 Conn. 675; *House v. Beak*, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307; *Johnson v. M'Lane*, 7 Blackf. (Ind.) 501, 43 Am. Dec. 102; *Wind v. Iler*, 93 Iowa, 316, 61 N. W. 1001, 27 L. R. A. 219; *Jameson v. Gregory's Exr.*, 4 Metc. (Ky.) 363; *Walker v. Blake*, 37 Me. 373; *Hunt v. Wyman*, 100 Mass. 198; *McKinney v. Bradlee*, 117 Mass. 321; *State v. Betz*, 207 Mo. 589, 106 S. W. 64; *Strauss Saddlery Co. v. Kingman*, 42

whether the parties intended to make approval a condition, without which the property should not pass, or whether their intent was that the property should pass at once with the right to return the goods. Sometimes it is expressly provided that the seller shall retain title.⁵⁸ Sometimes the contract may be put in the form of a bailment or lease, thus indicating clearly that the seller is to retain title until the buyer's option is exercised.⁵⁹ Frequently, however, no such definite indication is made. The use of the word "return" itself ordinarily implies a previous transfer of the property.⁶⁰ Whereas if it is agreed that goods shall be delivered on trial, or on approval, the language indicates that the buyer's approval is a condition precedent to the transfer of the property. But all the circumstances of the case must be considered.

§ 271. Rule 3 — Continued.— How title is avoided when the property has passed.— Frequently the bargain of the parties will fix the time within which the seller must return the goods.⁶¹ If the buyer fails to exercise the right thus given him, his title cannot thereafter be avoided.⁶² If the contract does not fix a time, the law in this case, as in others, adopts the rule of the time that is reasonable, under the circumstances. If the buyer retains the goods beyond such reasonable time, his title cannot thereafter be

Mo. App. 208; *People v. Cannon*, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668; *Omaha Nat. Bank v. Kraus*, 62 Neb. 77, 86 N. W. 906.

⁵⁸ *Bryce v. Ehrmann*, 42 Sc. L. Rep. 23; *Weiner v. Gill*, [1905] 2 K. B. 172; *Mowbray v. Cady*, 40 Iowa, 604; *Wright v. Barnard*, 89 Iowa, 166, 56 N. W. 424; *Crocker v. Gullifer*, 44 Me. 491, 69 Am. Dec. 118.

⁵⁹ *Goss Printing Press Co. v. Jordan*, 171 Pa. St. 474, 32 Atl. 1031; *Stiles v. Seaton*, 200 Pa. St. 114, 49 Atl. 774.

⁶⁰ See *Frye v. Burdick*, 67 Me. 408, and cases cited. So in *Foley v. Felrath*, 98 Ala. 176, 39 Am. St. Rep. 39, the contract provided that a note of the buyer for half the price might be paid by returning such of the goods as the buyer had been unable

to resell. The court said (p. 181), the case "was clearly one of a sale with right to rescind and return."

⁶¹ *Head v. Tattersall*, L. R. 7 Ex. 7; *Dewey v. Erie Borough*, 14 Pa. St. 211, 53 Am. Dec. 533; *Butler v. School District*, 149 Pa. St. 351; *Schlesinger v. Stratton*, 9 R. I. 578. See also *Columbia Rolling Mill Co. v. Beckett Foundry Co.*, 55 N. J. L. 391, 26 Atl. 888.

⁶² *Head v. Tattersall*, L. R. 7 Ex. 7, 10; *Stevens v. Hertzler*, 109 Ala. 423, 19 So. 838. See also *Prairie Farmer Co. v. Taylor*, 69 Ill. 440, 18 Am. Rep. 621; *Snody v. Shier*, 88 Mich. 304, 50 N. W. 252; *Colles v. Swensberg*, 90 Mich. 223, 51 N. W. 275; *Osborne v. Baker*, 103 Mich. 247, 61 N. W. 509.

avoided.⁶³ Of course the buyer may waive, before the period fixed by the contract or a reasonable time has expired, any right to return the goods, substituting thereby an absolute sale for one subject to a condition subsequent. And if the buyer makes performance of the condition impossible, as by reselling the goods, the same consequences follow.⁶⁴ So where the property is injured the buyer cannot perform the condition subsequent effectually.⁶⁵ This rule would seem applicable even though the injury was wholly due to accident, for in such a case the buyer is unable to fulfil the condition according to its real meaning and there is no reason why the seller, who is also free from fault, should be obliged to accept anything less than full performance of the condition.⁶⁶ When a proper tender of the goods is made the seller cannot prevent the revesting of ownership in him by refusing to

⁶³ *Buckstaff v. Russell*, 79 Fed. Rep. 611, 49 U. S. App. 253, 25 C. C. A. 129 (in this case machines were retained three and a half years); *House v. Beak*, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307 (in this case goods were sold to a retail merchant subject to a right to return such goods as he was unable to sell. Failure to return the goods for three years was held to make absolute the buyer's liability to pay the price); *Greacen v. Poehlman*, 191 N. Y. 493, 84 N. E. 390 (in this case boots were retained six months, but the defects were latent and when the buyer first complained the seller asked him to give the boots further trial. The question whether the delay was unreasonable was held properly left to the jury).

⁶⁴ *Windsor v. Cruise*, 79 Ga. 635, 7 S. E. 141; *Re Ward's Estate*, 57 Minn. 377, 59 N. W. 311. See also *Kirkham v. Attenborough*, [1897] 1 Q. B. 201; *Brown v. Marr*, 7 R. 427; *Bryce v. Ehrmann*, 42 Sc. L. Rep. 23. Compare *Weiner v. Gill*, [1905] 2 K. B. 172.

⁶⁵ *Ray v. Thompson*, 12 Cush. 281,

59 Am. Rep. 187. In this case a horse was so abused by the buyer as to be substantially injured. It was held the seller was not bound to receive him again. So in *Moss v. Sweet*, 16 Q. B. 493, 495, the court said *obiter* that in case of a sale or return, the risk was on the buyer. But in *Elphick v. Barnes*, 5 C. P. D. 321, the court in part explained this away by suggesting that the doctrine only applied where the loss was due to the fault of the buyer.

⁶⁶ *Foley v. Felrath*, 98 Ala. 176, 13 So. 485, 39 Am. St. Rep. 39. See also *Scroggin v. Wood*, 87 Iowa, 497, 54 N. W. 437. In *Head v. Tattersall*, L. R. 7 Ex. 7, the seller was held bound to receive back a horse injured by accident while in the seller's possession within the time allowed the buyer for returning it. It seems probable also that in case the property was intended to pass at once, but the court treated the case as if it were subject to the same rule as a sale on approval. The decision can hardly be supported. See also *Chapman v. Withers*, 20 Q. B. D. 824.

accept it. Irrespective of his acceptance, by the terms of the original bargain, the property vests upon tender.⁶⁷ The remedy of the buyer in a sale with the right to return has a close logical connection with that of a buyer in a sale accompanied by a false warranty, in jurisdictions where the buyer is allowed to rescind a sale for breach of the warranty. The phrase "sell or return" is, however, ordinarily used in cases where the buyer has a right to return for dissatisfaction with the goods even though no promise made by the seller in regard to them has been broken. This usage, however, is not universal. Sometimes the right to return depends on a contingency within the control of neither party, as where goods are sold to a retail dealer with a right to return such as are unsold after a specified period.⁶⁸ So far as concerns the transfer of the property and the effect of it, the cases are identical. The subject of the buyer's remedies for breach of warranty is dealt with hereafter.⁶⁹

§ 272. Rule 3 — Continued.— When the property vests in sale on approval.—The property passes to the buyer in a sale on approval if by words or otherwise he expresses approval or consent to receive title within the time allowed by the contract for the exercise of the option; and, as in the case previously considered, if the contract does not fix a time within a reasonable time.⁷⁰ Frequently in bargains of this sort, the contract does not fix a time for the approval to be signified but states only the period of trial to be allowed. According to the better view this cannot be construed as requiring the buyer to signify his approval or acceptance within the time allowed him for trial. He may use the full period for trial, and exercise his option with reasonable

⁶⁷ *Gay v. Dare*, 103 Cal. 454, 37 Pac. 466; *Laubach v. Laubach*, 73 Pa. St. 387. See also *Thorndike v. Locke*, 98 Mass. 340. If, however, the buyer assents to the refusal of the seller to receive the goods back, either expressly or by assuming the dominion of an owner over the goods, the property vests irrevocably in the buyer. *Stevens v. Cunningham*, 3 Allen, 491.

In this case on refusal of the seller to receive the goods back, the buyer rented them to the seller.

⁶⁸ *House v. Beak*, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307.

⁶⁹ *Infra*, § 603 *et seq.*

⁷⁰ *Washington v. Johnson*, 7 Humph. 468; *Cook v. Gross*, 60 N. Y. App. Div. 446, 69 N. Y. Suppl. 924; *Hickman v. Schimp*, 109 Pa. St. 16.

promptitude thereafter.⁷¹ The case is to be contrasted with that of a sale with a right of return. In the latter case a named period will be the extreme limit for the return. In a sale on

⁷¹ The law on this point was carefully considered and stated in *Springfield Engine Stop Co. v. Sharp*, 184 Mass. 266, 68 N. E. 224. This was an action for the price of an engine stop which had been placed by the plaintiff on the defendant's engine on thirty days' trial, to be removed by the plaintiff if the defendant did not like it. The period of trial expired on Friday, June 30th. The next day the defendant used the stop and on Monday also used it, but on that day he notified the plaintiff to remove it. A verdict for the defendant was ordered by the trial judge. In sustaining exceptions to this rule, Loring, J., said: "The plaintiff's first contention is that failure to give notice until July 3d, and the use of the stop on Saturday, July 1st, and Monday, July 3d, is conclusive of the defendants' liability; and in support of that contention it relies on *Prairie Farmer Co. v. Taylor*, 69 Ill. 440, 18 Am. Rep. 621. That also was a case where a thirty days' trial was made of a machine; but in that case the machine was used for nearly a year without notice of an election, and what is said there must be taken to have had reference to the facts then before the court. The true rule is laid down in the other cases cited by the plaintiff, and it is this: The party to the contract who is to make the trial has the full period agreed upon for the trial, and in the absence of any stipulation on the point he has a reasonable time after the expiration of it to signify his election. See *Elphick v. Barnes*, 5 C. P. D. 321; *Spickler v. Marsh*, 36 Md. 222; *Kahn v. Klabunde*, 50 Wis. 235; *Waters Heater Co. v. Mansfield*, 48 Vt. 378. The plaintiff's next con-

tention is that it had a right to go to the jury on the use made on Saturday and on Monday as evidence of the defendants' election to take the stop. The retention of the stop after Friday, June 30th, apart from the use of it, had no significance. This was not the case of a sale or return; by the terms of the agreement the plaintiff was to disconnect the stop from the engine and take it away if the defendants were not satisfied with it. But the use of the stop after the expiration of the period of trial agreed upon, unexplained, would be evidence of an election, as is the failure to return a machine taken under a sale or return agreement. See *Kahn v. Klabunde*, 50 Wis. 235; *Spickler v. Marsh*, 36 Md. 222; *Waters Heater Co. v. Mansfield*, 48 Vt. 378. The English cases are collected in *Benjamin, Sales*, 593 *et seq.* In the case at bar the use of the stop on Monday could not be taken to be evidence of an election, for on Monday morning the defendants wrote to the plaintiff that they elected to take the other stop, and the letter was posted between 2 and 3 o'clock on that day. This letter deprives the use made of the machine on Monday of all force as evidence of an election, as was said in *Hunt v. Wyman*, 100 Mass. 198, 200, in a similar case. See also *Elphick v. Barnes*, 5 C. P. D. 321. There is nothing on the record showing why the defendants used the stop on Saturday. If, for example, the use on Saturday came from inadvertence or because the defendants thought that the extension did not expire until the end of that day, the use on that day would be deprived of all force as evidence of an election, as we

approval, if the buyer fails to signify disapproval within a proper time, it has been said that this is not necessarily acceptance, though it may be evidence of it.⁷² Logically it is true that retention of the goods may be caused by something other than assent to become owner of them, but it seems that the seller is justified in assuming that such retention means assent. If this is true the fact that the buyer does not mean to indicate assent is immaterial. It seems desirable also, from a business standpoint, to compel the buyer to take the goods if he retains them beyond the permitted period. The Sales Act, therefore, makes an absolute rule.⁷³ This rule is justified moreover by the weight of judicial authority.⁷⁴ Unless the contract provides otherwise, it will devolve upon the buyer to give notice that he does not

have held to be the case of the use on Monday. And there may have been other explanations of that use which would result in the same conclusion. But no explanation was given at the trial as to the use made of the machine on Saturday, and on this state of the evidence the plaintiff had a right to go to the jury on the question whether the use of the stop on Saturday showed an election to take the stop and that the defendants afterward changed their minds and wrote the letter declining it on Monday." See also *Allyn v. Burns*, 37 Ind. App. 223, 76 N. E. 636. Compare *Fiss, etc., Horse Co. v. Kiernan*, 108 N. Y. Suppl. 1105.

⁷² *Hunt v. Wyman*, 100 Mass. 198, 200. "A mere failure to return the horse within the time agreed may be a breach of contract, upon which the plaintiff is entitled to an appropriate remedy; but has no such legal effect as to convert the bailment into a sale. It might be evidence of a determination, by the defendant, of his option to purchase. But it would be only evidence. In this case, the accident to the horse, before an opportunity was had for trial in order to deter-

mine the option, deprives it of all forces, even as evidence." *Wartman v. Breed*, 117 Mass. 18. See also extract quoted from *Springfield Engine Stop Co. v. Sharp*, 184 Mass. 266, 68 N. E. 224. *supra*. Also *Kahn v. Klabunde*, 50 Wis. 235, 6 N. W. 883.

⁷³ Rule 3 (2) (b) that such retention is the equivalent of approval; copied from the English Sale of Goods Act, § 18, rule 4 (b).

⁷⁴ *Moss v. Sweet*, 16 Q. B. D. 493; *Re Downing Paper Co.*, 147 Fed. Rep. 858; *Mowbray v. Cady*, 40 Iowa, 604, 606; *Turner v. Machine Co.*, 97 Mich. 166, 56 N. W. 356; *Columbia Rolling Mill Co. v. Beckett Foundry Co.*, 55 N. J. L. 391, 26 Atl. 888; *Butler v. School District*, 149 Pa. St. 351; *Washington v. Johnson*, 7 Humph. 468. See also *Hickman v. Schimp*, 109 Pa. St. 16; *Keeler v. Jacobs*, 87 Wis. 545, 58 N. W. 1107. Retention after an inconclusive expression of disapproval for the remainder of the period originally given for trial will not, however, operate as an acceptance of the property. *Ellis v. Mortimer*, 1 B. & P. N. R. 257.

accept the goods either by returning them or otherwise.⁷⁵ But it is possible for the parties to make such agreement in regard to the matter as they may see fit. They may provide that the seller must ascertain whether the buyer is satisfied.⁷⁶ The same kind of arrangement would be possible in case of a sale or return. They may also provide either that the buyer must be at the expense of returning the goods, or that the seller has the burden, on being notified that the goods are not approved of, of removing them. As to the presumptions governing the obligations of the parties to bear the burden of delivering or returning goods.⁷⁷ If the duty rests upon the buyer to give notice, and the seller is absent or cannot be found, the buyer must use such diligence as the circumstances of the case admit.⁷⁸

§ 273. **Varying consequences of sale or return and sale on approval.**—The differences in the rights of the parties in the two kinds of agreement under consideration are briefly the differences which always exist between the rights of those having the property and of those having merely a contract for the property. If the property has passed, the risk of accidental loss or damage rests upon the buyer.⁷⁹ If the property has not passed, the risk still remains with the seller.⁸⁰ Again, if the property has passed to the

⁷⁵*Dewey v. Erie Borough*, 14 Pa. St. 211, 53 Am. Dec. 533.

⁷⁶*Smalley v. Hendrickson*, 29 N. J. L. 371; *Gibson v. Vail*, 53 Vt. 476.

⁷⁷See *Colles v. Swensberg*, 90 Mich. 223, 51 N. W. 275; also *infra*, §§ 446, 496, 497.

⁷⁸*Dewey v. Erie Borough*, 14 Pa. St. 211, 53 Am. Dec. 533.

⁷⁹*Foley v. Felrath*, 98 Ala. 176, 13 So. 485, 39 Am. St. Rep. 39; *Strauss Saddlery Co. v. Kingman*, 42 Mo. App. 208; *Chase v. Union Stone Co.*, 63 How. Pr. 336; *Carter v. Wallace*, 32 Hun, 384. See also *Plunger Elevator Co. v. Day*, 184 Mass. 130, 68 N. E. 16. *Contra*, *Head v. Tattersall*, L. R. 7 Ex. 7. In *Chase v. Union Stone Co.*, goods had been purchased with the privi-

lege of exchange at any time, and it was held that where the buyer returned them in the exercise of his privilege and they were destroyed by fire in transit, the loss was his, as the property had not yet revested in the seller. Compare with this case *Lyons v. Stills*, 97 Tenn. 514, 37 S. W. 280, where the court held the death of a pony which was the subject-matter of the bargain did not prevent the buyer from exercising a right provided for therein of rescinding in case of dissatisfaction.

⁸⁰*Elphick v. Barnes*, 5 C. P. D. 321; *Quaker Mfg. Co. v. Tucker*, *Levett & Loeb Co.*, 134 Ill. App. 547; *Allyn v. Burns*, 37 Ind. App. 223, 76 N. E. 636; *Hunt v. Wyman*, 100 Mass. 198.

buyer, his creditors may seize the goods.⁸¹ Obviously they cannot do so unless the property has passed.⁸² Conversely if the property has passed the seller's creditors can make no valid seizure of it.⁸³ If the property has passed the buyer may transfer his title to a subpurchaser and give him an absolute title.⁸⁴ This also is possible, though the sale was on approval, unless the seller reserved title until the price should be paid, or unless there were some condition in the bargain other than the mere approval of the buyer. For if the only condition is the buyer's approval, he may approve at any moment and his resale of the goods would operate as such approval.⁸⁵ If the property has passed to the

⁸¹ *Hotchkiss v. Higgins*, 52 Conn. 205, 52 Am. Rep. 582; *Martin v. Adams*, 104 Mass. 262.

⁸² *Mowbray v. Cady*, 40 Iowa, 604; *Donnelly v. Mitchell*, 119 Iowa 432; *Dando v. Foulds*, 105 Pa. St. 74; *Hall & Brown Machine Co. v. Brown*, 82 Tex. 469, 17 S. W. 715. But see *Cook v. Gross*, 60 N. Y. App. Div. 446, as to circumstances under which the seller may be debarred from asserting his title against creditors of the buyer.

⁸³ *Wells v. McNeerney*, 74 Conn. 675.

⁸⁴ *Dearborn v. Turner*, 16 Me. 17, 33 Am. Dec. 630; *McKinney v. Bradley*, 117 Mass. 321.

⁸⁵ *O'Donnell v. Wing*, 121 Ga. 717, 49 S. E. 720; *Kirkham v. Attenborough*, [1897] 1 Q. B. 201; *Bryce v. Ehrmann*, 42 Sc. L. R. 23 (in these cases a purchase or pledge from the buyer on approval was sustained. Where, however, title is expressly reserved until payment in a jurisdiction where conditional sales are valid, a subpurchaser will not get a good title); *Weiner v. Gill*, [1905] 2 K. B. 172 (in this case the plaintiff, a manufacturing jeweler, delivered jewelry to a retail dealer on the terms of a memorandum headed as follows: "On approba-

tion. On sale for cash only or return. From Samuel Weiner, Diamond Mounter and Manufacturing Jeweler. Goods had on approbation or on sale or return remain the property of Samuel Weiner until such goods are settled for or charged. The consignees are responsible for these goods until they are returned to my possession." The purchaser, being informed by one Longman that he had a customer who might buy the goods, delivered them to Longman on the latter agreeing to pay cash or return them in a few days. Longman had no customer, and fraudulently pledged the goods with the defendant, a pawnbroker. The plaintiff was held entitled to recover the goods on the ground that the plaintiff had expressly reserved title. For this reason it was said the goods were not delivered "on approval" or on sale or return, or other similar terms" within the meaning of the Sale of Goods Act, and even if they were, the pledging by Longman did not amount to an act by the original purchaser "adopting the transaction." This decision affords a rule of construction for the American Sales Act also, as the words of that act are copied from the English statute. The decision is criticised by

buyer, the seller loses all security upon the goods. Thereafter his only claim is that given him by his contract at the time.⁸⁶ If the property has not passed the seller may reclaim the goods if the buyer repudiates his obligation on the contract or becomes incapacitated as, by insolvency, from fulfilling it.⁸⁷

§ 274. Rule 4 (1).—Subsequent appropriation.—This rule is copied from the fifth rule in the corresponding section⁸⁸ of the English act.⁸⁹ The rule relates only to unascertained or future goods and, therefore, has no application to subsequent transfers of existing property owned by the seller at the time of the contract. Such a case, unless covered by the first two rules of the section under consideration, would depend upon the broader principle of the previous section; the intention of the parties would have to be sought. Objection is commonly taken, in the text-books on sales, to the use of the word “appropriation,” because it is said appropriation may mean either that the seller would break his contract if he delivered other goods than those in question, though the title still remains in him, or it may mean that the property has actually passed to the buyer.⁹⁰ In fact, however, the latter

Prof. Richard Brown in 17 Juridical Review, 221, on the ground that by section 25 (2) of the English Sale of Goods Act the buyer in possession had power to transfer a title irrespective of the terms of the bargain between buyer and seller. There is force in the contention, but as section 25 (2) was not copied in the American act, the question is immaterial here).

⁸⁶ *Dearborn v. Turner*, 16 Me. 17, 33 Am. Dec. 630; *Bushnell v. Bicknell*, 17 Me. 344, 35 Am. Dec. 262; *Crane v. Pearson*, 49 Me. 97; *McKinney v. Bradlee*, 117 Mass. 321.

⁸⁷ *Re George M. Hill Co.*, 123 Fed. Rep. 866. By the terms of the contract in this case the buyer need not take the machine which was the subject of the bargain unless he was satisfied. Though his grounds for dissatisfaction were probably unreasonable and though he continued to

use the machine he had expressed dissatisfaction. While affairs were in this condition he became bankrupt. It was held the machine did not pass as part of the bankrupt estate. See also *James Smith Machine Co. v. Holden*, 73 Vt. 396, 51 Atl. 2.

⁸⁸ Section 18.

⁸⁹ The only change consists in the substitution in the first line of the rule in the American act of the words “contract to sell” instead of the words “contract for the sale of,” in order to conform to the general practice throughout the act.

⁹⁰ This criticism was made by Parke, B., in *Wait v. Baker*, 2 Ex. 1, and at the time the observation was made the criticism doubtless had force; sixty years’ subsequent use of the word in one of the meanings referred to has dispelled the ambiguity.

meaning is that which the word has had definitely affixed to it, and the word naturally expresses this meaning. Specification is the proper word to indicate merely that definite goods have either by the contract or subsequently been fixed upon as the subject-matter of the sale.⁹¹ The principle stated by the rule is well settled. As an original question it might be well urged that when a contract is made for the sale of unspecified goods, the property should pass unless a contrary intention is manifested, as soon as the goods become specified and put in a deliverable condition by the seller. It is well settled, however, that the property does not pass at so early a moment. Some subsequent act in regard to the goods is necessary as a manifestation of the intent to transfer it. The intention alone is not enough, and certainly unless clearly so agreed, the completion of the goods is not a sufficient manifestation of intention by outward act.⁹² There is not

⁹¹ Chalmers, *Sale of Goods Act* (5th ed.), 49, suggests that "delivery" would have been a better word, and urges that there is always actual or constructive delivery where the property passes by appropriation; but, as will be seen, it is well settled that there may be appropriation though the goods remain in the absolute control of the seller; and it seems unfortunate to use the word "delivery" for a case where all that is meant is that the seller by operation of law becomes bailee of the goods for the buyer.

⁹² See *supra*, § 132. This principle is variously expressed in the cases, but it is at least clear that something other than the completion of the goods is necessary. In *Schneider v. Westerman*, 25 Ill. 514, it is said that the property does not pass in goods which are to be manufactured, until they are completed, ready for delivery, and notice is given. As will be seen, the suggestion that notice is necessary is not well founded. An act of appropriation by a seller may be assented to in advance. In a

later Illinois decision, *Rothwell v. Luken*, 60 Ill. App. 150, a contract for the construction of a peculiar kind of vehicle by a carriage manufacturer was held not to ripen into a sale until the vehicle was completed and tendered to, or set apart for, the buyer. As a general rule this statement is also open to criticism. Setting apart the vehicle for the buyer would not operate as a transfer of the property unless done with the buyer's authority or unless it was subsequently assented to by him. How far tender to a buyer of goods which the buyer has contracted to take but which at the time of tender in violation of his contract he refused to take can have the effect of a transfer of the property is considered hereafter. *Infra*, § 562 *et seq.* In *Fordice v. Gibson*, 129 Ind. 7, 28 N. E. 303, a contract for staves of the seller's first manufacture to be delivered f. o. b. at a certain point was held not to ripen into a sale on the manufacture of the staves, and the court said that delivery or some act designat-

much authority upon the question whether the parties, if they expressly so agree, may vary the rule that the property does not pass on the mere completion of the goods. In other words, it is not clear whether the rule that the property does not pass until some subsequent act of appropriation is one of presumption based perhaps on supposed intention, or whether it is an absolute rule of law. In theory there seems no reason why the intention of the parties should not prevail if it is clearly manifested and some authority supports this view. The completion of the goods is itself an outward act, which it would seem might be agreed upon as the appropriation.⁹³ As a general rule, however, some act of appropriation of the goods to the buyer, other than mere completion or preparation, is essential ~~and~~ for the transfer of the property, and it is necessary that the act of appropriation should be assented to by both parties. But as in the formation of contractual agreements generally, it is immaterial that the parties express their assent at different times, nor is it material which party makes the proposition. The buyer may make it by requesting the seller sub-

ing them as the staves intended to be delivered was essential. So in *Pettengill v. Merrill*, 47 Me. 109, the court suggested that delivery or tender was necessary. In regard to the use of the word "delivery" in this connection, see the preceding note. See further to the effect that the property will not pass on the completion or specification of the goods without more, *Updicke v. Henry*, 14 Ill. 378; *Goodman v. Kennedy*, 10 Neb. 270, 4 N. W. 987; *West Jersey R. R. Co. v. Trenton Car Works*, 32 N. J. L. 517; *Johnson v. Hibbard*, 29 Or. 184, 44 Pac. 287, 54 Am. St. Rep. 787; *Gammage v. Alexander*, 14 Tex. 414. Compare *Spicers v. Harvey*, 9 R. I. 582.

* In *Rider v. Kelley* 32 Vt. 268, 76 Am. Dec. 176, the court while holding that acceptance by the buyer or appropriation for him is in general necessary, said the rule might be modified where the parties agree

to treat the article as constructively delivered when finished, or where the vendee finds the materials and superintends or specially directs in the process of manufacture. In *Williams v. Chapman*, 118 N. C. 943, 24 S. E. 810, the buyer advanced to the manufacturer money to pay for raw material, some operative expenses, and the cost of boxing, and the manufacturer in writing stated that he did "hereby sell the future products of his mill for a specified price in consideration of the advancements." It was held the property in the goods passed to the buyer as soon as their manufacture was completed. In *Spicers v. Harvey*, 9 R. I. 582, castings were made by the seller on the buyer's order from patents furnished by him and such castings when made were held to become the buyer's property subject to a lien for the price.

sequently to appropriate goods to him, or the seller may make it by appropriating goods to the buyer and subsequently securing the latter's assent. It is also immaterial which party by the terms of the contract is to make the appropriation. If the goods are in the hands of the seller and the buyer selects from them, and is authorized so to do, there can be little difficulty in deciding that the property thereupon passes, in the absence of express agreement to the contrary. If, however, the seller's goods were in the buyer's possession and the buyer was to appropriate some of them to the contract, questions of considerable difficulty might arise in regard to when the definite appropriation has been made. If the buyer contracted to buy all the goods of the seller in his possession at the time of the contract, in the absence of express agreement to the contrary, the property would doubtless be held to pass immediately. Though the governing principle requiring an act of appropriation is thus clear, the application of the principle is frequently accompanied with great difficulty. The buyer rarely expresses his consent to an appropriation in definite words. On the contrary it is necessary to resort to inference from the terms and circumstances of the bargain. A correct judgment in regard to the question presented can best be obtained by an examination of the leading decisions upon the subject.

§ 275. Rule 4 (1) — Continued.—Subsequent appropriation—Examination of decisions.—The earliest case where the question under consideration seems to have been involved was *Mucklow v. Mangles*.⁹⁴ The seller contracted to build a barge and the buyer, from time to time, paid him most of the price as the barge progressed. When the barge was nearly finished the name of the buyer was painted on the stern. The seller then became bankrupt and it was held that the property had not passed to the buyer. It will be noticed in this case that the contract was not originally for specific goods; the goods had become specific by the building of the barge in question and the painting of the buyer's name thereon. As the buyer advanced money it was doubtless on the understanding that the very barge then under construction should be that to which the contract related, but this does not prove that the barge had

⁹⁴ 1 Taunt. 318 (1808).

become the buyer's property. It was still unfinished and as something remained to put it in a deliverable condition, the presumption that the property would not pass until the necessary acts were done to complete the goods was applicable. A somewhat similar case is *Woods v. Russell*.⁹⁵ Here the seller contracted to build a ship, the price to be paid in four instalments. The ship had not been completed when the seller became bankrupt, but before that time the seller had signed a certificate to enable the buyer to register the vessel in his own name. To make such registry it was necessary for the buyer to make oath that he was the owner. At the time this certificate was given by the seller, the buyer paid the third instalment. The seller shortly afterward became bankrupt and the buyer took possession of and finished the ship. It was held that the title passed at the time of the registry of the ship as the buyer's property, that having been done with the seller's assent. On this view the appropriation seems to have been made by the buyer when he registered the vessel as his. Perhaps the view would be quite as tenable that the property passed when the seller signed the certificate to enable the buyer to register the vessel as his. The court also held that the rudder of the vessel and the cordage which had been bought by the seller specifically for this ship, though never attached to it, also followed as an incident. Upon this point the case is clearly wrong, for nothing seems to have been done indicating an intention to make a transfer of title to these articles before they were attached to the vessel, and the decision upon this point has been overruled.⁹⁶ The court also suggested as a ground for decision of the case in regard to the ship, that the payment by instalments appropriated specifically to the buyer and vested in him a property in the ship while in process of manufacture. This doctrine was later adopted in England.⁹⁷ The rule thus stated is, however, an artificial one. It is obvious that the property in the vessel can hardly

⁹⁵ 5 B. & Ald. 942.

⁹⁶ *Wood v. Bell*, 5 E. & B. 772.

⁹⁷ *Clarke v. Spence*, 4 A. & E. 448, See also *Wood v. Bell*, 5 E. & B. 772; *Seath v. Moore*, 11 A. C. 350; *Reid v. Macbeth*, [1904] A. C. 223. Although the English Sale of Goods

Act makes no mention of such a rule, yet as the court in *Clark v. Spence*, seem to regard the rule as one of construction of the intention of the parties, it may be assumed that it is still unshaken. It is so stated in Benjamin, *Sale* (5th Eng. ed.), 363.

pass to the buyer in pieces corresponding to the instalments paid. This would involve during the progress of the work a divided ownership, though the line of division of the property in the nature of the case could not be clear. It is, however, possible for the property in the vessel so far as it is completed to pass to the buyer at the time the first instalment is paid, and doubtless payment of the price is some evidence of an intention to transfer title. If title to the vessel in its incomplete state passes to the buyer when the first instalment of the price is paid, the materials thereafter added would pass to the buyer by accession as they are added to the vessel. There seems no reason, however, to distinguish by any special presumption or rule of law the case of a vessel, and the English rule has not found favor in this country.⁹⁸ In *Robde v. Thwaites*,⁹⁹ the buyer bought twenty hogsheads from a much larger quantity of sugar which was in the seller's warehouse on the floor; sixteen other hogsheads were filled and the seller notified the buyer that they were ready and requested him to take them away. He said he would take them away as soon as he could. It was held that the property passed to the sixteen hogsheads by the subsequent assent of the buyer to the appropriation made by the seller. In *Atkinson v. Bell*,¹ the buyer ordered machines of the seller, to be made according to a special order. They were made under the supervision of an agent of the buyer and altered in accordance with his directions. They were then packed in boxes also by his directions. The seller then wrote the buyer asking for shipping directions, which were never sent, and the buyer refused to take the machines. It was held that the property had never passed. This case has been criticised on the ground that the boxing of the machines in accordance with directions from the buyer's agent was a sufficient appropriation, assented to by both parties to

⁹⁸ *Clarkson v. Stevens*, 106 U. S. 505, 1 S. Ct. 200, 27 L. ed. 139; *Yukon Steamboat Co. v. Gratto*, 136 Cal. 538, 69 Pac. 252; *Green v. Hall*, 1 Houst. 506; *Williams v. Jackson*, 16 Gray, 514; *Briggs v. A Life Boat*, 7 Allen, 287; *Wright v. Tetlow*, 99 Mass. 397; *Elliott v. Edwards*, 35 N. J. L. 265; *Edwards v. Elliott*, 36 N. J. L. 449, 13 Am. Rep. 463;

affd., 21 Wall. 532, 22 L. ed. 487; *Stevens v. Shippen*, 29 N. J. Eq. 602; *Andrews v. Durant*, 11 N. Y. 35, 62 Am. Dec. 55; *Derbyshire's Est.*, 81 Pa. St. 18. One case only, *Sandford v. Wiggins Ferry*, 27 Ind. 522, seems to have adopted the English rule.

⁹⁹ 6 B. & C. 388.

¹ 8 B. & C. 277.

transfer the title,² and this criticism seems just. In *Elliott v. Pybus*,³ a machine was ordered by the buyer and about a quarter of the price paid in advance. When the machine was finished he saw it and made another small payment. On being requested to pay the balance of the price he admitted that his order had been followed and asked the seller to deliver the machine. The seller refused and the buyer then complained of the price and refused to pay, but subsequently said he would "endeavor to arrange it if they would give him time." The property was held to have passed. In *Tripp v. Armitage*,⁴ a contract was made to build a hotel for the defendant who advanced money on security of the materials brought on the premises. The builder bought some sash frames onto the premises, but later took them away to put pulleys on them, and then became bankrupt. It was held that the property had not passed. It is to be observed that the sash frames were subject to what was in effect a pledge while they remained upon the premises, but when removed the surrender of possession by the pledgee destroyed the security. Aside from the advance made on the security of the materials, the situation of the sash frames seem to have been analogous to that of the rudder and cordage in the case of *Woods v. Russell* previously referred to. In *Wilkins v. Bromhead*,⁵ the seller contracted to build a portable greenhouse for the plaintiff and did so, and notified the plaintiff of the completion and requested payment of the price. The plaintiff sent the money and requested the seller to keep the greenhouse until he was ready for it. On bankruptcy of the seller it was held that the property had passed. The payment of the price makes the case a clear one. In *Campbell v. Mersey Docks*,⁶ the plaintiff contracted to buy 250 bales of cotton "ex Bosphorus." There were 500 bales in the cargo. When the cotton was landed the bales were numbered and a warehouse receipt for bales numbered from 1 to 250 was sent to the plaintiff. Prior to this time, however, the seller had sold 200 of the bales bearing those numbers to a third person and offered the plaintiff other bales from the same cargo. The plaintiff

² Benjamin, Sale (5th Eng. ed.),

360.

³ 10 Bing. 512.

⁴ 4 M. & W. 687.

⁵ 6 M. & G. 963.

⁶ 14 C. B. (N. S.) 412.

refused and brought action for conversion. The trial court instructed the jury that the appropriation by the seller of 250 bales was not sufficient to vest the property without an assent by the buyer, and also that the warehouse receipt sent to the buyer was not conclusive, but that it was open to the company to show that this was done by mistake of a clerk. It appeared⁷ that it was the practice at Liverpool, where the case occurred, that after the bales are numbered the first purchaser (in this case the plaintiff) takes those bales which are first discharged from the ship and which, consequently, bear the lowest numbers. It seems difficult to support the decision in view of the custom at Liverpool. The mere numbering of the bales would seem some evidence of an appropriation. It may well be, however, that in view of the practice of later sending a warehouse receipt the property ought not to be regarded as passing until the latter time, but the sending the warehouse receipt should certainly have been conclusive upon the seller. It is true that the warehouse receipt could not transfer the property to all the bales named in it, because part of those bales had already been sold and delivered to other persons, but as the plaintiff paid his price, relying on the receipt given him, the defendant ought not to be allowed to set up the mistake of its own clerk as a ground for escaping liability. In *Young v. Matthews*,⁸ a brick-maker agreed to sell a creditor 1,300,000 bricks. Three clumps of bricks were shown which contained less than that number of bricks.⁹ The seller's foreman pointed out the three clumps and in reply to a question expressly agreed to hold and deliver this quantity of bricks. Only one of the three clumps consisted of finished bricks. It was held, nevertheless, that the property passed to all three. In *Jenner v. Smith*¹⁰ the defendant agreed at a fair price to buy two pockets of hops of the plaintiff from samples shown to him. The plaintiff stated that the hops were lying in the warehouse of one Prid. There were, in fact, three pockets of hops belonging to the plaintiff, lying in Prid's warehouse. The plaintiff later marked two of these with the defendant's name and sent

⁷ This fact is to be found in the report of the case in 8 L. T. (N. S.) 245.

⁸ L. R. 2 C. P. 127.

⁹ This is a fair inference from the fact stated in the report of the case in 36 L. J. C. P. 61.

¹⁰ L. R. 4 C. P. 270.

him a bill for them. The court nonsuited the plaintiff and it was held, properly. There seems little if any evidence in this case of assent by the buyer to the appropriation in question. Had there been but two pockets in the warehouse, the property would have passed; the buyer did not know there were more and, therefore, could not be regarded as assenting either to become immediately an owner in common with the seller or to let the seller pick out two pockets as appropriated to the bargain. In *Pletts v. Beattie*,¹¹ an order was given through a traveling salesman to a brewer to supply a named quantity of ale weekly until further notice, and concluded as follows: "I assent to the appropriation by you to this order at your brewery of goods of the above description and in a deliverable state." The brewer's carter selected ale at the brewery in accordance with the order. The goods were then sent with others for another customer. It was held there was a complete sale at the brewery. The decisions in this country proceed upon the same theory. In *Tift v. Wright & Weslosky Co.*,¹² a customer of a merchant agreed to purchase a certain quantity of oats at a given price. In accordance with an agreement, the oats were weighed, set aside, the customer's name placed on them, and they were charged to him. It was held to be a complete sale when this had been done. In *Weld v. Came*,¹³ a billiard table built to the buyer's order was finished too late to be shipped with others. It was, however, subsequently completed; the buyer was notified of this and it was boxed. Later the seller suggested selling it to some one else, but the buyer said not to do so and it remained boxed and set aside until destroyed by fire. The price had been paid and the buyer sued to recover it. The trial judge directed a verdict in his favor, but it was held that the question whether the property had passed should have been left to the jury. In *Mitchell v. Le Clair*,¹⁴ the seller offered the buyer a lot of butter at a certain price if accepted before twelve o'clock next day. The buyer gave a telegraphic acceptance within that time. The seller, thereupon, weighed some butter, set it apart, and marked each tub to indicate that it was appropriated to the buyer. He then sent a bill to the buyer marked "cash on demand." It was held that the sale was

¹¹ [1896] 1 Q. B. 519.

¹² 113 Ga. 681, 39 S. E. 503.

¹³ 98 Mass. 152.

¹⁴ 165 Mass. 308, 43 N. E. 117.

thereupon completed. It will be noticed that in this case the buyer's assent to the appropriation was given prior to the appropriation and that the goods remained wholly within the control of the seller. In *Andrews v. Cheney*,¹⁵ the buyer agreed to buy goods corresponding to a sample and paid the price. The goods were not specified, but the seller was to procure them, and the buyer was then to call for them. Within the time named in the contract the seller obtained the goods, set them aside, and marked them with the buyer's name. The buyer failed to call by the agreed day, and thereafter the goods were burned. The seller sued to recover the price. The court held that the property had not passed to the buyer because by the terms of the contract the goods must be like the sample and there was not evidence that the buyer had authorized the seller to determine for him the correspondence of the goods with the sample. In *Bayne v. Hard*,¹⁶ the defendants agreed to sell a thousand bags of coffee to average in grade about standard No. 7, any difference above or below the standard to be paid for or allowed for, by the buyer or seller as the case might be. The invoice was to date from the time when the coffee should be in store, and the price was to be paid within thirty days from the date of invoice. The steamer with the coffee arrived in New York October 7th, but before this time the buyer had sold his interest in the bargain to the plaintiff. The defendants notified the original buyer of the arrival of the coffee and he in turn notified the plaintiff. The coffee was all in store October 24th. Gradings of the coffee were tendered about the same time in order to fix the price and a dispute arose in regard to these gradings. The difficulty was settled by arbitration, and the price ultimately fixed. On October 25th the buyer failed and the defendants refused to perform their contract in regard to the coffee, because they claimed to set off against the contract, some claims against the buyer. It was held, however, that the property passed when the coffee was all in store, and the plaintiff was entitled to the goods. In *Leggo v. Welland Vale Mfg. Co.*,¹⁷ a manufacturer contracted to make goods for a purchaser, and for the purpose of so doing to make tools

¹⁵ 62 N. H. 404.

opinion, in 174 N. Y. 534, 66 N. E.

¹⁶ 77 N. Y. App. Div. 251, 79

1104.

N. Y. Suppl. 208; *affd.*, without

¹⁷ [1901] 2 Ont. L. Rep. 45 (C. A.).

required to make the goods. Payment for the tools was to be made in specified period after notice that the manufacture of the tools had been completed. It was held that the property in the tools passed when the manufacturer put them in use.

§ 276. Rule 4 (1) — Continued.— **Subsequent appropriation — Materials furnished by the seller.**— To be distinguished from cases where the seller is subsequently to appropriate goods to the buyer are cases where the buyer furnishes the materials upon which the seller is to do the work. The term "seller" is improper in such a case; the bargain is one for work and labor, and the ownership of the goods is, at the outset and throughout the process of manufacture, in the so-called buyer. As has been seen¹⁸ the courts have gone very far under the Statute of Frauds in withdrawing contracts, which are logically contracts to sell, from the statute by calling them contracts for work and labor. It is not to be supposed that when considering the question of title, aside from the Statute of Frauds, courts should go equally far, and hold that in the cases which have been treated as contracts of work and labor, under the statute, the property is in the buyer throughout the process of manufacture. That result would not be reached unless the so-called buyer furnished a considerable part of the material going into the construction of the goods. In case he furnishes a portion of the materials the question is — do the parties intend that the materials furnished by the buyer shall by accession become the property of the seller when added to the materials furnished by the latter; in which case the property will not pass until the completed article is appropriated to the buyer? Or, do the parties intend that the materials furnished by the seller shall by accession to the goods furnished by the buyer become at once the latter's property? The proportion of goods furnished by one party or the other furnishes the best evidence of their intention in the absence of a direct expression of it.¹⁹

¹⁸ *Supra*, § 54.

¹⁹ In *West Jersey R. R. Co. v. Trenton Car Works*, 32 N. J. L. 517, the plaintiff ordered a railway car and furnished the plush and reps for the seats, but the bulk of the materials were furnished by the manu-

facturer. It was held that the property in the car remained in the manufacturer until delivery or appropriation. So in *In re Nonmagnetic Watch Co.*, 89 Hun, 196, 34 N. Y. Suppl. 1017, the buyer of watches, manufactured for him by

§ 277. Rule 4 (1) — Continued.—**Incorrect or partial appropriation and delivery.**—Appropriation of the goods to the buyer can only be binding upon him if made in accordance with authority previously given him or if subsequently assented to by him. If, therefore, goods are appropriated by the seller which are not in conformity with the authority given, the property will not pass. The lack of conformity may be in kind or quantity.²⁰ This seems obvious on principle as a general rule, but where goods are necessarily appropriated in parts or instalments, it may be urged that the buyer must have contemplated such appropriation by instalments and must have agreed to become owner of each instalment as it was appropriated. The law, however, takes what is probably the better view, that presumptively the buyer does not intend to become owner of anything until there can be final appropriation of the whole.²¹ Some well-known cases seem to infringe upon the

the seller, furnished the hair springs and balances, but it was held that the property did not vest in the buyer prior to delivery or appropriation.

²⁰ Most of the cases illustrating this point are cases of shipment by carriers. See *infra*, § 278, and cases there cited.

²¹ The leading case upon this point is *Bryans v. Nix*, 4 M. & W. 775. One Tempany shipped on board a boat, known as boat No. 604, a cargo of oats. He obtained a bill of lading for this cargo and a bill of lading from the master of boat No. 54 for a cargo of oats upon that boat. No oats had, however, then been put on board, although one was ready for shipment. On February 2d, Tempany wrote to the plaintiffs inclosing both bills of lading, and said that he had drawn on the plaintiff for £730 against the oats. The plaintiffs accepted the draft on February 7th, and returned it to Tempany who received it on February 9th. On February 6th, however, Tempany had given an order requesting the delivery to Walker, an agent of the

defendant, a creditor of Tempany, requesting the delivery to him for the defendant, of several cargoes, including boats No. 605 and No. 54. At this time boat No. 54 was partially loaded. The loading was completed on the 9th. The defendant on the arrival of the oats got possession of them and the plaintiffs brought trover for conversion. The court held him entitled to recovery as to boat No. 604, on the ground that there was appropriation at least on the 7th of February when the buyer complied with the condition by accepting the bill of exchange while the order given to Walker on the 6th of the same month being clearly executory only; but the plaintiffs were held to have no property in the cargo of boat No. 54. At the time the bill of exchange was accepted the cargo was not loaded. The court said that if the cargo had been subsequently loaded for the purpose of appropriating it to the bill of lading held by the defendant, the property would then have passed, but since when only a small part of the

rule that has just been stated and an adequate explanation of them must be sought. In *Aldridge v. Johnson*,²² a bargain was made for the sale of 100 quarters of grain to be taken from 300 quarters then in the seller's warehouse. The buyer was to send sacks for the grain. He sent 200 sacks for the purpose, and the seller filled 155 of them. They stood in the warehouse for a few days and the seller directed one of his clerks to get some trucks and have the sacks put on them to be sent to the buyer. The clerk applied for trucks, but was unable to get them. After these directions the

cargo was loaded, Tempany was induced to enter into a new bargain with Walker by virtue of which he appropriated the cargo of the defendant, this appropriation was effectual. The case necessarily decides that though Tempany intended at the time the loading of boat No. 54 began to appropriate the cargo to plaintiffs and continued of this mind until part of the cargo had been taken on board, he could subsequently alter his intention and appropriate the whole cargo to another. If he could do this when the cargo was loaded in a small part, it seems that he could also do it if the cargo was loaded in a large part. Similar in principle is the case of *Anderson v. Morice*, L. R. 10 C. P. 58, 609, 1 A. C. 713. In this case the plaintiff agreed to buy a cargo of rice to be loaded at Rangoon on the "Sunbeam." Payment was to be made by draft of the seller on the purchaser at six months with documents attached. The "Sunbeam" did not belong either to the seller or the purchaser. The freight was to be paid in the first place by the seller, but was specifically included in the price to be paid by the purchaser, so that in the end he was to pay the cost of the hire of the ship. While the vessel was at Rangoon being loaded and after nearly 9,000 bags out of a total of about 10,000 had

been put on board, the vessel sank and became a total loss. The plaintiff sued the insurer, and the defense was set up that the plaintiff was not injured since the risk was not on him. It was held by the Common Pleas that the plaintiff might recover, but this decision was reversed by the Exchequer Chamber on the ground that the cargo was not at the risk of the plaintiff until the shipment was complete. On appeal the opinions of the Law Lords were equally divided and the decision of the Exchequer Chamber, therefore, stood. It is possible by the terms of an agreement to throw the risk on one party or the other irrespective of title, and some of the judges made this principle the basis of their decision but any evidence or argument showing an intent to retain or transfer risk seems to have about as much force as showing an intent to retain or transfer the property, for certainly risk and ownership generally go together. In the Exchequer Chamber, Lords Chelmsford and Hatherly expressly held that the property would not pass until the cargo was completed. This case is to be compared with the later decisions of *Colonial Insurance Co. v. Adelaide Insurance Co.*, 12 A. C. 128, hereafter stated. See also *Adlam v. McKnight*, 32 Mont. 349.

²² 7 E. & B. 885.

seller saw the buyer and told him that the grain would be sent forward that day by rail. A clerk of the buyer also saw a clerk of the seller's and demanded the grain, and was answered, that as soon as trucks could be obtained, the grain would be sent forward. On the same day, however, the seller directed the grain to be held and later had it all turned from the sacks on to a heap from which it had been taken, so that it was undistinguishable from the rest of the heap. This was done because the seller found himself in financial trouble, and a few days later he became bankrupt. The buyer sued the seller's assignee in bankruptcy for the value of the goods, and was held entitled to recover. As to the grain which had been put into the sacks Lord Campbell said, "that when the bankrupt put the barley into the sacks, *eo instanti* the property in each sackful vested in the plaintiff. I consider that there was *a priori* an assent by the plaintiff. He had accepted and approved of the barley in bulk. He sent his sacks to be filled out of that bulk. There can be no doubt of his assent to the appropriation of such bulk as should have been put into the sacks. There was also evidence of his subsequent appropriation by his order that it should be sent on. There remained nothing to be done by the vendor, who had appropriated a part by the direction of the vendee. It is the same as if boxes had been filled and sent on by the bankrupt, in which case it cannot be disputed that the property would pass; and it can make no difference that the plaintiff ordered the sacks to be forwarded by the vendor." Erle, J., adds: "If it were necessary to rest the decision on the assent of the vendee in addition to this, I am of opinion that there is abundant evidence of such assent; for the vendee demanded, over and over again, the portion which had been put into the sacks." It does not appear, however, from the report of the case that the buyer was ever informed that only 155 of the sacks had been filled, and the demands that he made for the performance of the contract seem to have been demands for all the grain to which he was entitled — a larger amount than that actually put in the sacks. This decision was followed by *Langton v. Higgins*.²³ In this case the buyer contracted for all the oil of peppermint made from the year's crop of peppermint raised by the seller. A considerable advance was made upon the contract in accordance with the custom between the parties. The buyer sent

²³ 4 H. & N. 402.

the seller bottles to be filled with the oil, and the oil was manufactured and the bottles filled, but wrongfully disposed of to a third person whom the original buyer sued in *detinue* and *trover*. A verdict for the plaintiff was directed and it was held proper. Bramwell, who delivered the principal opinion, said "In all reason when a vendee sends his ship, or cart, or cask, or bottle to the vendor and he puts the article sold into it, that is a delivery to the vendee."²⁴ It is to be noticed that Bramwell here claims that there has been delivery to the buyer, not merely appropriation. In the previous case delivery was not mentioned. It seems clear that where delivery of part of the goods is made to the buyer, assuming that the word "delivery" implies some knowledge or assent on the part of himself or his agent, the natural inference is that the property would pass. If for instance a man should ask a fruit dealer to pick out a dozen apples for him, and the fruit dealer handed the apples over to the buyer, one by one, as they were picked out, the presumption would be that the property passed at once. On the other hand if the fruit dealer set them aside, one by one, as he picked them out, still retaining possession of them, no such inference would be proper. Although in both cases each apple when it was set aside was intended by the seller to form one of the lot which was the subject of the order. In the later case it cannot be assumed that the seller intended to appropriate each apple separately, and still less can it be assumed that the buyer assented

*A fuller extract from his opinion is as follows: "Looking at the principle, there ought to be no doubt. A person agrees to buy a certain article, and sends his bottles to the seller to put the article into. The seller puts the article into the buyer's bottles; then is there any rule to say that the property does not pass? The buyer in effect says, 'I will trust you to deliver into my bottles, and by that means to appropriate to me the article which I have bought of you.' On the other hand the seller must be taken to say, 'You have sent your bottles, and I will put the article in them for you.' In all reason, when a vendee sends his

ship, or cart, or cask, or bottle to the vendor and he puts the article sold in it, that is a delivery to the vendee. If we could suppose the case of a metal vessel filled with a commodity which rendered the vessel useless for subsequent purposes, it would be monstrous if the vendor could say, 'I have destroyed your vessel by putting into it the article you purchased, but still the property in the article never passed to you.' Or suppose a vendor was to deliver a ton of coals into the vendee's cellar, could he say, 'I have put the coals into your cellar, but I have a right to take them away again?'"

to take the ownership of each apple separately; the agreement was for the lot.²⁵ In *Langton v. Higgins* all the oil was put into the plaintiff's bottles, so that the question of partial appropriation was not actually involved, but Bramwell said in regard to this: "Again, suppose only a portion of the oil had been put into the bottles, inasmuch as the plaintiff was not bound to take a part only would the property vest? *Aldridge v. Johnson* is an authority on that point. It may be that the plaintiff would have the option of refusing to take a part only of the oil or of accepting it, but that right is not inconsistent with the property vesting at his election. It might vest in him conclusively, but at all events it would vest when he exercised his option." In *Colonial Insurance Co. v. Adelaide Ins. Co.*,²⁶ as in the earlier decision of *Anderson v. Morice*,²⁷ a vessel in which goods were being loaded under an agreement to sell, sank when part of the goods had been loaded and the question arose upon whom the risk of loss fell, the only essential difference between the facts in the two cases is that in the later case the vessel was chartered by the buyer, whereas in the earlier case the captain received the cargo as bailee for the seller, since bills of lading were to be given to the seller which by the terms of the contract the seller was to exchange for the price. In *Anderson v. Morice*, the House of Lords divided evenly on the question of risk, but in view of the chartering of the vessel by the buyer in the later case, a delivery to the vessel was there held a delivery to the buyer, and the property, therefore, was properly assumed to have passed.²⁸

²⁵ It is believed that the doctrine thus stated is warranted by the decisions on the one hand stated in note 21. *supra*, holding that the property does not pass to a portion of the goods as it is appropriated; and by the decision, on the other hand, of *Colonial Insurance Co. v. Adelaide Ins. Co.*, 12 A. C. 128, stated in the text, as well as by the language of Bramwell in *Langton v. Higgins*.

²⁶ 12 A. C. 128.

²⁷ L. R. 10 C. P. 58, 609, 1 A. C. 713. The facts are stated *supra*, note 21.

²⁸ At page 138 Sir Barnes Peacock

said in delivering the opinion of the court: "If no loss had happened and the sellers without lawful excuse had neglected to supply a full cargo, the purchasers must have paid for the wheat which had been put on board, unless they returned it. If the sellers had completed the cargo the purchasers must have paid for the whole. In either case they had at the time of the loss an interest in the part which had been put on board. In the one case that they might be able to return it to excuse them from payment for it in the event of their electing to put an end

These cases seem to warrant the rule that mere appropriation of part does not warrant the inference that the property was intended to pass to that part, but if delivery of part is made to the buyer, the inference is justified that the property was intended to pass. It is of course clear that if an intention be manifested to transfer the property in parts as appropriated without delivery, the intention of the parties will be respected; and so even though delivery is made, the seller's title may be retained. The rule given merely expresses the natural inference when nothing exists to indicate a contrary intention.²⁹ The question remains to be considered whether it can be regarded as a manifestation of an intention to take the property in parts, if the buyer sends his own receptacles for the goods, but puts these receptacles into the seller's hands. It is submitted that the facts in *Aldridge v. Johnson* and *Langton v. Higgins* do not warrant the conclusion that delivery had been made to the buyer. It may be urged that even though there has been no delivery under such circumstances, there is nevertheless a manifestation of intent to take the property as the receptacles are filled. In spite of the decision in *Aldridge v. Johnson*,³⁰ it seems

to the contract in case of the non-completion of the supply; in the other, that they might have the goods for which they would be obliged to pay."

²⁹ In *Ogg v. Shuter*, L. R. 10 C. P. 159, 1 C. P. D. 47, the contract called for cargo of potatoes to be shipped in sacks furnished by the buyer, to be paid for by cash against bill of lading. The potatoes were so shipped, the bill of lading being taken to the seller's order and sent with his indorsement to his own title, to be transferred to the buyer on payment of the balance of the price, part having been paid in advance. The buyer thinking the cargo was short refused to pay the full price. The seller's agent, therefore, declined to surrender the bill of lading and resold the potatoes. The cargo was in fact complete. The plaintiff brought trover and was allowed to recover by the lower court, but this

decision was reversed in the Exchequer Chamber. The lower court erroneously assumed that both parties supposed the cargo to be short, and that the buyer was not in default in refusing to accept the draft for the price on tender of the bill of lading. The upper court, while not absolutely holding that the property had not passed, decided that the retention of the bill of lading gave the seller ~~not merely a right to retain~~ possession until the buyer fulfilled the conditions of the contract, but also a power to dispose of the goods so long at least as the buyer continued in default. It is to be noticed in this case that the provisions of the contract, cash against bill of lading, indicates an intention either that the property should not vest in the buyer when the sacks were filled, or that if the property passed, a lien should be retained.

³⁰ 7 E. & B. 885.

of doubtful propriety to say that sending 200 sacks operates as an agreement to become owner of each one as it is filled. If the property passes as each sack is filled, it not only follows that the buyer is entitled to demand the goods if the seller becomes a bankrupt though some of the sacks are not filled, but the risk of loss of the partially filled sacks must be upon the buyer. It may be doubted whether this would be so held.³¹ At least if there

³¹ In *Rochester Oil Co. v. Hughey*, 56 Pa. St. 322, the defendant contracted to buy and the plaintiff to sell four barge loads of oil, about 2,200 barrels at \$4.50 a barrel, deliverable at Oleopolis, and to be measured in the tanks of the Pennsylvania Tube Company. The tube company received oil from various owners, which it did not keep separate, but measured when it received and delivered to the order of the owner by measurement at the tanks. The buyer furnished barges, and 495 barrels had been run into one barge, and about 450 barrels into another, when the oil took fire and both barges and oil were burned. The seller sued for the price and offered evidence tending to show that by the course of business the barges were during delivery in the custody and control of the purchaser. This evidence was rejected and a request for an instruction to the jury that if the barges were in the possession and control of the buyer or his agents, the oil was delivered as soon as it entered the barges. So far as to change property between seller and buyer was denied. The court said: "The question was submitted to the jury on the trial below, and they found that the contract between the plaintiff and defendant was for the sale and delivery of four barge-loads of oil, and not a sale of oil by the barrel. Of course, until delivery no specific oil passed to the defendant. Until this took place, he had only a right of action

to recover for a breach of contract. It is unnecessary to say whether the defendant was bound to take and pay for the number of barrels in each completely laden barge; if there be a question about that, it is not here, but whether the contents of partially laden barges in progress of being filled passed as fast as it entered the barge. The court thought not, and so decidedly think we. The defendant could not be compelled to take a partly filled barge when he had contracted for full ones, any more than if he had contracted for a barrel of oil could he have been compelled to accept one-half or quarter full. This would hardly be contended for, yet the principle is the same. *Winslow, Lanier & Co. v. Leonard*, 12 Harris, 14; *Story, Sales*, §§ 296, 299. Under the finding of the jury there is little room for argument against the ruling complained of. Nor do we see any error in rejecting the offers of testimony." A similar case is *Hays v. Pittsburgh Packet Co.*, 33 Fed. Rep. 552, where the District Court for the Western District of Pennsylvania followed the decision just stated. The Climax Coal Company had undertaken to fill a flatboat with coal-slack, and the boat was only partially filled when it was removed. *Acheson, J.*, said: "The contract was still executory. The libelant was not bound to accept the flatboat only a third or one-half full. If the boat had then been swept away by a flood, the loss of the slack would

is no delivery to the buyer it seems probable that any assent to appropriation in parts relates only to completed units.³² If, however, there is delivery, it seems on principle that the property passes in the goods as delivered. As the buyer receives possession, he must, in the absence of agreement to the contrary, be assumed to assent to become owner.³³ Doubtless if the full quantity is not delivered, the buyer may return what he has already received, but his right to do so seems rather by virtue of a condition subsequent than because the property has never vested in the part received by him.³⁴ The unwillingness of English writers, and those who follow them, to admit that when the property has once vested in the buyer the transaction can be rescinded is perhaps accountable for part of the lack of adequate analysis of the situation.³⁵ But it now seems clear that even in England the buyer may return the goods,³⁶ and the obvious justice of such a rule ought to make it evident that a breach by the seller of a promise on the faith of which the whole transaction was entered into, should be a good ground for rescinding an executed sale and re-

have fallen on the coal company. True, the flatboat belonged to the libellant, but the title to the slack did not pass to him as fast as it was loaded into the boat. *Nesbit v. Burry*, 25 Pa. St. 208; *Rochester Oil Co. v. Hughey*, 56 Pa. St. 322; *Sneathen v. Grubbs*, 88 Pa. St. 147. There is no evidence or circumstance indicating that it was the understanding or intention of the parties that, during the progress of the filling of the flatboat, the title to each bushel of slack as it was loaded should pass to the purchaser." If the question were merely one of appropriation, these cases would be sound, but it seems impossible to distinguish them, on the question of delivery, from the case of *Colonial Ins. Co. v. Adelaide Ins. Co.*, 12 A. C. 128, stated in the text, and the English decision seems correct.

³² In *Aldridge v. Johnson*, 7 E. & B. 885, it seems to have been assumed that the property vested sack by sack

as each was completely filled. Lord Campbell said: "When the bankrupt put the barley into the sacks, *eo instanti* the property in each sackful vested in the plaintiff."

³³ In accordance with this view is *Colonial Ins. Co. v. Adelaide Ins. Co.*, 12 A. C. 128; opposed to it the Pennsylvania decisions stated above.

³⁴ *Shipton v. Casson*, 5 B. & C. 378; *Oxendale v. Wetherell*, 9 B. & C. 386; *Colonial Ins. Co. v. Adelaide Ins. Co.*, 12 A. C. 128, 138.

³⁵ Thus in the second edition of *Blackburn, Contract of Sale*, 501, the learned editor says of the statements in *Shipton v. Casson*, and *Oxendale v. Wetherell*, cited in the preceding note, that "it seems more than doubtful, on principle, whether the buyer could return the goods if the property had passed to him in the absence of some agreement express or implied."

³⁶ *Colonial Ins. Co. v. Adelaide Ins. Co.*, 12 A. C. 128, 138.

vesting the property in the buyer. This subject is, however, more fully considered in connection with the remedies of the buyer for breach of warranty.³⁷ Another view of the effect of putting the goods in the buyer's receptacles where these receptacles are of very slight value compared with the value of the goods put into them, is that by accession the property in the sacks passes to the seller. This doctrine would doubtless only be applicable to cases where the receptacles were not only of slight value, but where only a single use of them was contemplated.³⁸

§ 278. **Rule 4 (2).—Appropriation by delivery to a carrier.**—By far the commonest and most important illustration of the trans-

³⁷ *Infra*, § 608.

³⁸ The case which suggests this statement is *Atchison, etc., R. R. Co. v. Schriver*, 72 Kans. 550, 84 Pac. 119, 4 L. R. A. (N. S.) 1056. In this case, in accordance with a previous arrangement, the plaintiff delivered to the defendant railroad a carload of flour in bags which had been furnished by D. B. Kirk & Co., the prospective buyer. The carload was consigned to "shippers' order, notify D. B. Kirk & Co." It was held that the railroad was liable for delivering the flour to Kirk & Co. without the surrender of the bill of lading, which had been attached by the shipper to a draft on Kirk & Co. and sent forward. The draft was dishonored. The court said: "The fact that the bags when furnished to the plaintiff, belonged to Kirk & Co., gave the latter no right to the possession of them, much less the right to detain the entire consignment of flour. The bags were voluntarily turned over to the plaintiff to be filled with flour. In a certain sense the process of manufacturing flour for market is not entirely complete until the flour is incased in sacks. At least the product is not merchantable until that or its equivalent is done, since the commodity cannot be handled in bulk. When once a bag has been filled with

flour, the two cannot be separated without loss; and it is not contemplated that they shall be separated except as the flour is finally consumed. For all practical commercial and legal purposes, the bag and its contents become inseverable. They are no longer independently identified as so many pounds of flour and a bag, but they become united in a single entity, a sack of flour. The flour, however, is the principal thing. The sack is but a minor accessory to the flour, and, in comparison with it, is of an almost negligible value. Therefore, under ordinary circumstances, and in the absence of an express agreement to the contrary, a party supplying sacks will be held to consent that his subsidiary and relatively unimportant contribution to the final product shall become an accession to the contribution of the manufacturer. If by accident, inadvertence, mistake, or other conduct not involving fraud, a sack be improperly filled, the result is the same as if it were lost or destroyed. The remedy is not by replevin, but through an action for damages, since the law, as a means of justice, will not jeopardize the overwhelming mass and value of the article for that which is insignificant and incidental."

fer of the property in goods by subsequent appropriation by the seller arises where the seller, in fulfillment of a contract with, or an offer from the buyer, delivers goods to a carrier for shipment to the buyer. That the property passes on delivery to the carrier, under these circumstances, was settled indeed before the general rules as to appropriation by the seller had been completely formulated.³⁹ The question may be asked why this time rather than an earlier moment should be regarded as that of the transfer of the property. If 100 barrels of flour are ordered from a distance, it must be assumed that the seller will first segregate 100 barrels, that he will then carry the goods either in his own trucks, or others, hired for the purpose, to the station of the carrier, from which they are to be shipped to the buyer. Why should not the property pass when the barrels are first segregated or when they are put into the trucks, rather than when they are delivered to the carrier? It is sometimes said that they are still in the seller's control prior to delivery to the carrier. This is doubtless true but, as has been seen, effective appropriation may be made even though goods are still in the exclusive possession and control of the seller. The true answer seems rather to be this, that where several things are to be done by the seller to the goods, it is to be assumed that the parties intend the appropriation to be deferred until the last of these acts have been done. The analogy naturally presents itself of the rule that where something remains to be done to put the goods in a deliverable condition the property presumably does not pass. Where, as in the case of shipment by carrier, the last of the acts which the seller is to perform puts the goods out of his control, there is an added reason for selecting that time. Though the buyer may assent to an appropriation of the goods while still wholly in the seller's control, it is a more natural assumption, if by the terms of the bargain the goods are

³⁹ As long ago as 1743 Lord Hardwicke said in *Snee v. Prescott*, 1 Atk. 245, 248: "I admit the case mentioned by the plaintiff's counsel, of inland dealers in England, that if goods are delivered to a carrier or hoyman to be delivered to A. and the goods are lost by the carrier or hoyman, the consignee can only bring

the action, which shows the property to be in him, and it is the same where goods are delivered to a master of a vessel." In *Dutton v. Solomonson*, [1803] 3 B. & P. 582, the court also regarded it as clear that the property would pass to the buyer when the goods were thus delivered.

promptly to be put in the hands of a third person, that the property does not pass until the latter moment. Whatever reasons may be given for the rule, it is well settled both in England and in this country.⁴⁰ In order to make the rule applicable, however, the seller must have acted in conformity with authority given him by the buyer. If, therefore, the goods which he sends are not those ordered,⁴¹ or even if there are too many,⁴² or too few,⁴³

⁴⁰ *Fragano v. Long*, 4 B. & C. 219; *Bryans v. Nix*, 4 M. & W. 775; *Cork Distilleries Co. v. Railway Co.*, L. R. 7 H. L. 269; *Ex parte Pearson*, 3 Ch. 443; *Johnson v. Railway Co.*, 3 C. P. D. 499; *United States v. Andrews*, 207 U. S. 229; *Hobbie v. Smith*, 27 Fed. Rep. 656; *Easton v. Wostenholm*, 137 Fed. Rep. 524, 70 C. C. A. 108; *Robinson v. Pogue*, 86 Ala. 257; *Brandon Printing Co. v. Bostick*, 126 Ala. 247, 28 So. 705; *Elliott v. Howison*, 146 Ala. 568, 40 So. 1018; *Main v. Jarrett*, 83 Ark. 426, 104 S. W. 163, 119 Am. St. Rep. 144; *Hill v. Freita Mercantile Co.*, Colo. , 94 Pac. 354; *Grange Co. v. Farmers' Mill Co.*, 3 Cal. App. 519, 86 Pac. 615; *Dwersy v. Kellogg*, 44 Ill. 114; *Carthage v. Munsell*, 203 Ill. 474, 67 N. E. 831; *Leggett & Meyer v. Collier*, 89 Iowa, 144, 56 N. W. 417; *Torrey v. Corliss*, 33 Me. 333; *Lombard Governor Co. v. Great Northern Paper Co.*, 101 Me. 114, 63 Atl. 555; *National Bank of Bristol v. B.*, etc., R. R. Co., 99 Md. 661, 59 Atl. 134, 105 Am. St. Rep. 321; *Johnson v. Stoddard*, 100 Mass. 306; *Prince v. Boston & L. R. Co.*, 101 Mass. 542, 100 Am. Dec. 129; *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291; *Betz v. McMorro*, 173 Mass. 8, 52 N. E. 1069; *Dr. A. P. Sawyer Medicine Co. v. Johnson*, 178 Mass. 374, 59 N. E. 1022; *Cox v. Andersen*, 194 Mass. 136, 80 N. E. 236; *Kessler v. Smith*, 42 Minn. 494, 44 N. W. 794; *Neimeyer Lumber Co. v. Burlington R. Co.*, 54 Neb. 321, 74

N. W. 670, 40 L. R. A. 534; *Kelsea v. Ramsey & Gore Mfg. Co.*, 55 N. J. L. 320, 26 Atl. 907; *Krulder v. Ellison*, 47 N. Y. 36, 7 Am. Rep. 402; *Bowlin Liquor Co. v. Beaudoin*, 15 N. Dak. 557, 108 N. W. 545; *Schmertz v. Dwyer*, 53 Pa. St. 335; *Philadelphia, etc., R. Co. v. Wireman*, 88 Pa. St. 264; *Dannemiller v. Kirkpatrick*, 201 Pa. St. 218, 50 Atl. 928; *Mitchell v. Baker*, 208 Pa. St. 377, 57 Atl. 760; *Greif v. Seligman* (Tex. Civ. App.), 82 S. W. 533.

⁴¹ *Pope v. Allis*, 115 U. S. 363, 29 L. ed. 393, the court after a citation of authorities said: "The authorities cited sustain this proposition, that when a vendor sells goods of a specified quality, but not in existence or ascertained, and undertakes to ship them to a distant buyer when made or ascertained, and delivers them to the carrier for the purchaser, the latter is not bound to accept them without examination. The mere delivery of the goods by the vendor to the carrier does not necessarily bind the vendee to accept them. On their arrival he has the right to inspect them to ascertain whether they conform to the contract, and the right to inspect implies the right to reject them if they are not of the quality required by the contract. The rulings of the Circuit Court were in accordance with these views." To the same effect is *Vigers v. Sanderson*, [1901] 1 K. B. 608. In this case it was expressly provided that property should pass on shipment, but it was,

or they are sent at a materially different time,⁴⁴ or by a different route or method of shipment,⁴⁵ or are misdirected,⁴⁶ the property will not pass. Moreover the seller must not only observe the express terms of the order or contract, but must also fulfill such obligations as the law imposes, irrespective of express bargain. Goods, therefore, must be packed in a reasonably careful manner, having in view the nature of the goods and the transit, or the property will not pass.⁴⁷ The contract made with the carrier for the transportation of the goods must also be a proper one, having in view all the circumstances of the case. Generally a remedy against the carrier for failure to perform its common-law

nevertheless, held that the property would only pass to goods of the description contracted for. So in *Weil v. Stone*, 33 Ind. App. 112, 69 N. E. 698; *Gardner v. Lane*, 9 Allen, 492, 85 Am. Dec. 779; *Barton v. Kane*, 17 Wis. 37, 84 Am. Dec. 728; *Schiller v. Blyth v. Fargo Co.*, 15 Wyo. 304, 88 Pac. 648.

⁴² *Cunliffe v. Harrison*, 6 Ex. 903; *Downer v. Thompson*, 2 Hill, 137; *Croninger v. Crocker*, 62 N. Y. 151; *Perry v. Mount Hope Iron Co.*, 16 R. I. 318, 15 Atl. 87; *Barton v. Kane*, 17 Wis. 37, 84 Am. Dec. 728. See also *Dixon v. Fletcher*, 3 M. & W. 146; *Hart v. Mills*, 15 M. & W. 85; *Levy v. Green*, 8 E. & B. 575, 1 E. & E. 969; *Rommel v. Wingate*, 103 Mass. 327. Compare *Martz v. Putnam*, 117 Ind. 392, 20 N. E. 270; *Iron Cliffs Co. v. Buhl*, 42 Mich. 86, 3 N. W. 269; *Brownfield v. Johnson*, 128 Pa. St. 254, 18 Atl. 543, 6 L. R. A. 48; *McHenry v. Bulifant*, 207 Pa. St. 15, 56 Atl. 226. But if the seller sends a larger quantity than the contract requires, for the price of the smaller quantity, there seems no valid ground of objection. *Downer v. Thompson*, 6 Hill, 208, revg. s. c., 2 Hill, 137, on this ground.

⁴³ *Sutherland Medicine Co. v. Baltimore*, 81 Ark. 229, 98 S. W. 966;

Richardson v. Dum, 2 Q. B. 218; *Downs v. Marsh*, 29 Conn. 409.

⁴⁴ *Green v. Lineville Drug Co.*, 150 Ala. 112, 43 So. 216; *White-Branch-McConkin-Sheldon Co. v. Carson*, 25 Ky. L. Rep. 1230, 77 S. W. 366; *Rommel v. Wingate*, 103 Mass. 327; *Hoover v. Maher*, 51 Minn. 269, 53 N. W. 646; *Reynolds v. Spencer*, 92 Hun, 275.

⁴⁵ *Ullock v. Reddelein, Dans. & L.* 6; *Wheelhouse v. Parr*, 141 Mass. 593, 6 N. E. 787; *Jones v. Schneider*, 22 Minn. 279; *Hills v. Lynch*, 3 Rob. 42 (N. Y. Super. Ct.); *Corning v. Colt*, 5 Wend. 253. Compare *Anaconda Mining Co. v. Houston*, 107 Ill. App. 183. If the route is not specified by the parties it is sufficient if the buyer ships the goods by the usual route. *Robinson v. Pogue*, 86 Ala. 257; *Hauseman v. Nye*, 62 Ind. 485; *Garbracht v. Commonwealth*, 96 Pa. St. 449; *Sarbecker v. State*, 65 Wis. 171, 26 N. W. 541.

⁴⁶ *Green v. Lineville Drug Co.*, 150 Ala. 112, 43 So. 216; *American Jewelry Co. v. Witherington*, 81 Ark. 134, 98 S. W. 695; *Woodruff v. Noyes*, 15 Conn. 335; *Garretson v. Selby*, 37 Iowa, 529.

⁴⁷ *Wilson v. Western Fruit Co.*, 11 Ind. App. 89, 38 N. E. 827; *Finn v. Clark*, 10 Allen, 479, 12 Allen, 522.

duty must be preserved.⁴⁸ The goods may be, however, of so dangerous or fragile a character that the carrier will not accept them without a contract limiting its liability. Under these circumstances the shipper is justified in making the shipment under such a contract.⁴⁹ It is not part of the seller's duty to insure the goods,⁵⁰ though by contract or even by custom such a duty might be imposed on the seller.⁵¹ If goods are shipped but because of some failure on the part of the seller to comply with the terms of the offer or contract, or with the duties imposed upon him by law, the property does not pass, the shipment constitutes an offer by the seller to the buyer, for there is a clear manifestation by the seller of willingness to allow the buyer to have the goods shipped, in satisfaction of the seller's obligation under the contract, or in performance of the order or offer previously sent by the buyer, and this cross-offer of the seller will be accepted by the buyer if he accepts the goods after an opportunity for inspecting them, or after he is, or ought to be, aware of the seller's failure to comply with the terms of the original contract or offer.⁵² As hereafter will be noticed,⁵³ a buyer has a right to inspect the goods in order to satisfy himself that the seller has fulfilled the authority conferred upon him to appropriate goods to the bargain, but this right of inspection is not a condition precedent to the transfer of the property in cases where the seller has been authorized to make an appropriation. If the seller conforms to the authority given him, the property passes and the buyer's subsequent inspection merely enables him to satisfy himself that because the authority given the seller was properly exercised the property passed.⁵⁴

⁴⁸ *Buckman v. Levi*, 3 Campb. 414; *Clarke v. Hutchins*, 14 East, 475; *Ward v. Taylor*, 56 Ill. 494.

⁴⁹ *Stafford v. Walker*, 67 Ill. 83 (fruit).

⁵⁰ *Bartlett v. Jewett*, 98 Ind. 206. See Sales Act, § 46 (3).

⁵¹ *Bartlett v. Jewett*, 98 Ind. 206; *New York Tartar Co. v. French*, 154 Pa. St. 273, 26 Atl. 425.

⁵² *Anaconda Mining Co. v. Houston*,

107 Ill. 183. See also *Peterson v. Mineral King Fruit Co.*, 140 Cal. 624, 74 Pac. 162.

⁵³ *Infra*, § 470 *et seq.*

⁵⁴ See *infra*, § 470 *et seq.* In *Giffen v. Selma Fruit Co.*, 5 Cal. App. 50, 89 Pac. 855, the court said, speaking of a contract by which the seller agreed to ship goods like a sample, that "title will not pass until there has been an acceptance" in

§ 279. Rule 4 (2) — Continued.— Sales C. O. D.— The practice is common in this country of sending goods to the buyer marked "C. O. D." The meaning of these letters is "collect on delivery."⁵⁵ The object of so marking goods is to instruct the carrier not to deliver the goods until the price has been collected. It has been held by some authorities that the effect of this is to retain title in the seller until the price has been paid.⁵⁶ The weight of authority, however, supports the view that possession only is to be retained by the seller until the price is paid and that the property passes immediately on delivery to the carrier, assuming that the circumstances are such that the property would pass were it not for the requirement of payment of the price before delivery.⁵⁷ The latter view seems preferable on principle

such a sale. This statement, however, must be regarded as erroneous. The sample served merely as a brief form of description. *Supra*, § 250. If the goods which the seller shipped were like the sample, the property would pass on shipment, but in the absence of circumstances showing a contrary intention the buyer would have no power to reject such goods. See also *Baars v. Mitchell*, 154 Fed. Rep. 322, 83 C. C. A. 466; *Goss v. Astoria Veneer Mills*, 121 N. Y. App. Div. 182, 105 N. Y. Suppl. 794.

⁵⁵ *State v. Intoxicating Liquors*, 73 Me. 278; *Baker v. Bourcicault*, 1 Daly, 23; *Crook v. Cowan*, 64 N. C. 743, 745; *State v. O'Neil*, 58 Vt. 140, 2 Atl. 586, 56 Am. Rep. 557; dismissed for want of jurisdiction, 144 U. S. 323, 36 L. ed. 450.

⁵⁶ *United States v. Shriver*, 23 Fed. Rep. 134; *United States v. Cline*, 26 Fed. Rep. 515; *Crabb v. State*, 88 Ga. 584, 15 S. E. 455 (compare *Dunn v. State*, 82 Ga. 27, 8 S. E. 806, 3 L. R. A. 199); *State v. United Express Co.*, 70 Iowa, 271, 30 N. W. 118 Iowa, 447, 92 N. W. 66; *State v. 568*; *State v. American Express Co.*, *Wingfield*, 115 Mo. 428, 22 S. W. 363, 37 Am. St. Rep. 406; *State v. O'Neil*,

58 Vt. 140, 2 Atl. 586, 56 Am. Rep. 557; dismissed for want of jurisdiction, 144 U. S. 323, 36 L. ed. 450 (this case was carried to the Supreme Court of the United States, but was dismissed on the ground that no Federal question was involved. *Harlan, J.*, in a dissenting opinion expresses assent to the decision of the State court that the property did not pass until the condition of payment was complied with); *State v. Goss*, 59 Vt. 266, 9 Atl. 829, 59 Am. Rep. 706. See also *Wagner v. Hallack*, 3 Colo. 176; *City of South Bend v. Martin*, 142 Ind. 31, 53, 41 N. E. 315, 29 L. R. A. 531; *Latta v. United States Express Co. (Iowa)*, 92 N. W. 68; *Dosh v. United States Express Co. (Iowa)*, 99 N. W. 298; *Lane v. Chadwick*, 146 Mass. 68, 15 N. E. 121; *Hardy v. American Express Co.*, 182 Mass. 328, 65 N. E. 375, 59 L. R. A. 731; *Sims v. Norfolk, etc., R. R. Co.*, 130 N. C. 556, 41 S. E. 673.

⁵⁷ *United States v. Adams Express Co.*, 119 Fed. Rep. 240; *Pilgreen v. The State*, 71 Ala. 368; *State v. Carl*, 43 Ark. 353, 51 Am. Rep. 565; *Hunter v. State*, 55 Ark. 357, 359; *Carthage v. Duvall*, 202 Ill. 234, 66

as well as because of the weight of authority. The intention of the seller as expressed by the letters "C. O. D." may be carried out either by retention of title or retention of possession. It seems best to give the letters an effect which will disturb as little as possible the inferences to be drawn from the other circumstances of the case. Just as in the case of an ordinary bargain and sale, where the payment of the price is a concurrent condition with the obligation to deliver the goods, the condition implied by law that the price must be paid before the buyer can obtain the goods in any doubtful case should be held to give the seller a lien merely and not to prevent an immediate transfer of title, so where goods are sent from a distance and the seller by marking the goods "C. O. D." endeavors to secure the benefit of the same concurrent condition which the law would imply in his favor if buyer and seller were in the same place, a similar construction should be adopted.⁵⁸

§ 280. **Rule 5.—Effect of an obligation of the seller to deliver at a particular place.**—As is provided by a subsequent section of the Sales Act,⁵⁹ apart from a contract or usage to the contrary, the place of delivery is the seller's place of business or residence, unless the goods, to the knowledge of the parties, were in some other place when the contract or sale was made. If the seller's

N. E. 1099; *Carthage v. Munsell*, 203 Ill. 474, 67 N. E. 831; *State v. Cairns*, 64 Kans. 782, 68 Pac. 621; *James v. Commonwealth*, 102 Ky. 108, 42 S. W. 1107; *State v. Intoxicating Liquors*, 73 Me. 278; *State v. Peters*, 91 Me. 31, 39 Atl. 342; *Greenleaf v. Gallagher*, 93 Me. 549, 552, 45 Atl. 829, 74 Am. St. Rep. 371; *State v. Intoxicating Liquors*, 93 Me. 464, 57 Atl. 798; *Higgins v. Murray*, 73 N. Y. 252; *Norfolk, etc., R. R. Co. v. Barnes*, 104 N. C. 25, 10 S. E. 83 (but see *Sims v. Norfolk, etc., R. R. Co.*, 130 N. C. 556, 41 S. E. 673); *State v. Mullin*, 78 Ohio St. 358, 85 N. E. 556; *Commonwealth v. Fleming*, 130 Pa. St. 138, 18 Atl. 622, 5 L. R. A. 470, 17 Am. St. Rep. 763; *Freshman v. State*, 37 Tex. Cr. App. 126, 38 S. W. 1007;

Keller v. State (Tex. Cr. App.), 87 S. W. 669; *Golightly v. State*, 49 Tex. Cr. App. 44, 90 S. W. 26, 2 L. R. A. (N. S.) 383; *State v. Flanagan*, 38 W. Va. 53, 17 S. E. 792, 22 L. R. A. 430, 45 Am. St. Rep. 836. Most of the decisions in this and the preceding note involve the legality of a sale of liquor, the question depending upon whether the sale was complete on the shipment or not until the goods were received and paid for. The principal involved seems identical with that in any case involving the question of the transfer of title. The authorities are thoroughly collected and carefully examined by Professor Gregory in 4 Col. L. Rev. 541.

⁵⁸ See further *infra*, § 340 *et seq.*

⁵⁹ Section 43 (1).

obligation to deliver is simply that imposed by law in accordance with this rule, the fact that the seller still is under an obligation to deliver the goods will not prevent the application of the presumption that the property passes as soon as all the terms of the bargain are agreed upon.⁶⁰ Where, however, the seller assumes a wider obligation in regard to delivery, the case is different, and rule 5 of section 19 applies. This rule states the doctrine of the common law. It is based upon a theory analogous to that supporting rule 2 of section 19 — something further remains to be done by the seller, not indeed to put the goods in a deliverable state, but in order to carry out the bargain. And this duty is not, as is ordinarily the case with the duty of the seller to deliver, conditional upon the concurrent payment of the price, or dependent upon the duty of the buyer to come for the goods. Where the seller contracts to deliver the goods at the buyer's residence or at any other particular place it is the seller's duty to go forward unconditionally with the transportation of the goods to that place. Until he has done that, presumably the property is not intended to pass.⁶¹ The commonest illustration of the principle arises where goods are, by the terms of the contract, to be sent by a carrier to the buyer and the seller contracts not simply to start the goods forward but that they shall be delivered at their desti-

⁶⁰ See *supra*, § 264.

⁶¹ In *Calcutta Co. v. De Mattos*, 32 L. J. Q. B. 322, 335, Cockburn, C. J., said: "If by the terms of the contract the seller engages to deliver the thing sold at a given place, and there be nothing to show that the thing sold was to be in the meantime at the risk of the buyer, the contract is not fulfilled by the seller unless he delivers it accordingly;" that is, "the property would remain in the seller and the thing would be at his risk." So in *Badische Fabrik v. Basle Chemical Works* [1898], A. C. 200, 207, Lord Herschell said in speaking of goods ordered to be sent by mail from Switzerland to England: "If the goods were according to the order to be delivered by the seller in England, the sale would not have

been constituted and complete in Switzerland. Until the goods had been delivered in London there would have been no sale. The property in the goods would not have passed to the purchaser." See also an unreported case referred to in *Smith's Leading Cases* (9th ed.), 166. To the same effect is the language of the court in *McElwee v. Metropolitan Lumber Co.*, 69 Fed. Rep. 302, 305, 16 C. C. A. 232: "Undoubtedly, the general rule is, that if the seller obligates himself as a part of his contract to deliver the property to the buyer at some specified place, title will not pass until such delivery." See also *Cross v. State*, 75 Ark. 522, 87 S. W. 1026; *Young v. Edwards*, W. Va., 60 S. E. 992.

nation.⁶² Whether by the terms of the contract the seller is authorized to make a final appropriation of the goods to the buyer by delivering them to the carrier at the point of shipment, or

⁶²United States *v.* Andrews, 207 U. S. 229, 240 28 S. Ct. 100; *Hobbie v. Smith*, 27 Fed. Rep. 656; *Peace River Phosphate Co. v. Grafflin*, 58 Fed. Rep. 550; *Alabama Nat. Bank v. Parker*, 146 Ala. 513, 40 So. 987; *Devine v. Edwards*, 101 Ill. 138; *Commonwealth v. Adair*, 28 Ky. L. Rep. 657, 89 S. W. 1130; *Magruder v. Gage*, 33 Md. 344; *Taylor v. Cole*, 111 Mass. 363; *Suit v. Woodhall*, 113 Mass. 391; *Weil v. Golden*, 141 Mass. 364, 6 N. E. 229; *Commonwealth v. Hugo*, 164 Mass. 157, 41 N. E. 123; *Taussig v. Southern Land Co.*, 124 Mo. App. 209, 101 S. W. 602; *Neimeyer Lumber Co. v. Burlington R. Co.*, 54 Neb. 321, 74 N. W. 670, 40 L. R. A. 534; *Conn v. Reed, Dawson & Co.*, 73 N. J. L. 112, 62 Atl. 271; *McNeal v. Braun*, 53 N. J. L. 617, 23 Atl. 687, 26 Am. St. Rep. 441; *Ludlow v. Browne*, 1 Johns. 1, 3 Am. Dec. 277; *Sneathen v. Grubbs*, 88 Pa. St. 147; *Braddock Glass Co. v. Irwin*, 153 Pa. St. 440, 25 Atl. 490; *Dannemiller v. Kirkpatrick*, 201 Pa. St. 218, 50 Atl. 928; *Bloyd v. Pollock*, 27 W. Va. 75; *McLaughlin v. Marston*, 78 Wis. 670, 47 N. W. 1058; *Fromme v. O'Donnell*, 124 Wis. 529, 102 N. W. 18. In *McNeal v. Braun*, 53 N. J. L. 617, 23 Atl. 687, 26 Am. St. Rep. 441, *De Pue, J.*, said: "It is sometimes stated as a general rule that delivery to the carrier is delivery to the consignee, and that the goods are to be carried to their destination at his risk. But an examination of the decisions to that effect will show that this doctrine prevails only where the contract of sale, as between the consignor and consignee, was concluded at the place of shipment, and the un-

dertaking to ship was collateral to the contract of sale, as in *Tregelles v. Sewell*, 7 Hurlst. & N. 574. It will also be found that the rule, uniformly adopted in the line of decisions, is that the risk of loss in transportation depends upon the nature of the transaction, the terms of the contract, and the intention of the parties. In *Dunlop v. Lambert*, Lord Cottenham said: "When the party undertaking to consign undertakes to deliver at a particular place, the property till it reaches that place, and is delivered according to the terms of the contract, is at the risk of the consignor." In *Calcutta Company v. De Mattos*, Mr. Justice Blackburn said: "There is no rule of law to prevent the parties from making whatever bargain they please. If they use words in the contract showing that they intend that the goods shall be shipped by the person who is to supply them, on terms that when shipped they shall be the consignee's property and at his risk, so that the vendor shall be paid for them whether they are delivered at the port of destination or not, this intention is effectual. * * * If the parties intend that the vendor shall not only deliver them to the carrier, but also undertake that they shall actually be delivered at their destination, and express such intention, this is also effectual. In such a case, if the goods perish in the hands of the carrier, the vendor is not only not entitled to the price, but he is liable for whatever damage may have been sustained by the purchaser in consequence of the breach of the vendor's contract to deliver at the place of destination." The court, therefore,

whether the duty of the seller is to deliver the goods at their destination, the risk of transportation being upon him, is a question of fact. If the contract specifies that one party or the other is to pay the freight, this almost certainly indicates the intention of the parties in regard to the matter. If the buyer is to pay the freight, it is a reasonable supposition that he does so because the goods became his at the point of shipment and the carrier is his agent in transporting them. On the other hand, if the seller is to pay the freight, the inference is equally strong that the duty of the seller is to have the goods transported to their ultimate destination and that the carrier is his agent in transporting the goods. Accordingly if the seller is to pay freight, the presumption is, as stated in rule 5, that the property does not pass until the goods have reached their destination.⁶³ Other circumstances of the contract, however, may make it evident that the intention of the parties was not to impose any obligation upon the seller to deliver the goods at the point of destination, but merely as a matter of adjustment of the price to throw the expense of the freight upon the seller. Thus if a contract which provides

concluded in the case at bar, where the plaintiff had contracted to sell and deliver the coal at Burlington: "It was undisputed in the case now before the court, and, in fact, was conceded by the plaintiff's counsel, that delivery of the coal by the plaintiff, at Burlington, at his own expense, was a material term in the contract of sale. Under a contract of this sort, delivery of the coal on board the barge was delivery to the master as the plaintiff's bailee or agent to perform for him the act of delivery in execution of his contract. 1 Benjamin, Sales (Corbin's ed.), § 566. Meanwhile, and until delivery was consummated in such a manner as to be effectual as between vendor and purchaser, the coal was at the plaintiff's risk." So in *Magruder v. Gage*, 33 Md. 344, the court said: "If the vendor undertakes to make the delivery himself at a distant place,

thus assuming the risk in the carriage, the carrier becomes the agent of the vendor, and the property will not pass until the delivery is actually made." If the bargain requires delivery through a common carrier to a drayman whom the purchaser has authorized to receive all his freight, the property passes on delivery to the drayman. *Harris v. Pellenz*, 146 Mich. 529, 109 N. W. 1044.

⁶³ *Fragano v. Long*, 4 B. & C. 219, 223; *Berger v. State*, 50 Ark. 20, 6 S. W. 15, 24; *Devine v. Edwards*, 101 Ill. 138; *Hunter Bros. v. Kramer Bros.*, 71 Kans. 468, 80 Pac. 963; *Suit v. Woodhall*, 113 Mass. 391; *McLaughlin v. Marston*, 78 Wis. 670, 47 N. W. 1058. Compare *Dr. A. P. Sawyer Medicine Co. v. Johnson*, 178 Mass. 374, 59 N. E. 1022 (stated *infra*, note 69); *Warner Saw Mill Co. v. Ferree*, 201 Pa. St. 405, 50 Atl. 924.

for the payment of freight by the seller also provides for payment at a time prior to the arrival of the goods at their destination, it is a fair inference that the transfer of the property was not to be deferred until the arrival of the goods. In British contracts the letters "c. i. f." or "c. f. i." standing for cost, freight, and insurance, are in common use and signify that the price fixed covers not only the cost of the goods but the expense of freight and insurance to be paid by the seller.⁶⁴ And under such a contract it seems that no inference is permissible that the seller was bound to deliver at the point of destination.⁶⁵ In mercantile contracts the letters "F. O. B." are frequently used to express the obligation of the parties in regard to the payment of freight and other charges. These letters which stand for the words "free on board" mean that the seller shall bear all expenses until the goods are

⁶⁴ In *Ireland v. Livingston*, L. R. 5 H. L. 395, 406, Blackburn, J., said: "The terms at a price, 'to cover cost, freight, and insurance, payment by acceptance on receiving shipping documents,' are very usual, and are perfectly well understood in practice. The invoice is made out debiting the consignee with the agreed price (or the actual cost and commission, with the premiums of insurance, and the freight, as the case may be), and giving him credit for the amount of the freight which he will have to pay to the shipowner on actual delivery, and for the balance a draft is drawn on the consignee which he is bound to accept (if the shipment be in conformity with his contract), on having handed to him the charter-party, bill of lading, and a policy of insurance. Should the ship arrive with the goods on board he will have to pay the freight, which will make up the amount he has engaged to pay. Should the goods not be delivered in consequence of a peril of the sea, he is not called on to pay the freight, and he will recover the amount of his interest in the goods under the policy. If the nondelivery is in consequence

of some misconduct on the part of the master or mariners, not covered by the policy, he will recover it from the shipowner. In substance, therefore, the consignee pays, though in a different manner, the same price as if the goods had been bought and shipped in the ordinary way."

⁶⁵ *Bowden v. Little*, 4 Comm. (Australia) 1364. In this case an agreement was made for the purchase and sale of 450 tons of onions at certain prices "c. i. f. Sydney;" the seller's place of business was in Japan. Onions were shipped from Japan which were merchantable at the place of shipment, but were not merchantable when they arrived at Sydney. It was held that the risk was on the buyer. Barton, J., however, said: "If the defenders had averred that by the custom of merchants a contract c. i. f. meant, and was universally recognized as meaning, a contract under which the seller bound himself to deliver at the port to which the goods were consigned, that would have been a different matter. But no such custom is averred."

delivered at the place where they are to be "F. O. B." By necessary implication, all further expense is upon the buyer.⁶⁶ If therefore, the contract provides that the goods are to be delivered F. O. B. at the point of shipment, the presumption that the property is to pass then is applicable.⁶⁷ On the other hand when the goods are to be delivered F. O. B. at the point of destination, as the seller must pay the freight to that point,⁶⁸ presumably the property does not pass until then.⁶⁹ It must constantly be borne in mind that the rules here spoken of, like others in the section of the Sales Act under consideration, are rules of presumption merely

* The meaning of these letters is well understood by the courts. *United States v. Andrews*, 207 U. S. 229, 28 S. Ct. 100; *Sheffield Furnace Co. v. Hull Coal Co.*, 101 Ala. 446, 14 So. 672; *Capehart v. Furman Improvement Co.*, 103 Ala. 671, 16 So. 627, 49 Am. St. Rep. 60; *Hurst v. Altamont Mfg. Co.*, 73 Kans. 422, 85 Pac. 551, 6 L. R. A. (N. S.) 928; *Neimeyer Lumber Co. v. Burlington R. R. Co.*, 54 Neb. 321, 74 N. W. 670, 40 L. R. A. 534; *Vogt v. Schienebeck*, 122 Wis. 491, 100 N. W. 820, 67 L. R. A. 756, 106 Am. St. Rep. 989. In the Alabama and Wisconsin decisions it was held that the meaning of these letters was so certain that parol evidence would not be admitted to explain them. In Pennsylvania it is held that these letters imply an obligation on the part of the buyer to furnish the cars. *Kunkle v. Mitchell*, 56 Pa. St. 100; *Dwight v. Eckert*, 117 Pa. St. 490, 12 Atl. 32; *Hocking v. Hamilton*, 158 Pa. St. 107, 27 Atl. 836. But in Alabama, Kansas, and Wisconsin it is held that *prima facie* the obligation is upon the seller. *Elliott v. Howison*, 146 Ala. 568, 40 So. 1018; *Hurst v. Altamont Mfg. Co.*, 73 Kans. 422, 85 Pac. 551, 6 L. R. A. (N. S.) 928; *O'Brien Co. v. Wilkinson*, 117 Wis. 468, 94 N. W. 337; *Vogt v. Schienebeck*, 122

Wis. 491, 100 N. W. 820, 67 L. R. A. 756, 106 Am. St. Rep. 989.

⁶⁷ *Congdon v. Kendall*, 53 Neb. 282, 73 N. W. 659; *Fruit Dispatch Co. v. Sturges*, 73 Ohio St. 351, 78 N. E. 1125; *Vogt v. Schienebeck*, 122 Wis. 491, 100 N. W. 820, 67 L. R. A. 756, 106 Am. St. Rep. 989. In *Dannemiller v. Kirkpatrick*, 201 Pa. St. 218, 50 Atl. 928, a distinction is taken between "deliver f. o. b." and "bill f. o. b.," the latter not necessarily imposing on the seller the duty to deliver.

⁶⁸ *Knapp Electrical Works v. N. Y. Wire Co.*, 157 Ill. 456, 42 N. E. 147.

⁶⁹ *Havens v. Grand Island Co.*, 41 Neb. 153, 59 N. W. 681; *Miller v. Seaman*, 176 Pa. St. 291, 35 Atl. 134; *Fromme v. O'Donnell*, 124 Wis. 529. But see *United States v. Andrews*, 207 U. S. 229, 28 S. Ct. 100, where the sale was held complete on shipment though the contract was for the goods f. o. b. Manila, the place of destination, other terms of the contract showing an intention to transfer the property. In *Dr. A. P. Sawyer Medicine Co. v. Johnson*, 178 Mass. 374, 59 N. E. 1022, the printed form of order contained the words "F. O. B. Chicago" the point of shipment, but there was written upon it "Freight paid" and "ship direct prepaid freight." The court held that the property passed on shipment, perhaps too summarily.

and will yield to proof of a contrary intention.⁷⁰ Probably the statement of Benjamin, quoted with approval by the Circuit Court of Appeals, accurately sums up the matter. “‘Slight evidence,’ says Mr. Benjamin, ‘is, however, accepted as sufficient to show that title passes immediately on the sale, though the seller is to make a delivery. The question, at last, is one of intent, to be ascertained by a consideration of all the circumstances.’”⁷¹

§ 281. **Reservation of possession or property by means of documents of title—Provisions of the Sales Act.—**

Sec. 20. RESERVATION OF RIGHT OF POSSESSION OR PROPERTY WHEN GOODS ARE SHIPPED.—

(1.) Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession of property may be thus reserved notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer.

(2.) Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

(3.) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods, as against the buyer.

⁷⁰ *United States v. Andrews*, 207 U. S. 229, 28 S. Ct. 100; *Hagins v. Combs*, 102 Ky. 165, 43 S. W. 222; *Bethel Steam Mill Co. v. Brown*, 57 Me. 1, 99 Am. Dec. 752; *Terry v. Wheeler*, 25 N. Y. 520. See also *Werner Saw Mill*

Co. v. Ferree, 201 Pa. St. 405, 50 Atl. 924.

⁷¹ *McElwee v. Metropolitan Lumber Co.*, 69 Fed. Rep. 302, 305, 16 C. C. A. 232, citing *Benjamin, Sales*, 329. See also *Board v. Mitchell*, 154 Fed. Rep. 322, 83 C. C. A. 466.

(4.) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading together to the buyer to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading he acquires no added right thereby. If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is indorsed in blank, or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill of lading, or goods from the buyer will obtain the property in the goods, although the bill of exchange has not been honored, provided that such purchaser has received delivery of the bill of lading indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful.⁷²

§ 282. **Effect of form of bill of lading upon appropriation.**—Bills of lading have a double importance in regard to the title of the goods for which they are issued. In the first place the form in which the shipper has the bill of lading made out indicates whether or not he appropriates the goods to another and, in the second place, after the bill of lading is made out it may be transferred by the holder as representing symbolically the goods. The second of these uses of bills of lading will be considered hereafter in connection with the similar use of warehouse receipts, when questions of title as against persons other than the buyer and seller are considered.⁷³ In the present connection it is proper to consider the effect of the form of bill of lading as show-

⁷² Subsection (1) follows with some change of expression section 19 of the English act except that for the somewhat loose phrase "right of disposal" is substituted "possession or property." The reason for this change in expression will appear more fully in the following discussion. The first sentence of subsection (2) is in the English act, except that "property in the goods" is substituted for "right of disposal." The remainder of the subsection is new. Subsection (3) is not in the Eng-

lish act, but is thought to be warranted by the existing law, as will appear from the discussion in the following sections. Subsection (4) substantially follows the English act as far as the words "If, however." The proviso beginning "If, however," is not in the English act. It expresses, nevertheless, the English law, because of the Factors' Act of 1889. *Cahn v. Pockett's Channel Co.*, [1899] 1 Q. B. 643 (C. A.).

⁷³ See *infra*, § 405 *et seq.*

ing the transfer or retention of the property as between buyer and seller. The custom of merchants to regard the form of bill of lading as indicative of the ownership of the goods is very old, and the recognition of the custom by courts of law is also old. The correct doctrine was laid down as long ago as 1697.⁷⁴ "If goods by bill of lading are consigned to A., A. is the owner, and must bring the action against the master of the ship if they are lost. But if the bill be special, to be delivered to A. to the use of B., B. ought to bring the action. But if the bill be general to A. and the invoice only shows that they are upon the account of B., A. ought always to bring the action, for the property is in him, and B. has only a trust, *per totam curiam*. And *per* Holt, Chief Justice, the consignee of a bill of lading has such a property as that he may assign it over. And Shower said that it had been adjudged so in the Exchequer." The theory of merchants upon which the law proceeds is perfectly simple. If the shipper directs delivery to another specified person it indicates his intention to deliver to the ship captain as bailee for the person named, and unless some rule of law prevents, the property thereupon vests in the person so named. On the other hand if the shipper directs the carrier to redeliver the goods at their destination to the shipper himself, or to his order, it indicates an intention that the ship captain shall be the bailee for the shipper and the property will remain in the latter. Modern cases recognize this doctrine to the fullest extent.⁷⁵ In

⁷⁴ *Evans v. Marlett*, 1 Ld. Raym. 271.

⁷⁵ *Wait v. Baker*, 2 Ex. 1; *Turner v. Trustees of Liverpool Docks*, 6 Ex. 543; *Shepherd v. Harrison*, L. R. 5 H. L. 116; *Wigton v. Bowley*, 130 Mass. 252. And see many cases cited in the following sections. In *Wigton v. Bowley*, the court said: "If the bill of lading or written evidence of the delivery to a carrier be taken in the name of the consignee, or be transferred to him by indorsement, the strongest proof is afforded of the intention to transfer the property to the vendee. *Merchants' National Bank v. Banks*, 102 Mass. 291. If the vendor

intends to retain the right to dispose of the goods while they are in course of transportation, he must manifest that intention at the time of their delivery to the carrier. It is not the secret purpose, but the intention as disclosed by the vendor's acts and declarations at the time, which governs." In *Emery's Sons v. Irving Bank*, 25 Ohio St. 360, 18 Am. Rep. 299, the court said: "If the bill of lading shows that the consignment was made for the benefit of the consignor or his order, it is very strong proof of his intention to reserve the *jus disponendi*. And on the other hand, if the bill of lading shows

England this custom appears to be confined to shipment by water and the law is so laid down by Benjamin, whose words have been quoted with approval in the House of Lords.⁷⁶ In this country, however, bills of lading issued by railroads are dealt with in

that the shipment is made for the benefit of the consignee, it is almost decisive of the consignor's intention to part with the ownership of the property. If the bill of lading does not disclose the person for whose benefit the consignment is made, it is of less weight on the question of the shipper's intention. We have no doubt, however, that if the bill of lading shows a consignment by vendor to vendee, and no other circumstance appears as to the intention, it will be taken as *prima facie* evidence of an unconditional delivery to the vendee."

In Moors v. Kidder, 106 N. Y. 32, 12 N. E. 818, the court said: "We have uniformly held that the bill of lading is the evidence of title, and is sufficient to vest the ownership and absolute control in him to whose order it is drawn." In Pennsylvania Company v. Holderman, 69 Ind. 18, 26, the court said: "It will be observed that the paragraph contains no allegation to the effect that the appellees were the owners of the carload of lumber, shipped and consigned by them to A. H. Stone. In the absence of such an averment and of proof to sustain it, the legal presumption would be and is, that, upon the delivery of said lumber to the appellant as a common carrier, the title thereto and the property therein would be vested in said A. H. Stone, the consignee thereof; and this legal presumption of the ownership of the lumber by the consignee, Stone, the appellant had the right to rely and act upon, in the absence of express notice from the appellees that they retained the title thereto, not-

withstanding their consignment thereof to said Stone." In Griffith v. Ingledew, 6 S. & R. 429, 431, Tilghman, C. J., expressed the fullest adoption of the mercantile view, suggesting that even though the intentions of the parties were not to transfer title, this intention affected only the equitable ownership, the legal title being fixed as in the case of a deed by the name of the consignee. "I think it will be found, upon a review of the decisions on this subject, that the legal property was vested in the plaintiff, although, no doubt, he held in trust for Patterson, the shipper. In deciding on the legal property, the court will look to the face of the bill of lading; but in ascertaining the equitable owner, the invoices, letters of advice, and other collateral evidence, will be resorted to."

"Where goods are delivered by the seller in pursuance of an order, to a common carrier for delivery to the buyer, the delivery to the carrier passes the property, he being the agent of the buyer to receive it, and the delivery to him being equivalent to a delivery to the buyer. Where goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the seller is not a delivery to the buyer, but to the captain as bailee for delivery to the person indicated by the bill of lading, as the one for whom they are to be carried. And this rule equally applies to the buyer's own ship, even in cases where the bills of lading show that the goods are free of freight, because

precisely the same way as are those issued by carriers by water.⁷⁷ It will be observed that this use of bills of lading as a controlling indication of the ownership of the goods seriously qualifies the principles already laid down in regard to appropriation of goods by the seller when he delivers them to a carrier. The particular methods in which bills of lading may be used between buyer and seller and the effect of their use will now be considered in detail.

§ 283. **The property is retained where the seller or his agent is consignee.**—It follows from what has been said that if the seller takes a bill of lading in which he is named as consignee as well as consignor, the carrier is a bailee for the seller, not the buyer, and the title is retained. The practice of taking bills of lading in this form has been common for centuries in order to preserve to the seller a hold upon the goods during transit,⁷⁸ and many cases have sustained the validity of this retention of title.⁷⁹

owner's property." Quoted with approval by Lord Chelmsford in *Shepherd v. Harrison*, L. R. 5 H. L. 116.

⁷⁷ See cases in the following sections, *passim*.

⁷⁸ In *Snee v. Prescott*, [1743] 1 Atkins, 245, it appears "That it is usual among merchants and factors at Leghorn, when they ship goods for persons who have not remitted them the money beforehand, or for which they draw bills of exchange or where they run a risk, not to fill up the bill of lading directly to the order of such person, but to the order of the shippers or factors; so that if any accident happen to their principal, before the delivery of the goods, they may get back the same, and thereby reimburse themselves."

⁷⁹ *Ruck v. Hatfield*, 5 B. & Ald. 632; *Craven v. Ryder*, 6 Taunt. 433; *Wait v. Baker*, 2 Ex. 1; *Van Casteel v. Booker*, 2 Ex. 691; *Ellershaw v. Magniac*, 6 Ex. 570; *Jenkyns v. Brown*, 14 Q. B. 496; *Mirabita v. Imperial Ottoman Bank*, 3 Ex. D. 164; *North Penn. R. R. v. Commercial Bank*, 123 U. S. 727, 31 L. ed. 287;

Seeligson v. Philbrick, 30 Fed. Rep. 600; *The Prussia*, 100 Fed. Rep. 484; *Easton v. Wostenholm*, 137 Fed. Rep. 524, 532, 70 C. C. A. 108; *Jones v. Brewer*, 79 Ala. 545; *Tishomingo Institution v. Johnson, Nesbitt & Co.*, 140 Ala. 691, 40 So. 503; *Berger v. State*, 50 Ark. 20, 6 S. W. 15; *Ward v. Taylor*, 56 Ill. 494; *Sohn v. Jervis*, 101 Ind. 578, 582; *Forcheimer v. Stewart*, 65 Iowa, 593, 22 N. W. 886, 54 Am. Rep. 30; *Merchants' Bank v. Citizens' Bank*, 93 Iowa, 650, 652, 61 N. W. 1065, 57 Am. St. Rep. 284; *Kentucky Ref. Co. v. Globe Ref. Co.*, 104 Ky. 559, 47 S. W. 602, 42 L. R. A. 353, 84 Am. St. Rep. 468; *Hopkins v. Cowen*, 90 Md. 152, 44 Atl. 1062, 47 L. R. A. 124; *Merchants' Bank v. Bangs*, 102 Mass. 291; *Libby v. Ingalls*, 124 Mass. 503; *Wright & Colton Co. v. Warren*, 177 Mass. 283, 58 N. E. 1082; *Security Bank v. Luttgren*, 29 Minn. 363, 13 N. W. 151; *Willman Co. v. Fussy*, 15 Mont. 511, 39 Pac. 738; *Neimeyer v. Railroad Co.*, 54 Neb. 321, 332, 74 N. W. 670, 40 L. R. A. 534; *First Bank v. Northern R.*, 58 N. H. 203; *Farmers'*

This principle is applicable even though the goods are shipped on the buyer's vessel, for the captain having authority to sign bills of lading by so doing constitutes himself as an independent bailee of the goods for the shipper.⁸⁰ It is commonly said that the seller by taking the bill of lading in his own name reserves the *jus disponendi* or right of disposal of the goods, and the latter expression is used in the section of the English Sale of Goods Act corresponding to that here under discussion. There seems no doubt that the seller who thus consigns the goods to himself has complete control over them, and that the so-called *jus disponendi* is in fact title. The seller may not only retain the goods until the buyer performs his obligation under the contract, but may, even in violation of the contract, dispose of them to third persons. If the seller does this, of course he is liable in damage to the buyer, but the second purchaser from the seller acquires an indefeasible right.⁸¹ It is not ordinarily material for the seller's pro-

& Mechanics Bank v. Logan, 74 N. Y. 568; Furman v. Union Pacific R. R. Co., 106 N. Y. 579, 13 N. E. 587; Emery's Sons v. Irving Bank, 25 Ohio St. 360, 18 Am. Rep. 299; Bellefontaine v. Vassaux, 55 Ohio St. 323, 45 N. E. 321; Pennsylvania R. Co. v. Stern, 119 Pa. St. 24, 12 Atl. 756, 4 Am. St. Rep. 626; Greenwood Grocery Co. v. Canadian Elevator Co., 72 S. C. 450, 453, 52 S. E. 191, 2 L. R. A. (N. S.) 79; Bank v. Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618; Grayson County Bank v. Nashville, etc., Ry. (Tex. Civ. App.), 79 S. W. 1094; Joslyn v. Grand Trunk Ry. Co., 51 Vt. 92.

⁸⁰ Van Casteel v. Booker, 2 Ex. 691; Turner v. Trustees of Liverpool Docks, 6 Ex. 543; Falke v. Fletcher, 34 L. J. C. P. 146.

⁸¹ Wait v. Baker, 2 Ex. 1; Ellershaw v. Magniac, 6 Ex. 570; Gabaron v. Kreeft, L. R. 10 Ex. 274. In Wait v. Baker, one Lethbridge agreed to sell 500 quarters of barley to the defendant f. o. b. at Kingsbridge to be shipped to Bristol, for cash,

on handing bill of lading, or acceptance at two months. Lethbridge had the bill of lading made out to his own order and left it undorsed at the defendant's place of business. Later in the day the defendant made some objection to the quarter of barley but finally, after some dispute, agreed to take it and offered Lethbridge cash. Lethbridge, however, refused the money, declined to indorse the bill of lading to the defendant, and subsequently indorsed it to the plaintiff for a present of advance. The defendant, having got possession of part of the barley from the ship captain, was sued in trover by the plaintiff. A verdict was directed for the plaintiff, and this was sustained by the upper court. Parke, B., said: "In this case it is said that the delivery of the goods on shipboard is equivalent to the delivery I have mentioned, because the ship was engaged on the part of Lethbridge as agent for the defendant. But assuming that it was so, the delivery of the goods on board the ship was not

tection whether the bill of lading is an order bill or a "straight" bill naming him as consignee without the word "order." Though

a delivery of them to the defendant, but a delivery to the captain of the vessel, to be carried under a bill of lading, and that bill of lading indicated the person for whom they were to be carried. By that bill of lading the goods were to be carried by the master of the vessel for and on account of Lethbridge, to be delivered to him in case the bill of lading should not be assigned, and if it should, then to the assignee. The goods, therefore, still continued in the possession of the master of the vessel, not as in the case of a common carrier, but as a person carrying them on behalf of Lethbridge. There is no breach of duty on the part of Lethbridge, as he stipulates under the original contract that the price is to be paid on the delivery of the bill of lading. It is clearly contemplated by the original contract, that, by the bill of lading, Lethbridge should retain control over the property. It seems to me to follow that the delivery of the 500 quarters to the captain, to be delivered to Lethbridge, is not the same as a delivery of 500 quarters to a common carrier by order of the consignee. The act of delivery, therefore, in the present case, did not pass the property." The case of *Mirabita v. Imperial Ottoman Bank*, 3 Ex. D. 164, should also be considered in this connection. In that case a cargo of lumber was shipped by the sellers, who retained a bill of lading made out to their own order. A bill of exchange for the price was drawn upon the plaintiff which he had at first refused to accept, but afterward he tendered the price and demanded delivery of the bill of lading. The defendant, however, refused to accept the amount of the bill and sold the

cargo, and the plaintiff brought action for conversion. The plaintiff was allowed to recover. A distinction was taken between the cases previously cited where it was said the seller had the power of absolutely disposing of the cargo, and cases where the seller retains the bill of lading simply to secure payment of the price. In the latter case it was said on payment or tender by the purchaser there is a performance of the condition subject to which an appropriation was made and everything which is necessary to transfer the property is done, and the property passes to the purchaser. While the decision in this case is clearly right, it is submitted that the reasoning is wrong, and inconsistent with the previous decisions. In all the cases the object of the seller in taking the bill of lading to his own order was merely to secure payment of the price. The property was fully identified, and in *Wait v. Baker*, by the terms of the contract, was at the buyer's risk. The only purpose of the seller in not shipping directly to the consignee was to secure himself in regard to the price. The ground of decision adopted in *Mirabita v. Imperial Ottoman Bank*, moreover, would lead to the conclusion not only that the buyer could sue the seller for conversion but could also sue the third person to whom the defendant had sold the cargo, since the court says the property had passed to the plaintiff, and the failure of the plaintiff to get delivery would not, prior to the *Factors' Act* of 1889, have made any difference in England. It is submitted that the true explanation of the case is that the seller having retained a title merely for security, the equitable

as will be seen⁸² if the bill is in the latter form, the carrier need not require production or surrender of the bill, yet delivery must be made to the consignee, and this enables the seller to control the goods at their destination.⁸³

§ 284. **The seller's title may be only for the purpose of security.**—

It is to be observed that though the form in which the bill of lading is taken is indicative of the title to the goods shipped, in the nature of the case, it cannot always be conclusive. In the first place if the shipper does not have title himself, no disposition of the goods by him can possibly affect the ownership of the goods in the absence of an estoppel against the true owner.⁸⁴ As a shipper

interest in the property was in the buyer, just as in the case of a common-law mortgage the equitable interest is in the mortgagor though the legal interest is in the mortgagee. As commonly happens in the case of personal property, the equitable right of the buyer was allowed to be enforced at an action at law. A common case illustrating a similar principle arises where a defrauded seller of goods enforces by trover his equitable right to have the goods back. *Thurston v. Blanchard*, 22 Pick. 18, 33 Am. Dec. 700. And see *infra*, § 566 *et seq.*

⁸² *Infra*, § 285.

⁸³ In *Singer v. Merchants' Transportation Co.*, 191 Mass. 449, 77 N. E. 882, 114 Am. St. Rep. 635, however, the seller, Louis Singer, consigned goods to L. Singer, meaning himself, and sent the bill with a draft attached to a bank at the place of destination with directions to notify one Guralnik, who had ordered the goods. There was, however, a person named Lena Singer doing business at the place of destination and the carrier was accustomed to deliver goods to this person and so delivered the goods in question. It was held the carrier was not liable. Had the seller sent the goods under

an order bill the trouble would have been avoided, as L. Singer to whom delivery was mistakenly made could not have obtained the bill of lading and as the carrier would not then have delivered the goods without its production, could not have got the goods.

⁸⁴ *Merchants' Bank v. Bales*, 148 Ala. 279, 41 So. 516; *Brower v. Peabody*, 13 N. Y. 121; *Saltus v. Everett*, 20 Wend. 267, 32 Am. Dec. 541. See also *Ogle v. Atkinson*, 5 Taunt. 759. In this case one Smidt shipped goods to the plaintiff in the plaintiff's ship, bought with the proceeds of the plaintiff's goods which had been sold by Smidt as the plaintiff's factor. Smidt delivered the goods to the captain saying the goods were the plaintiff's and were to be delivered to him, but induced the captain to sign a bill of lading to order or assigns, which Smidt then sent to his agent with instructions not to deliver to the plaintiff unless he accepted a bill of exchange. This the plaintiff refused to do and was held, nevertheless, entitled to recover the goods from a warehouseman with whom they had been stored. Gibbs, C. J., said that the captain received the goods "as the plaintiff's own goods, which means his own goods absolutely, not with

cannot give to a consignee property which the shipper does not own, so also he cannot transfer to a consignee the property in goods unless the consignee assents to receive it. Accordingly if shipment is made by a seller of goods which he was not authorized to send, or in a manner which he was not authorized to adopt, the property cannot pass to the consignee by the mere fact that his name was inserted in the bill of lading as consignee at the request of the consignor.⁸⁵ This may, and does, indicate assent by the shipper to transfer the property, and the subsequent assent of the buyer may operate as a ratification of the seller's act, but, in the meantime, the property in the goods cannot be regarded as having passed. If it be supposed, however, that the circumstances are such that were it not for the form of the bill of lading the property would have passed, but the seller is named as consignee in the bill, an interesting situation is presented. The object of the seller in reserving the property is, it may safely be assumed, simply to secure himself in regard to the performance by the buyer of the latter's obligations. By shipping the goods the seller has lost all use of them and has definitely appropriated them to his bargain with the buyer. If the shipper could be perfectly sure that the buyer would fulfill his obligation it can hardly be doubted that

any qualification." As the property in the goods passed to the buyer when thus received by the captain, the subsequent issue of a bill of lading to the shipper's order could not revest the property in him. So in *Bank of Litchfield v. Elliott*, 83 Minn. 469, 86 N. W. 454, a shipper of wheat was held to have appropriated the wheat to his principal so as to pass the property, although he took a bill of lading and sent it forward, with a draft attached, through a bank. On the facts, the correctness of the decision of this case may be questioned, but it at least indicates that the bill of lading cannot control a previously vested title. In *Walker v. First National Bank*, 43 Or. 102, 72 Pac. 635, wheat belonging to the plaintiff was converted into flour by the Athena

Flouring Mill Company which was storing it, and the flour was consigned to a purchaser in San Francisco. The bill of lading in which the purchaser was named as consignee was sent forward through the defendant's bank with a draft, on the purchaser, attached. The court held that the bank was not guilty of conversion in receiving the bill of lading and delivering it to the consignee on receiving payment of the draft, but not on the ground that the shipment to the consignee by a converter could operate to transfer the property, but rather on the ground that the bank had not so dealt with the property (being merely a collecting agent), as to make itself liable. See also *infra*, § 421.

⁸⁵ See *supra*, § 278, and cases cited.

he would have made a straight consignment to the latter. The effect of naming himself as consignee in the bill of lading should not be greater than is necessary to effectuate the purpose of the parties. This purpose is to reserve the property for security only—the same purpose that the seller of goods under a conditional sale has; the same purpose that a mortgagee who takes title under a common-law mortgage has. The importance of distinguishing between a title held merely for the purpose of security, and the ordinary case, where the seller retains the full rights of ownership, are, in the main, two-fold. In the first place the beneficial owner, not the one who holds for security, will be subject to the risk of loss or deterioration. Reasons will be given in connection with a later section of the Sales Act⁸⁶ for believing that the risk of loss should fall upon the buyer.⁸⁷ In the second place the buyer has more than a mere contract right in regard to the goods. His right is in its nature an equitable property right, similar to that of a mortgagor in jurisdictions where the mortgagee is conceived of as having the legal title. If one who contracts to sell goods wrongfully refuses to carry out the bargain by transferring the property, the buyer has no redress other than an action for breach of contract. He has no property right in the goods and can avail himself of no action based upon ownership.⁸⁸ On the other hand an interest in property gives the seller a right to claim the goods themselves on satisfying his obligation. Therefore, if the seller refuses to turn over the goods by indorsing the bill of lading, or otherwise, when the price is tendered, the buyer may maintain an action for the goods themselves.⁸⁹ The

⁸⁶ Section 22.

⁸⁷ See *infra*, § 300 *et seq.*

⁸⁸ See *infra*, §§ 332, 598.

⁸⁹ *Mirabita v. Imperial Ottoman Bank*, 3 Ex. D. 164. In this case, Cotton, L. J., said: "There was an appropriation by the vendors of the cargo, subject only to payment of the price. This was tendered, and as it is conceded that the defendants were wrong in claiming anything more, the plaintiff, the purchaser, had offered to do all that was incumbent upon him to make the appropriation abso-

lute, and the property vested in him." It is true that in this case earlier decisions were distinguished and the court seemed to think that in the earlier cases the situation was different. It is submitted that in all the cases cited, if the action had been between buyer and seller merely, the proper tender by the buyer would have enabled him to assert the rights of an owner against the seller. Similarly in the case of a conditional sale where the seller retains title, a refusal to accept the price when prop-

views here expressed (and stated in the Sales Act) as to the security title of the seller have not been expressed in precisely this way by the courts, but the same idea underlies the statements found in various cases that the buyer has a special property in the goods.⁹⁰ The same principle is involved in the cases hereafter

erly tendered by the buyer gives the buyer not simply a right of action for breach of contract, but vests the ownership in the buyer. In *Carpenter v. Scott*, 13 R. I. 477, 479, speaking of such a sale, the court said: "Under it the vendee acquires not only the right of possession and use, but the right to become the absolute owner upon complying with the terms of the contract. These are rights of which no act of the vendor can divest him, and which, in the absence of any stipulation in the contract restraining him, he can transfer by sale or mortgage. Upon performance of the condition of the sale, the title to the property vests in the vendee, or, in the event that he has sold or mortgaged it, in his vendee or mortgagee, without further bill of sale. *Day v. Basset*, 102 Mass. 445, 447; *Crompton v. Pratt*, 105 Mass. 255, 258; *Currier v. Knapp*, 117 Mass. 324, 325, 326; *Chase v. Ingalls*, 122 Mass. 381, 383." See further, § 332.

⁹⁰In *Jenkyns v. Brown*, 14 Q. B. 496, *Klingender & Co.*, agents, purchased corn at New Orleans for the plaintiff, their principal, a London merchant. Purchase was made with *Klingender & Co.*'s money and they obtained a bill of lading for it, making the corn deliverable to their own order. This they indorsed, and having drawn a bill of exchange upon the plaintiff sold a bill of exchange to the defendants at New Orleans, handing them the bill of lading as security. The plaintiff was notified of this transaction and an invoice was sent to him. The court held the in-

ference from these facts was that *Klingender & Co.* did not transfer the property in the corn to the plaintiff subject to a lien, but only transferred the property to the plaintiff on the condition of his paying the bill of exchange, but in the meantime the corn was the property of the defendants. It will be observed that the analogy of conditional sale is here suggested in which the seller retains title to the goods until the price is paid. As to the interest of the defendants, *Coleridge, J.*, in delivering judgment of the court, said: "But we think that the defendants had a special property in the cargo, according to the intention of the parties as above stated, when the bill of lading was delivered to them." So in *Pollard v. Vinton*, 105 U. S. 7, 26 L. ed. 998, the court recognized that the consignor, by making the goods deliverable to himself, did not necessarily retain the entire interest in the goods. The court said: "In the hands of the holder it (the bill of lading) is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery." These words were quoted with approval in *McKelvey v. Perham*, 31 Mont. 602, 606, 79 Pac. 253. The same principle is involved in the case of *Browne v. Hare*, 3 H. & N. 484, 4 H. & N. 822. In this case the bill of lading made the goods deliverable to the consignor, and by the terms of the contract the price was payable on delivery of the bill of lading. It was admitted that the

considered where the goods are made deliverable to a third person, who by the terms of the arrangement is to transfer the bill of lading to the buyer on receiving payment or acceptance of a bill of exchange. In such cases, as will be seen, it has been clearly recognized both that the third person named as consignee in the bill of lading has the legal ownership of the goods, and also that the buyer has a special property in them, which may be defined either as the beneficial interest or equitable ownership subject to the payment of the debt, to secure which the legal title is retained.⁹¹ Where the seller has the bill of lading made out to himself as consignee, his purpose is identical with that which he has when by his direction the bill of lading names a third person as consignee, under such an arrangement as has just been mentioned, and the courts should place a similar construction upon the transaction. Just as the third person has the legal ownership, but only for the purpose of securing payment of the price, so where the seller has the bill of lading made out to himself as consignee, he also reserves the property only to secure to himself the payment of the price. In both cases all further interest in the goods is in the buyer.

§ 285. **Retention of bill of lading to the order of the buyer.**—(From what has already been said⁹² it follows that if the shipper in pursuance of authority previously given him by the buyer ships goods to the latter, naming him as consignee, the property passes to him on shipment. Where the bill of lading specifies a person as consignee, without the use of the word "order," the railroad issuing the bill usually does not require the surrender of the bill of lading by the consignee in order to get the goods, and the courts generally have recognized the validity of this custom of the railroad.⁹³ If, however, the bill of lading is made to

seller had a right to retain the bill of lading until the bill of exchange for the goods was accepted, yet the court held that the risk of loss was upon the buyer. It is true that the court said that the buyer had title, but it is submitted on the authority of the numerous decisions collected in § 283, that in fact the seller had legal title to the goods and that the

decision should properly rest on the ground that the buyer had the beneficial interest.

⁹¹ See *infra*, § 286.

⁹² *Supra*, § 282 *et seq.*

⁹³ *Nebraska Meal Mills v. St. Louis S. W. Ry. Co.*, 64 Ark. 169, 41 S. W. 810, 38 L. R. A. 358, 62 Am. St. Rep. 183; *Templeton v. Equitable Mfg. Co.*, 79 Ark. 456, 96 S. W. 188,

the order of the consignee, it is the custom of the railroads to require a surrender of the bill of lading before delivering the goods, and their failure to do so renders them liable to a holder of the bill.⁹⁴ Even though the order bill is stamped "not nego-

116 Am. St. Rep. 88; *Hardie v. Vicksburg, etc., Ry. Co.*, 118 La. 254, 255, 42 So. 793; *Forbes v. Boston, etc., R. R. Co.*, 133 Mass. 154; *Singer v. Merchants' Transportation Co.*, 191 Mass. 449, 77 N. E. 882, 114 Am. St. Rep. 635; *Bank of Litchfield v. Elliott*, 83 Minn. 469, 86 N. W. 454; *National Bank v. Atlantic, etc., Ry. Co.*, 25 S. C. 216, 224; *Greenwood Grocery Co. v. Canadian Elevator Co.*, 72 S. C. 450, 454, 52 S. E. 191, 2 L. R. A. (N. S.) 79; *Nashville, etc., Ry. Co. v. Grayson County Bank (Tex.)*, 93 S. W. 431; *Conley v. Canadian Pac. R. R. Co.*, 32 Ont. 258. But see *Barnum Grain Co. v. Great Northern R. R.*, 102 Minn. 147, 112 N. W. 1030, and *First Bank v. Northern R.*, 58 N. H. 203 (where the court seems of opinion that the carrier should require the surrender of all bills of lading); *Colgate v. Pennsylvania Co.*, 102 N. Y. 120, 6 N. E. 114 (where under a New York statute the court holds even straight bills must be taken up by the carrier unless they are stamped "not negotiable"); *Dwyer v. Gulf, etc., Co.*, 69 Tex. 707, 7 S. W. 504 (where the court holds, without apparently distinguishing between different forms of bills of lading, that a carrier may require production but not surrender of the document). This case is referred to and the carrier's right to demand production qualified by the possible condition that the carrier "had any good reason to doubt the consignee's right to receive the goods" in *Nashville, etc., Ry. Co. v. Grayson County Bank (Tex.)*, 93

S. W. 431; *First Nat. Bank v. Northern Pacific Ry. Co.*, 28 Wash. 439, 68 Pac. 965, where by local statute all bills of lading are made negotiable. In *George v. Louisville, etc., Ry. Co. (Miss.)*, 40 So. 486, it was held that the carrier, in the absence of special custom or contract had no right to demand the surrender of a bill of lading, the form of which does not appear, and was liable for damages caused by delay owing to such refusal.

⁹⁴ *Walters v. Western, etc., R. R. Co.*, 56 Fed. Rep. 369, 63 Fed. Rep. 391; *Tishomingo Institution v. Johnson, Nesbitt & Co.*, 146 Ala. 691, 40 So. 503; *Arkansas Southern Ry. Co. v. German Bank*, 77 Ark. 482, 92 S. W. 522; *Bass v. Glover*, 63 Ga. 745; *American Nat. Bank v. Georgia R. Co.*, 96 Ga. 665, 23 S. E. 898, 51 Am. St. Rep. 155; *Douglas v. People's Bank*, 86 Ky. 176, 5 S. W. 420, 9 Am. St. Rep. 276; *Wichita Bank v. Atchison, etc., R. R.*, 20 Kans. 519; *Atchison, etc., R. Co. v. Schriver*, 72 Kans. 550, 84 Pac. 119, 4 L. R. A. (N. S.) 1056; *Hopkins v. Cowen*, 90 Md. 152, 41 Atl. 1062, 47 L. R. A. 124; *Merchants' Bank v. Baltimore, etc., Steamboat*, 102 Md. 573, 63 Atl. 108, 111; *Chesapeake Steamship Co. v. Merchants' Bank*, 102 Md. 589, 63 Atl. 113; *Wright & Colton Co. v. Warren*, 177 Mass. 283, 58 N. E. 1082; *Ratzer v. Railroad Co.*, 64 Minn. 245, 66 N. W. 988; *Midland Bank v. Missouri Pacific Ry. Co.*, 132 Mo. 492, 33 S. W. 521, 53 Am. St. Rep. 505; *Schwarzschild, etc., Co. v. Savannah, etc., Ry. Co.*, 76 Mo. App.

liable.”⁹⁵ The reason of this distinction is obvious. If the bill is a straight bill, that is, if the goods are by its terms deliverable not to the order of the assignee but to the consignee simply, the railroad is unquestionably fulfilling its contract in delivering to the consignee so named. On the other hand, if, by the terms of the bill, the goods are to be delivered to the order of a person named, it cannot with certainty be determined who corresponds to this description unless the bill of lading itself is presented. By mercantile usage the word “order,” as used in a bill of lading, means as it does in a promissory note an order on the bill of lading itself by the indorsement of the person named on the face. The bills of lading ordinarily in use contain explicit statement that unless the word “order” is written on the bill, the property may be delivered by the carrier without the surrender of the bill, whereas if the word “order” is used, the surrender of the bill of lading properly indorsed is requisite for the delivery of the goods. It follows from this custom of the railroads, that if the seller takes a straight bill making the goods deliverable to the buyer, the retention of the bill of lading by the seller is useless. The buyer does not need the bill to get possession of the goods.⁹⁶ If, however, the bill of lading makes the goods deliverable to the order of the buyer, although

623; *Union Pac. R. Co. v. Johnson*, 45 Neb. 57, 63 N. W. 144, 50 Am. St. Rep. 540.

⁹⁵ *Merchants' Bank v. Baltimore, etc.*, Steamboat Co., 102 Md. 573, 63 Atl. 108; *Midland Bank v. Missouri, Kansas & Texas Ry. Co.*, 62 Mo. App. 531. See also *National Bank of Bristol v. Baltimore, etc., R. R. Co.*, 99 Md. 661, 59 Atl. 134, 105 Am. St. Rep. 321. But where a shipper, who had drawn for the price of the goods with bills of lading attached, entered into correspondence with the consignee to whom the railroad had delivered the goods and obtained from the consignee part of the price, this was held such a ratification of the railroad's delivery as to preclude an action against the railroad for con-

version. *Blowers v. Canadian Pacific Ry. Co.*, 155 Fed. Rep. 935. See further, *infra*, § 424.

⁹⁶ *Robinson v. Pogue*, 86 Ala. 257, 5 So. 685. In this case goods were sent forward in conformity with the contract with the purchaser. The bill of lading named the purchaser as consignee, but the seller sent the bill to his own agent in the city, where the buyer lived, to retain until the price was paid. The price was not paid and the bill of lading never delivered to the buyer, who, nevertheless, obtained the goods from the railroad and delivered them to a sub-purchaser who bought in good faith. It was held that the seller could not maintain detinue against this sub-purchaser.

the property in the goods passes to the buyer, he is unable to obtain the goods without the bill. The retention of the bill of lading, under such circumstances, controlling as it does the possession of the goods, is, therefore, closely analogous to the retention of a lien by the seller after the property has passed to the buyer. This is the effect of subsection (3) of section 14 of the Sales Act, which states the mercantile understanding of the situation, and that in general adopted by the courts in this country.⁹⁷ The distinction so sharply drawn in this country between order bills and straight bills does not seem to be observed in England.⁹⁸ As has already been said,⁹⁹ the use of bills of lading as indicative of the transfer of title seems to be confined to bills issued by water carriers, and it may be supposed that such carriers in England require a surrender of the bills whatever their form before the goods are delivered.

§ 286. **Effect of bill of lading where a third person is consignee.**

—Two devices have already been considered by which the seller of goods retains a hold upon them by means of the bill of lading after he has shipped them. First, by consigning the goods to himself, either by an order bill or a straight bill; second, by consigning the goods to the order of the buyer and retaining possession of the bill of lading. A third method, also in common use, is to consign the goods to a third person at the residence of the buyer, requesting this third person to retain the bill of lading or goods until payment of the price. When the price is paid the consignee of the goods indorses the bill or delivers the goods to the buyer. For the success of this third device it is immaterial, so far as the protection of the seller is concerned, whether the bill is or is not an "order" bill. If it is an "order" bill the carrier will not deliver the goods until it is surrendered,

⁹⁷ First Nat. Bank v. Crocker, 111 Mass. 163; Bank of Rochester v. Jones, 4 N. Y. 497, 55 Am. Dec. 290; Cayuga Bank v. Daniels, 47 N. Y. 631; Commercial Bank v. Pfeiffer, 108 N. Y. 242, 15 N. E. 311; Greenwood Grocery Co. v. Canadian Elevator Co., 72 S. C. 450, 52 S. E. 191, 2 L. R. A. (N. S.) 79.

See also Moakes v. Nicolson, 19 C. B. (N. S.) 290.

⁹⁸ The same view seems taken in First Bank v. Northern R., 58 N. H. 203, 204, but at the time of the decision of this case the custom of the railroads was doubtless neither fully developed nor widely recognized.

⁹⁹ *Supra*, § 282.

and the buyer cannot get it in order to make the necessary surrender except from the holder, the consignee. Even if it is not an "order" bill, however, the railroad, though it may not require the surrender of the bill of lading, will deliver only to the consignee, or to some one authorized by him to receive the goods. Accordingly the buyer is unable to get them except by obtaining an order from the holder of the bill of lading. The validity of this method of dealing is recognized in many cases.¹ The rights of the three parties concerned, the seller, the buyer, and the third person to whom the goods are consigned (who is usually a banker) may be thus analyzed: If the seller in sending the goods forward acts without previous authority from the buyer, he is in effect making an offer to the buyer of the goods shipped. By naming the third person as consignee of the bill, the seller vests a legal title in this third person, on the assent of the latter to act in the required capacity. This title of the third person is held merely for the benefit of the shipper, if the third person is the seller's agent only, and has not advanced money of his own to the seller. Frequently, however, the third person has, by discounting a draft drawn by the shipper, acquired a personal interest in the goods. This interest is simply to secure repayment of the money advanced. It is not, technically, a mortgage, but it is in legal effect analogous to a mortgage. The beneficial interest, the interest analogous to that of a mortgagor is still in the shipper. But it may be supposed that the seller in shipping the goods did so in compliance with a contract with the buyer, or an order from him. In this case, if the third person, the consignee, discounts a draft of the seller for the price, the seller's interest in the transaction is at an end, except in so far as the drawing of the draft may render him liable for the failure of the buyer to honor it. As before, the third person

¹Key v. Cotesworth, 7 Ex. 595; New Haven Wire Company Cases, 57 Conn. 352, 5 L. R. A. 300; s. c., sub nom., Baring v. Galpin, 18 Atl. 286; Moors v. Wyman, 146 Mass. 60, 15 N. E. 104; Moors v. Drury, 186 Mass. 424, 71 N. E. 810; Moors v. Bird, 190 Mass. 400, 77 N. E. 643;

Moors v. Kidder, 106 N. Y. 32, 12 N. E. 818; Drexel v. Pease, 133 N. Y. 129, 30 N. E. 732; Brown v. William Clark Co., 22 R. I. 36, 46 Atl. 239; National Bank v. Citizens' Bank (Tex. Civ. App.), 93 S. W. 209; Mershon v. Moors, 76 Wis. 502, 45 N. W. 95.

is the holder of the legal title for the purpose of security, but the beneficial interest, the interest corresponding to that of the mortgagor, is in the buyer, instead of in the seller as in the previous case, for the buyer has agreed to buy the goods in question and has authorized the seller to appropriate them to him. If the consignee does not discount a draft for the price, or make advances to the seller on the faith of the shipment, the consignee is a mere agent of the shipper, and what may be called the mortgage title given by the bill of lading is reserved by the seller and is held to secure his right to the price. The analysis thus given is, it is believed, warranted by the decisions and statements of the courts. That the consignee who has advanced money on the faith of the shipment is the owner of the goods has been recognized to the fullest extent.² It is equally true

² In *Farmers' & Mechanics Bank v. Logan*, 74 N. Y. 568, the plaintiff occupied the position of consignee for security of goods shipped by Sears & Daw, and one Brown was the prospective purchaser for whose benefit the shipment was made. The court said: "Here, the wheat is bought by Sears & Daw for Brown, but, on the instant, the property in it is, by the bill of lading, vested in the plaintiff, but as an indemnity, and charged with a trust that it be sold, if not paid for by Brown, and the avails applied to repay the advance made upon it. In analogy with the decision in the case cited, why is not the risk upon Brown, and the profit or the loss his, though he have not the property in the wheat? It cannot be successfully contended that, until Brown paid the draft, he could have maintained an action for the delivery of the wheat, had the plaintiff retained it. He could not have shown that he ever had right to possession, or right to the dominion over it, to the exclusion of all others. 'So long as the advances were not paid, there was no theory

whereby' Brown 'could claim title. It had never been in' him. 'At the moment his interest, whatever it was, accrued, it came burdened with the formal ownership of the plaintiff.' *Bank of Toledo v. Shaw*, 61 N. Y. 283. Had Sears & Daw advanced the money as factors, in compliance with the order of their principal and giving him credit, the purchase would have been for him at once, and he would, at the instant, have become the owner of the thing bought. But the facts are far otherwise, and must not be lost sight of. At the outset, as one of the first steps in the process, the legal title was lodged in the plaintiff, not to leave it until the payment by Brown of the draft. Thus the case is kept out of the law governing the relations of pledgor and pledgee. The plaintiff was not a pledgee of the property of Brown. It had a right to it, not the qualified and special property of one holding, as a security, a chattel belonging to another. It had the legal title, under an agreement to transfer it on payment being made; it 'held the title in trust for' Brown, 'after its own

that this ownership is qualified. There may be disagreement as to the name which most accurately describes the kind of ownership, but that it is qualified is settled.³

claim was satisfied,' 61 N. Y. 283." In Moors v. Kidder, 106 N. Y. 32, the defendants, as agents for Baring Brothers, advanced money for the purchase of a cargo to be shipped for account of one Swain, but with the bills of lading to the order of Baring Brothers. The court said: "It is further quite evident that from the moment of the shipment and the delivery of the bill of lading, the absolute *jus disponendi* was in Kidder, Peabody & Co., by the very terms of Swain's agreement. They were at liberty to 'dispose' of the property 'at discretion,' and either for 'security' or reimbursement. It is also to be noted that what is spoken of as 'pledged' is not merely the goods or the property, but the bills of lading also. These documents carry the title as well as the right of possession, and the pledge or hypothecation is expressly applied to both. The meaning, assuredly, was that the title should pass. Very likely, as is suggested for the defendant, the transfer was rather in the nature of a mortgage in which the title passes than in that of a pledge in which the pledgor is general owner. Here, then, we have a case where no title was attempted to be given to Swain, where it was given to the Barings by the bill of lading to them, where they paid for the property by their own credit and money, where it was the very pith of the adventure that the shellac should furnish the means of meeting the price, where the invoice was to be made to their order, where the possession was to be theirs, where they were to have the right of disposal at discretion, and Swain was to have no control until payment of the

draft. In such a case he could not be general owner, and an inference to that effect from an inapt expression cannot be indulged. So far the case, in our judgment, cannot be distinguished from that against Logan, upon the authority and reasoning of which the Barings must be deemed owners, and not merely pledgees." That the third person making advances and named as consignee is the owner is further established by New Haven Wire Company Cases, 57 Conn. 352, 5 L. R. A. 300; s. c., *sub nom.*, Baring v. Galpin, 18 Atl. 266; Moors v. Drury, 186 Mass. 424; Mershon v. Moors, 76 Wis. 502, 45 N. W. 95; and the position of a bank which at the instance of a consignee takes up a draft drawn upon him obtaining as security the accompanying bill of lading is similar; that is, the bank is, so far as is necessary to protect its advances, the owner of the goods. Walters v. Western, etc., R. Co., 66 Fed. Rep. 862, 14 C. C. A. 267, 30 U. S. App. 25.

³ In Moors v. Kidder, 106 N. Y. 32, the court said: "Very likely as is suggested for the defendant the transfer was rather in the nature of a mortgage in which the title passes than in that of a pledge in which the pledgor is general owner." Though the consignee making advances is thus regarded as a mortgagee and it is submitted that this is a correct description of his relation to the property, he is not a mortgagee in any narrow sense, and would not be within the statutory designation of a mortgagee whose mortgage must be recorded or who must sell the mortgaged property according to specified methods. Moors v. Drury, 186 Mass. 424. In this

§ 287. Effect of direction in bill of lading to notify purchaser.—

Where the bill of lading names as consignee some person other than the buyer, it is important that the buyer should have means of knowing when the goods arrive. It is generally the custom of carriers to notify consignees of the arrival of goods at their

case the court held that the security holder did not have to comply with the statutory requirements for the disposition of mortgaged property of an insolvent debtor. Doubtless the decision is right, but the court adds (p. 425): "We consider it well settled that under circumstances similar to those in this case, a banker making advances and retaining the title is an owner and not a mortgagee or pledgee." The Massachusetts court when it said this, however, could not mean that if the banker were tendered the amount of his advances by the person for whose account the goods were shipped, he would not be bound to surrender the goods though he had no contractual relation with the claimant. The latter's right, therefore, must be a property right if it exists at all. That such a right does exist was decided in the case of *Mirabita v. Imperial Ottoman Bank*, 3 Ex. 164, and is clearly stated in *Forty Sacks of Wool*, 14 Fed. Rep. 643, 645. where Lowell, J., speaking of the right of a buyer, one Mooney, under such circumstances said: "No doubt the buyer has an equitable title. If the bankers, for example, had sold the goods and indorsed the bill of lading to a stranger, Mooney might have recovered of them whatever the goods were worth above the original cost." So in *Walters v. Western, etc.*, R. Co., 63 Fed. Rep. 391, 392, Newman, J., said: "Where a time draft is drawn by the consignor of goods and attached to a bill of lading for the goods, and the draft is sent to a bank for collection at the place to

which the goods are consigned, an acceptance by the drawee entitles him to have the bill of lading delivered to him." The whole matter is well summed up in *Drexel v. Pease*, 133 N. Y. 129, 136. The court said: "The doctrine is that where a commercial correspondent advances his own money or credit for a principal for the purchase of property for such principal, and takes the bills of lading in his own name, looking to the property as security for reimbursement, such correspondent becomes the owner of the property, instead of the pledgee, up to the moment when the original principal shall pay the purchase price, and the correspondent occupies the position of an owner under a contract to sell and deliver when the purchase price is paid. This doctrine is stated in *Moors v. Kidder*, 106 N. Y. 32, and founded upon the cases cited by Finch, J., in that case. Nothing therein gives color to the idea that the correspondent's ownership is of that character which would permit his exaction, even though agreed to by the principal, of a general lien upon the property for other and prior indebtedness of the principal as against one in the situation of *St. Amant*. The correspondent's position is one of ownership so far only as is necessary to secure him for the advances he made upon the merchandise described in the bill of lading, and in such a case as this he is bound to sell upon receipt of the purchase price from the principal, or, in other words, upon receipt of the amount he advanced upon its credit.

destination,⁴ but if the shipper is, himself, named as consignee, the notification of the buyer will be much delayed if it has to come from information first given to the shipper. Even if the consignee is a third person who resides in the same place as the buyer, it may be advisable not to trust to a notification sent to the consignee alone. For these reasons it is common to insert in such bills a direction to notify the buyer. Such a direction doubtless indicates that the person to be notified has an interest in the goods, but it is not equivalent to naming him as consignee; it rather suggests that he is not to be allowed possession of the goods until payment is made to the consignee. Accordingly the carrier may refuse to deliver to the person to be notified unless authorized by the consignee, and indeed if the carrier without such authority should deliver the goods to the person to be notified, he is liable for so doing.⁵ If, however, the person to be notified does in fact make proper settlement for the price of the goods with the person entitled to receive it, the carrier is freed from liability for making such a delivery.⁶

In no other sense is the correspondent the owner of the property." See also *Walters v. Western, etc., R. Co.*, 66 Fed. Rep. 862, 14 C. C. A. 267, 30 U. S. App. 25.

⁴ Though in the absence of local custom the carrier may not be bound to do so. *Ross v. Chicago, etc., Ry. Co.*, 110 Mo. App. 290. See also *Elliott, Railroads*, § 1527.

⁵ *Northern Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 8 S. Ct. 266, 31 L. ed. 287; *Southern R. Co. v. Atlanta National Bank*, 112 Fed. Rep. 861, 56 L. R. A. 546, 50 C. C. A. 558; *Tishomingo Institution v. Johnson, Nesbitt & Co.*, 146 Ala. 691, 40 So. 503; *Arkansas S. R. Co. v. German Nat. Bank*, 77 Ark. 482, 92 S. W. 522, 113 Am. St. Rep. 160; *Raleigh, etc., R. Co. v. Lowe*, 101 Ga. 320, 28 S. E. 867; *Florida Central R. R. Co. v. Berry*, 116 Ga. 19, 42 S. E. 371; *Atchison Elec. R. Co. v. Schriver*, 72 Kans. 550, 84 Pac.

119, 4 L. R. A. (N. S.) 1056; *Illinois C. R. Co. v. Southern Bank*, 41 Ill. App. 287; *Hopkins v. Cowen*, 90 Md. 152, 44 Atl. 1062, 47 L. R. A. 124; *Libby v. Ingalls*, 124 Mass. 503; *Wright & Colton Co. v. Warren*, 177 Mass. 283, 58 N. E. 1082; *Union Stock Yards Co. v. Westcott*, 47 Neb. 300, 66 N. W. 419; *First Bank v. Northern R. Co.*, 58 N. H. 203; *Bank of Commerce v. Bissell*, 72 N. Y. 615; *Farmers' & Mechanics Bank v. Logan*, 74 N. Y. 568; *Furman v. Union Pac. R. R.*, 106 N. Y. 579, 587, 13 N. E. 587. See also *Sloan v. Carolina, etc., Ry. Co.*, 126 N. C. 487, 36 S. E. 21; *Wright v. Northern C. R. Co.*, 8 Phila. 19; *Joslyn v. Grand Trunk Ry.*, 51 Vt. 92.

⁶ In *Witt v. East Tennessee, etc., R. Co.*, 99 Tenn. 442, 41 S. W. 1064, this was so held and, it seems, correctly. Although the bank which received the price as agent for the shipper became insolvent and failed to

§ 288. **Effect of bill of lading in other form.**—Bills of lading are not commonly made out to bearer, as strictly negotiable paper frequently is. There seems reason to suppose, however, that if a bill were made out in this form the carrier would be justified in delivering to the bearer of the bill, and that a transfer of the bill by delivery would have the same effect as the transfer by indorsement of a bill made to the order of a consignee.⁷ Negotiable paper which is blank as to the payee's name has similar effect as if made payable to bearer. The same may be supposed to be true in regard to a bill of lading where no consignee is named.⁸ Occasionally bills of lading are drawn to the consignee in care of another. Thus the seller may consign goods to the buyer in his own care. The object of this mode of shipment seems to be similar to that which is better accomplished by adding to a bill of lading, which names the shipper as consignee, a direction to notify the buyer. Doubtless, however, the courts would require the carrier to recognize the apparent intention to retain a hold upon the goods where the former method is adopted.⁹

remit the price, the wrongful act of the carrier in delivering the goods prematurely did not cause the seller's loss which would have occurred had the carrier held the goods until the price was fully paid. The case of *General Electric Co. v. Southern R. R. Co.*, 72 S. C. 251, 51 S. E. 695, seems, perhaps, inconsistent with this decision. It was held that so much of the carrier's answer should be struck out as alleged that the goods were shipped on a conditional sale with the intention of having them delivered to the person to be notified on payment of a draft for a portion of the price sent through a bank for collection, and that this portion of the price was received by the carrier when the goods were delivered and was tendered to the plaintiff. Judgment for the full value of the goods was given against the carrier.

⁷ In *Jones v. Brewer*, 79 Ala. 545, the bill of lading contained the addition "deliver to bearer." In *Allen v. Williams*, 12 Pick. 297, the bill of lading ran to a specified consignee "or bearer."

⁸ In *Furman v. Union Pac. R. Co.*, 106 N. Y. 579, 13 N. E. 587, no consignee was named and the court said that the bill of lading must be produced in order to justify delivery by the carrier.

⁹ In *Village of Bellefontaine v. Vassaux*, 55 Ohio St. 323, 45 N. E. 321, the goods were consigned by the bill of lading to the buyer in care of the seller's agent, and it was held under these circumstances the place of delivery of the goods was the storehouse of the latter, and that the buyer had no immediate right to the goods. See also *Arkansas Southern Ry. Co. v. German Bank*, 77 Ark. 482, 92 S. W. 522, 113 Am. St. Rep. 160.

§ 289. **Bill of lading sent forward with bill of exchange.**—In whatever form the shipper may take the bill of lading in order to retain a hold upon the goods, it is essential that some method be used by which this hold can be released as soon as the buyer's obligation in regard to the price is satisfied. This can be done by sending the bill of lading to an agent, who resides in the same place as the buyer, with oral instruction to deliver the bill of lading properly indorsed, if indorsement is necessary, upon payment by the buyer of the price. More commonly, however, instead of leaving the matter for negotiation with the agent, the seller draws a draft for the price upon the buyer and attaches thereto the bill of lading. The seller may or may not discount the draft, accompanied by the bill of lading, to secure its payment. Sometimes he discounts the draft at his own bank and this bank sends forward the two documents to its correspondent bank in the place where the buyer resides. If the seller is not anxious for an immediate advance upon the goods, or if his bank is unwilling to discount the draft, he may himself send forward the documents to the bank or to some other person at the residence of the buyer. So common has this practice become that the mere fact that a bill of lading and a draft are attached together indicates that the shipper intends to make the delivery of the goods conditional upon the payment of the draft. This rule is accordingly enacted in the English Sale of Goods Act and the English provision is copied in the American Sales Act.¹⁰ The authorities collected in the note show that the courts have fully recognized the meaning and validity of the mercantile custom.¹¹ In carrying out

¹⁰ Subsection (4) of § 20.

¹¹ *Turner v. Trustees of Liverpool Docks*, 6 Ex. 543; *Jenkyns v. Brown*, 14 Q. B. 496; *Shepherd v. Harrison*, L. R. 5 H. L. 116; *Ogg v. Shuter*, 1 C. P. D. 47 (C. A.); *Rew v. Payne*, 53 L. T. 932; *Cahn v. Pockett's Channel Co.*, [1899] 1 Q. B. 643 (C. A.); *Dows v. Nat. Exchange Bank*, 91 U. S. 618, 630, 23 L. ed. 214; *Seeligson v. Philbrick*, 30 Fed. Rep. 600; *Schreiber v. Andrews*, 101 Fed. Rep. 763, 41 C. C. A. 663, affg. *Andrews v. Schreiber*, 93 Fed. Rep.

367; *Portland Flouring Co. v. British, etc., Ins. Co.*, 130 Fed. Rep. 860, 65 C. C. A. 344; *Arkansas Southern Ry. Co. v. German Bank*, 77 Ark. 482, 92 S. W. 522, 113 Am. St. Rep. 160; *Ramish v. Kirschbraun*, 107 Cal. 659, 661, 40 Pac. 1045; *Giffen v. Selma Fruit Co.*, 5 Cal. App. 50, 89 Pac. 855; *Mathewson v. Belmont Mill*, 76 Ga. 357; *Erwin v. Harris*, 87 Ga. 333, 13 S. E. 513; *Cragun v. Todd*, 131 Iowa, 250, 108 N. W. 450; *Halsey v. Warden*, 25 Kans. 128; *Kentucky Refining Co. v. Globe Refining Co.*, 104

the device in question it is customary to send the bill of lading with the draft attached thereto to some person other than the buyer, and it will be readily seen that this is the only safe method, for if the bill of lading and draft are sent directly to the buyer the latter may obtain the goods without paying the draft, and the seller, even if he has a good right of action against the buyer on this account, is compelled to enter upon litigation in order to enforce his rights, whereas if the bill of lading and draft are sent through a third person the buyer is unable to obtain the goods without paying the price. It does not follow, however, ~~that be-~~ cause the seller is not fully protected by sending the bill of lading and draft directly to the buyer that no condition is imposed by so doing. On the contrary it seems clear that where the two documents are sent together, the fair construction to be put upon the seller's conduct is that he makes a conditional offer, an offer of the bill of lading conditional upon the acceptance of the draft. Accordingly the English act provides,¹² and the provision is copied in the American Sales Act,¹³ that the transmission to the buyer of a bill of lading and bill of exchange binds the buyer to return the bill of lading if he does not honor the bill of exchange.¹⁴ The case must be sharply distinguished if the seller, instead of transmitting the bill of lading and bill of exchange together, sends the bill of lading directly to the buyer,

Ky. 559, 47 S. W. 602, 42 L. R. A. 353, 84 Am. St. Rep. 408; *First Bank v. Crocker*, 111 Mass. 163; *Stollenwerck v. Thacher*, 115 Mass. 224, 226; *McArthur Co. v. Old Second Bank*, 122 Mich. 223, 81 N. W. 92; *Freeman v. Kraemer*, 63 Minn. 242, 65 N. W. 455; *Scharff v. Meyer*, 133 Mo. 428, 34 S. W. 858, 54 Am. St. Rep. 672; *Marine Bank v. Wright*, 48 N. Y. 1; *Emery's Sons v. Irving Bank*, 25 Ohio St. 360, 18 Am. Rep. 299; *Greenwood Grocery Co. v. Canadian Elec. Co.*, 72 S. C. 450, 52 S. E. 191, 2 L. R. A. (N. S.) 79; *Bank v. Cummings*, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618; *Grayson County Bank v. Nashville, etc., Ry.* (Tex. Civ. App.), 79 S. W. 1094.

¹² Section 19 (3).

¹³ Section 20 (4).

¹⁴ The extraordinary inference is drawn from this provision by the editors of the last edition of Benjamin, Sale (5th Eng. ed.), 395, that a transmission to the buyer of the bill of lading, together with a bill of exchange drawn by a third party, will not suspend the passing of property. It is true the statute does not expressly cover this case, but the analogy is perfect between it and the case for which the statute does expressly provide, and as the statute contains no provision one way or the other, this analogy should clearly lead a court to hold that the same condition is imposed in both cases.

notifying the latter of a bill of exchange drawn simultaneously which is to be forwarded through a bank. In the nature of the case where the documents are sent separately by different channels, they cannot be expected to arrive at the same time. Under such circumstances, therefore, there is no reason to suppose that the seller intended to make the delivery of the bill of lading conditional upon the honoring of the bill of exchange. The essential point to observe is whether the bill of lading and bill of exchange are sent together, in which case the mere fact of their joinder indicates an intent to impose a condition upon the delivery of the bill of lading, or whether the documents are sent separately, in which case no such inference is permissible. It has sometimes been supposed that the essential question is whether the documents were transmitted directly to the buyer or sent through a third person,¹⁵ but this seems clearly wrong on principle because it is as evident that the seller does not mean to allow the buyer to have the bill of lading when he sends it to him directly with the bill of exchange attached, as when he sends it to him indirectly to a third person. Where, however, the two documents are sent through different channels the inference that concurrent conditions are intended is not possible.¹⁶

§ 290. **Whether a draft attached to a bill of lading must be paid or only accepted before surrender of the bill of lading.**—Though it is well settled that the attachment of a bill of exchange to a bill of lading indicates, without any express statement to that effect, a condition imposed upon the delivery of the bill of lading, what that condition is has been the subject of some litigation. It has been authoritatively decided that if the bill of exchange is payable on time, the bank or other person to whom the bill of lading and bill of exchange has been sent may properly surrender the bill of

¹⁵ Benjamin, Sale (5th Eng. ed.), p. 394, relying upon *Ex parte Banner*, 2 Ch. D. 278 (C. A.).

¹⁶ *Key v. Cotesworth*, 7 Ex. 595 (in this case Kilgour & Leith of Glasgow, desiring to buy Madras silk handkerchiefs from the plaintiffs, arranged with the defendants to supply money for that purpose. The defendants

agreed with the plaintiffs to accept a bill of exchange on bills of lading being forwarded to the defendants' order. The plaintiffs accordingly filed the order of Kilgour & Leith and forwarded bills of lading in a letter which contained also a notice that a bill of exchange for the price had been drawn. The bill of exchange

lading on acceptance (without payment) of the bill of exchange.¹⁷ It has, however, been decided in a few cases that if the bill of

was sent to the plaintiff's correspondent in London, who caused it to be presented to the defendants for acceptance. It was, however, dishonored because, Kilgour & Leith having got into financial difficulties, the defendant claimed the right to retain the goods covered by the bills of lading as security for a previous indebtedness of Kilgour & Leith. The plaintiffs brought *assumpsit* for the proceeds of the goods which had been sold by the defendants. The plaintiff was, however, nonsuited and a rule for a new trial was discharged. Parke B., delivered the opinion of the court, and held that the property vested in Kilgour & Leith, or in the defendants as agents of Kilgour & Leith absolutely, subject to no condition. It is clear from later American decisions, cited *supra*, § 286, that title vested in the defendants and that the right of Kilgour & Leith was equitable or beneficial only. But the decision seems sound for the reason that the plaintiffs manifested no intention to make the right of the defendants conditional upon acceptance by them of the bill of exchange, and, therefore, the plaintiffs had lost all property in the goods. If, however, instead of suing for the proceeds of the goods, the plaintiffs had sued for breach of an agreement to accept the bill of exchange, they should have recovered judgment. The receipt and retention of the bill of lading was a clear acceptance by the defendants of the terms of the arrangement with the plaintiffs even apart from previous assent); *Ex parte Banner*, 2 Ch. D. 278 (C. A.) (in this case Christiansen & Co. shipped from Para goods to Tappenbeck & Co. in Liverpool. In accordance with a pre-

vious course of dealing, Christiansen & Co. drew bills of exchange on Tappenbeck & Co. and discounted them at Para. With the proceeds they purchased goods which they consigned to Tappenbeck & Co., and sent the bills of lading and invoices by mail directly to them, notifying them at the same time of the drafts which had been discounted. Both firms became bankrupt while goods were on the way to Liverpool, and it was held that these goods belonged to the estate of Tappenbeck & Co., and that the creditors of Christiansen & Co. could not have the proceeds of the goods applied to the drafts drawn for their cost. The court properly distinguished *Shepherd v. Harrison*, L. R. 5 H. L. 116, and suggested that the shipper should have taken the bill of lading to his own order and forwarded it to his own agent. The decision seems entirely sound but the method which the court suggests for the protection of the seller, though the most complete possible, seems not to be the only way in which the shipper could indicate an intention to make the right of the buyer conditional upon acceptance of a draft for the price. Had the drafts been attached to the bill of lading, even though both had been sent directly to Tappenbeck & Co., an intention to retain a hold upon the goods until the drafts were paid would have been manifested, and this intention should be effectual between the parties and those who stand in the same position).

¹⁷ In *Shepherd v. Harrison et al.*, L. R. 4 Q. B. 493, Lord Cockburn said: "The authorities are equally good to show, when the consignor sends the bill of lading to an agent in this country to be by him handed

lading makes the goods deliverable to the consignor, it indicates *prima facie* an intention that the bill of lading shall not be surrendered until the bill of exchange is paid, even though the latter be a time bill.¹⁸ The doctrine of these cases seems indefensible as well as inconsistent with the decisions previously

over to the consignee, and accompanies that with bills of exchange to be accepted by the consignee," that that "indicates an intention that the handing over of the bill of lading, and the acceptance of the bill or bills of exchange, should be concurrent parts of one and the same transaction." The question was elaborately considered in *National Bank of Commerce v. The Merchants' Bank*, 91 U. S. 92, 23 L. ed. 208. The court reached the same result and said: "The opinions we have suggested are supported by other very rational considerations. In the absence of special agreement, what is the consideration for acceptance of a time draft drawn against merchandise consigned? Is it the merchandise? or is it the promise of the consignor to deliver? If the latter, the consignor may be wholly irresponsible. If the bill of lading be to his order, he may, after acceptance of the draft, indorse it to a stranger, and thus wholly withdraw the goods from any possibility of their ever coming to the hands of the acceptor. Is, then, the acceptance a mere purchase of the promise of the drawer? If so, why are the goods forwarded before the time designated for payment? They are as much, after shipment, under the control of the drawer, as they were before. Why incur the expense of storage and of insurance? And if the draft with the goods or with the bill of lading be sent to a bank for collection, as in the case before us, can it be incumbent upon the bank to take and maintain custody of the property sent

during the interval between the acceptance and the time fixed for payment? (The shipments in this case were hundreds of bales of cotton.) Meanwhile, though it be a twelve-month, and no matter what the fluctuations in the market value of the goods may be, are the goods to be withheld from sale or use? Is the drawee to run the risk of falling prices, with no ability to sell until the draft is due? If the consignment be of perishable articles—such as peaches, fish, butter, eggs, etc.—are they to remain in a warehouse until the term of credit shall expire? And who is to pay the warehouse charges? Certainly not the drawees. If they are to be paid by the vendor, or one who has succeeded to the place of the vendor by indorsement of the draft and bill of lading, he fails to obtain the price for which the goods were sold." The same result has been reached in other cases: *Walters v. Western, etc., R. Co.*, 63 Fed. Rep. 391, 392; *Woolen v. Erie Bank*, 12 Blatchf. 359; *Commercial Bank v. Chicago, etc., Ry. Co.*, 160 Ill. 401, 43 N. E. 756; *Lanfear v. Blossman*, 1 La. Ann. 148; *Moore v. Louisiana Nat. Bank*, 44 La. Ann. 99, 10 So. 407; *Marine Bank v. Wright*, 48 N. Y. 1.

¹⁸ *Security Bank of Minnesota v. Luttgen*, 29 Minn. 363, 13 N. W. 151; *Bank v. Cummings*, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618. See also *Newcomb v. Boston, etc., R. Corp.*, 115 Mass. 230; *McArthur Co. v. Old Second Bank*, 122 Mich. 223, 81 N. W. 92.

cited. There seems no reason to distinguish in this matter between a case where the bill of lading makes the goods deliverable to the order of the buyer, and where it makes the goods deliverable to the order of the seller. It is true that in the one case the seller retains only a right of possession analogous to a lien, whereas in the other case he retains title, but in both cases alike he retains an effective hold upon the goods and the question is, When does he intend to surrender it? The reasoning quoted in a previous note from the Supreme Court of the United States¹⁹ seems conclusively to show that the intention must be presumed to retain the disposition of the goods only until the draft is accepted. No doubt the seller, if he chose, could impose an express condition that the bill of lading, whatever its form, should not be surrendered until the draft was paid.²⁰ If the bill of exchange which goes forward with the bill of lading is payable on demand, it is equally clear that the bill of lading should not be surrendered until the bill of exchange is paid, not merely accepted; for such a bill does not call for acceptance when first presented, it should be paid.²¹ A more troublesome case is that where the bill of exchange is drawn at sight in places where the rule of the common law (now changed in many States by the Negotiable Instruments Law), still prevails that a sight draft is entitled to days of grace. Probably a reasonable interpretation of a transaction where a bill of lading accompanies a sight draft even in such a community is that the seller intends to require payment of the draft before the bill of lading is surrendered. A sight draft is not usually regarded as a time draft, and the period of grace is so short that it can hardly be supposed that a sale on credit was intended.²² It may be urged that the difference is very slight between such a case and that of a draft payable in a very short

¹⁹ *Supra*, note 17.

²⁰ *National Bank of Commerce v. Merchants' Bank*, 91 U. S. 92, 94, 23 L. ed. 208; *Stollenwerck v. Thacher*, 115 Mass. 224.

²¹ See cases cited in the notes to this and the preceding section.

²² This was so held in *McArthur Co. v. Old Second Bank*, 122 Mich. 223, 81 N. W. 92. See also *Walters v.*

Western, etc., R. Co., 63 Fed. Rep. 391; *Commercial Bank v. Chicago, etc., Ry. Co.*, 160 Ill. 401, 409. 43 N. E. 756. In *National Bank of Commerce v. Merchants' Bank*, 91 U. S. 92, 23 L. ed. 208, one of several drafts there in question was a sight draft. The opinion of the court does not, however, make any specific reference to this draft.

time. This may be conceded, and it is undoubtedly a question of fact whether or not the reasonable inference from the transaction is that a sale on credit was intended,²³ and if the time named is extremely short it is fairly arguable that the rule applicable to drafts on longer time does not apply.

§ 291. **Effect of intention at variance with form of the bill of lading.**—It is universally admitted that the form of the bill of lading is at least strong evidence of the intent of the seller in regard to the transfer or retention of the property.²⁴ The courts have generally been disposed, however, to assert that this evidence was not conclusive.²⁵ So far as any litigation between the original parties to the transaction is concerned, this rule merely amounts to this, that the parol evidence rule does not debar the parties from showing their actual intent, whatever the form of the bill of lading, and such, no doubt, is the law.²⁶ It is the mer-

²³ In *Lanfear v. Blossman*, 1 La. Ann. 148, the draft was payable one day after sight, but the court held that the buyer was entitled to the bill of lading on his offer to accept the draft, and that the draft could not be treated as dishonored when the drawee refused to accept it unless the bill of lading was concurrently surrendered to him.

²⁴ See *supra*, § 282.

²⁵ *The Carlos F. Roses*, 177 U. S. 655, 20 S. Ct. 803, 43 L. ed. 929; *Bank of Litchfield v. Elliott*, 83 Minn. 469, 86 N. W. 454; *Neimeyer Lumber Co. v. Burlington R. R. Co.*, 54 Neb. 321, 74 N. W. 670, 40 L. R. A. 534, and cases cited; *Straus v. Wesel*, 30 Ohio St. 211; *Greenwood Grocery Co. v. Canadian Elevator Co.*, 72 S. C. 450, 453, 52 S. E. 191, 2 L. R. A. (N. S.) 79.

²⁶ *First National Bank v. Ege*, 109 N. Y. 120, 16 N. E. 317, 4 Am. St. Rep. 431 (in this case one Williams shipped goods to the defendant and sent a bill of lading in which the defendant was named as consignee directly to the defendant. A dupli-

cate bill of lading was pledged to secure a draft on the defendant discounted by the plaintiff bank before the defendant received the bill sent to him, and the defendant had notice of this fact. The defendant refused to accept the draft and nevertheless obtained the goods. It was held he was liable for the value of the property. It was evidently the intention of the shipper, as the defendant had cause to know, that the property in the goods or a lien upon them should be retained to secure the draft, though the means which the shipper took to carry out the intention were inadequate, since he not only consigned the goods to the defendant but sent him the bill of lading. The defendant could not claim a larger right against the shipper than his agreement with the shipper warranted, and the plaintiff succeeded to the rights of the shipper. The court said: "By taking a transfer of a bill of lading from the consignor and discounting a draft upon the faith thereof, the plaintiff acquired title to the property described therein to the extent of the

cantile understanding, however, that a purchaser of a bill of lading may justifiably rely upon the form of the bill as indicating title to the goods. The rights of third persons in goods and in documents of title will hereafter be considered at length.²⁷ In order to avoid misapprehension, however, it is necessary at this point, though somewhat out of logical sequence, to call attention to the difference in the situation where a purchaser for value from the seller is involved. The doctrine of the common

draft discounted by it, paramount to the claims of any other party. This would clearly be so unless such party had in good faith parted with value in reliance upon the possession of the property lawfully acquired"); *Commercial Bank v. Pfeiffer*, 108 N. Y. 242, 15 N. E. 311, and cases therein cited. In *Hilmer v. Hills*, 138 Cal. 134, 70 Pac. 1080, the seller shipped goods to the plaintiff who had agreed to buy them. It was agreed that the seller should draw on the buyer for the price, with the bill of lading attached, sending the draft and bill of lading forward so as to reach the plaintiff about the time that the goods arrived. By mistake the seller sent the bill of lading, naming the plaintiff as consignee, directly to the plaintiff with the invoice. The draft for the price was shortly afterward sent forward but was later recalled. While the goods were in transit a broker, through whom the seller had made previous sales, objected to a sale being made without his intervention, and in consequence of his objection the seller diverted the goods to the broker. The plaintiff brought action against both the seller and the broker for this diversion. It was held the action could not be maintained. The court held that the parties intended to make the transfer of title conditional upon the payment of the price, a condition which had not happened. No tender of the price had been made by

the plaintiff. (Had such a tender been made it is submitted that the plaintiff should have recovered. See *Mirabita v. The Imperial Ottoman Bank*, 3 Ex.D. 164, stated *supra*, § 283, note 81.) The goods were shipped directly to the buyer and, therefore, even had the bill of lading been retained and attached to the draft, the seller would thereby have retained a right in the nature of a lien rather than title. This lien would have been discharged by the tender. Even though the plaintiff made no tender, the case is not wholly free from difficulty. The seller doubtless was justified by the original bargain between the parties in making delivery conditional on payment of the price, but in fact he consigned the goods directly to the buyer and sent him the bill of lading. If this was by mistake, it was a mistake which the seller did not try to rectify immediately, and if the plaintiff had no reason to suppose when he received the bill of lading that a mistake had been made, it would seem as if the seller had waived the protection which he was entitled to retain. It is said in the opinion, however, "it seems to be conceded that the bill of lading having been forwarded by mistake, the case should be treated as if the bill had been attached to the draft." This concession disposes of the objection suggested.

²⁷ See *infra*, § 405 *et seq.*

law is simply that if the seller of goods has not title he cannot confer it. This doctrine is, however, qualified by principles of estoppel, which should apply in the case of the transfer of bills of lading. Therefore, if a shipper takes a bill of lading negotiable in form, under which the goods are deliverable to the order of another, the shipper should not be allowed to dispute the effectiveness of a transfer of the bill by the person to whose order he himself had it made out. Similarly if he has the bill made out to his own order and indorses the bill in blank and delivers it to another, he should not be allowed to dispute the title of a purchaser for value to whom the document has been transferred. The whole basis of estoppel is the justifiable belief of an actor that the words or conduct of the person estopped bear a certain meaning. If it is the custom of merchants to regard the form in which an order bill of lading is taken as indicative of title, purchasers are justified in believing in a particular case that the title is accurately indicated. These principles do not apply with the same force to straight bills, for such bills, for reasons already given,²⁸ could not safely be and are not, in fact, generally bought and sold as representing the goods. Some consequences of the views here expressed will be found in the following section.

§ 292. **Effect of buyer's obtaining possession of bill of lading without accepting draft.**—It sometimes happens, even though the bill of lading with a draft attached is sent to a bank, or other third person, that the buyer obtains possession of the bill of lading without honoring the draft. If the bill of lading and the draft are both sent directly to the buyer without the intervention of a third person, the same situation also arises. Though the buyer has been intrusted with the possession of the bill of lading only upon condition of payment of the draft, he nevertheless has the power without payment to obtain the goods and deal with them. In any litigation, under these circumstances, between the seller and buyer, it cannot be doubted that the seller must prevail. The intent of the seller is clearly indicated by the attachment of the draft to the bill of lading, and the buyer, knowing that intent, cannot take any advantage of his possession of the bill of lading to any greater extent than the offer of the seller authorizes. But if

²⁸ *Supra*, § 285.

the buyer wrongfully sells or pledges the bill of lading or obtains the goods and sells or pledges those, a different question arises when the seller seeks to enforce his right against the innocent third person. The distinction in regard to the form of bill of lading, to which attention has already been directed,²⁹ must here also be observed. If the seller has named the buyer as consignee, either the property has passed to the consignee or at least it seems to have done so to one who inspects the document. So if the bill of lading, though naming the seller himself as consignee, is indorsed by him to the buyer or in blank, the possession of the document by the buyer gives him, if not the actual title, at least an apparent ownership. On the other hand, if the seller took a bill of lading in which he or a third person was named as consignee, and no indorsement of the document had been made, possession of the bill of lading by the buyer would not indicate that the buyer had title. On the broad principle of justice that where one of two innocent parties must suffer, he should suffer whose act brought about the perilous situation, it seems clear that the seller ought not to be allowed to recover goods from ~~a~~ ~~third person~~ whom he has ~~thus~~ clothed with the appearance of ownership, if he has not, indeed, actually given him the ownership. The Sales Act accordingly so provides, and though the previous decisions are somewhat inconsistent, the provisions of the act seem justified by the weight of authority.³⁰ If the bill

²⁹ *Supra*, § 282.

³⁰ This result has been reached in England, and although the decision is under a special provision of the English Sale of Goods Act, not inserted in the American statute, and at variance with the rule generally prevailing at common law, it, nevertheless, shows the policy of the law. *Cahn v. Pockett's Channel Co.*, [1899] 1 Q. B. 643 (C. A.) (copper was shipped by the seller in the defendants' steamship, and the sellers forwarded the buyer a bill of lading to their own order indorsed in blank, together with a draft for the buyer's acceptance. On receipt of the docu-

ments the buyer transferred the bill of lading to his bankers to be given up to the plaintiffs (to whom the buyer had contracted to sell copper) on payment of the price at which they had agreed to buy the copper. The plaintiffs paid the price and received the bill of lading without notice that the original seller of the goods had not been paid. The original buyer was insolvent and never accepted the draft. The plaintiffs sued the carrier for refusal to deliver the copper. The Court of Appeals held the plaintiffs entitled to recover. *Collins, L. J.*, said: "From the point of view of the *bona fide*

of lading is obtained by larceny, however, the foregoing principles do not apply. The situation is analogous to that existing in any

purchaser, the ostensible authority based on the fact of possession is the same whether there is property in the thing, or authority to deal with it, in the person in possession at the time of the disposition or not. But the Legislature has not carried the rights of a purchaser under these acts so far as to make the sale equivalent to a sale in market overt. The purchaser must accept the risk of his vendor having found or stolen the goods, or documents, or otherwise got possession of them without the consent of the owner. However fraudulent the person in actual custody may have been in obtaining the possession, provided it did not amount to larceny by a trick, and however grossly he may abuse confidence reposed in him, or violate the mandate under which he got possession, he can by his disposition give a good title to the purchaser"); Commercial Bank v. Armsby Co., 120 Ga. 74, 47 S. E. 589 (in this case goods were shipped under a bill of lading making them deliverable to the order of the consignee with directions to notify Walton & Carr. The original bill of lading was indorsed by the consignor and sent directly to Walton & Carr, who were to act as agents merely for the shippers. Walton & Carr, however, fraudulently pledged the bill of lading with the plaintiff. It was held that the plaintiff was entitled to prevail. The court said: "It was the daily practice of banks in Augusta and elsewhere to advance money on such security, for possession of the bill of lading was regarded as *prima facie* evidence of the title of the holder to the goods of which the bill was the symbol. Ordinarily bills of lading of this kind are attached to drafts for

the purchase price of the goods, and can only be obtained by payment of the draft. Carr's possession of the bill of lading was, therefore, *prima facie* evidence that he had paid a draft drawn by the consignor and was entitled to the property. The departure of the Armsby Company from this custom placed it in the power of Carr to commit a fraud on the bank — an opportunity of which he seems to have promptly availed himself. Applying the well-known rule that where one of two innocent persons must suffer from the wrong of another the burden should be borne by him who placed it in the power of the wrongdoer to perpetrate the fraud, we fail to see how it can be held that the plaintiff can recover"). In Western Union R. R. Co. v. Wagner, 65 Ill. 197, the seller of butter delivered it at a railway station and authorized the railroad agent to issue a bill of lading to the seller. It was verbally agreed between the buyer, seller, and railroad agent, that the butter should not be shipped until the rest of the price had been paid. The buyer, however, obtained an advance from one Hewitt on a pledge of the bill of lading. It was held that this pledge was effectual. The court said: "When the vendor of the butter delivered it at the railway station, and authorized the railway agent to issue a bill of lading to the vendee, he thereby placed the vendee in the possession of the property so far as third persons, knowing nothing of the verbal arrangement, might become interested. The verbal agreement between the vendor, the vendee, and the railway agent that the butter should not in fact be shipped until the residue of the purchase money

case where the seller of goods has a lien upon them. A voluntary surrender of possession for whatever purpose or however induced, to the general owner, should deprive the lienholder of his rights if a *bona fide* purchaser for value has obtained them or an interest in them from the general owner; but it may be supposed that if the general owner stole the goods from the possession of the lienholder, the latter would be protected.³¹

should be paid may have been quite sufficient as between the parties, but was not of the slightest avail as against Hewitt, who, without notice of such arrangement, advanced to the vendee the value of the property on the pledge of the receipt. The mistake of the vendor was in consenting that the bill of lading or warehouse receipt — for it might be regarded in either light — should be issued to the purchaser and retained by him." See also *Mears v. Waples*, 4 Houst. 62. So it was said in *Moore v. Moore*, 112 Ind. 149, 152, 2 Am. St. Rep. 170. And the language though not originally used in regard to bills of lading is quoted with approval in regard to them by the court in *National Bank of Bristol v. Baltimore, etc., R. R. Co.*, 99 Md. 661, 59 Atl. 134, 105 Am. St. Rep. 321. "The more modern rule upon the subject under consideration seems to be that, where the owner of things in action, although not technically negotiable, has clothed another to whom they are delivered in the method common to all mercantile communities, with the usual apparent indicia of title, he will be estopped from setting up against a second assignee to whom the securities have been transferred for value and without notice, that the title of the first assignee was not perfect and absolute." See also *Munroe v. Philadelphia Warehouse Co.*, 75 Fed. Rep. 545; *Pollard v. Reardon*, 65 Fed. Rep. 848, 21 U. S. App. 639, 13 C. C. A. 171, and *infra*, §§ 426,

427. On the other hand the case of *Stollenwerck v. Thacher*, 115 Mass. 224, seems opposed to the rule here advocated and the provision of the Sales Act. In that case a bill of lading making the goods deliverable to the order of the consignee was indorsed in blank by the latter and sent to an agent with a draft attached. The agent was instructed not to deliver the bill of lading until the draft was paid, nevertheless he did so, and the purchaser of the goods, having obtained possession of the bill of lading, pledged it. The consignor was permitted to enforce his rights against this innocent purchaser for value.

³¹ *Gurney v. Behrend*, 3 E. & B. 622, 634; *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. ed. 892. In this case a bill of lading indorsed in blank by the consignor was sent forward through a bank with a draft attached on Kuhn & Bro. The delivery of the bill of lading was to be conditional upon the payment of the draft. A duplicate bill was sent directly to Kuhn & Bro. The bank presented the draft, with the original bill of lading still attached, to Kuhn & Bro. for acceptance. In examining the papers a member of that firm without detection substituted the duplicate bill of lading for the original, and after accepting the draft returned it with the duplicate bill of lading to the bank messenger. Thereafter the bill of lading was pledged and the cotton for which it had been issued was sold by

§ 293. **Recognition of mercantile custom in regard to bills of lading in the civil law.**—Bills of lading issued by railroads do not fulfill in Europe the same large function which they fulfill here. This is probably due to the fact that the European countries are of such small size that the time occupied in transportation by rail is short. Bills of lading issued for water transportation are, however, universal; and the principles governing them are well established. Moreover bills of lading may be, and frequently are, issued by railroads and may be used in mercantile transactions in the same way as bills of lading for ocean transport. The analogy of bills of lading issued by vessels has been followed on the continent of Europe as a guide for the determination of questions arising in regard to similar instruments issued by railroads exactly as has been done in the United States. It may be said broadly, as a summary of foreign law, that probably bills of lading have everywhere at least as great a degree of negotiability as they have in this country, and the form of the bill of lading has at least as great an effect in determining who is the owner of the goods. In Germany, whose

sample. The jury found that the bank was not negligent, and also that the pledgees had reason to believe that the bill of lading was held to secure payment of an outstanding draft as the ultimate purchasers of the cotton bought it without sight of the bill of lading. The court held that they stood in no better position than the pledgees. The decision of the case was rested on the ground that in the case of bills of lading, one who had reason to believe facts which would indicate a right existed in favor of another was not a purchaser for value in good faith, though in fact he acted innocently. The prevailing rule in regard to negotiable instruments on this point is otherwise, and the court so assumed. The court discusses at some length the nature of the bills of lading and the effects of statutes, declaring them to be negotiable. The court said:

“If the goods themselves be lost or stolen, no sale of them by the finder or thief, though to a *bona fide* purchaser for value, will divest the ownership of the person who lost them, or from whom they were stolen. Why, then, should the sale of the symbol or mere representative of the goods have such an effect? It may be that the true owner by his negligence or carelessness may have put it in the power of a finder or thief to occupy ostensibly the position of a true owner, and his carelessness may estop him from asserting his right against a purchaser who has been misled to his hurt by that carelessness. But the present is no such case. It is established by the verdict of the jury that the bank did not lose its possession of the bill of lading negligently. There is no estoppel, therefore, against the bank's right.”

legislation is entitled to special consideration because of the commercial importance of the country, and because its codification of the law is the most complete, the most modern, the most carefully prepared, and the most scientific in the world, bills of lading are put absolutely on the footing of bills of exchange, with no reserves whatever.³² The Commercial Code of Germany is also in force in Austria. In most other European countries and in Central and South America, the legislation of France has been copied; sometimes, as in Italy and Belgium, with no changes, so far as bills of lading are concerned; sometimes, as in Holland and Spain, with slight changes. By the French Code a bill of lading may be "to order" or "to bearer" as well as to a specified person,³³ and when issued in proper form is conclusive proof in favor of an innocent holder of the facts which it states.³⁴

³² Handelsgesetzbuch, §§ 363, 426, 442, 446, 448.

³³ Commercial Code, Art. 281.

³⁴ Commercial Code, Art. 283; Lyon

Caen et Renault, *Traité de Droit Commercial* (2d ed., Paris, 1894), Vol. 5, 708.

CHAPTER VIII.

TRANSFER OF PROPERTY AS BETWEEN BUYER AND SELLER (CONTINUED) — SALES AT AUCTION.

Section 294. Sales at auction — Provisions of Sales Act.

295. Sales of separate lots by auction are separate sales.

296. Formation of contract at auction.

297. Sales advertised without reserve.

298. Puffing.

299. Contracts not to bid.

§ 294. Sales at auction — Provisions of Sales Act.—

Sec. 21. SALE BY AUCTION.—In the case of a sale by auction —

(1.) Where goods are put up for sale by auction in lots, each lot is the subject of a separate contract of sale.

(2.) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve.

(3.) A right to bid may be reserved expressly by or on behalf of the seller.

(4.) Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ or induce any person to bid at such sale on his behalf, or for the auctioneer to employ or induce any person to bid at such sale on behalf of the seller or knowingly to take any bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer.¹

§ 295. Sales of separate lots by auction are separate sales.— It seems so plain on principle where separate lots are the subject

¹This section follows, with some changes, section 58 of the English Sale of Goods Act. In the first sub-section, however, in the English statute after the word "is" there are inserted "*prima facie* deemed to be."

of separate bidding and are separately knocked down that there is a separate contract or sale in regard to each lot, as hardly to need enactment or statement. If separate lots are to be put up it is obvious that as soon as the hammer falls on the first lot, the purchaser of that lot has a complete and separate bargain. He need make no other. When a second lot is put up it can make no difference in regard to the nature of the bargain whether the bidder who secured the first lot ultimately becomes the highest bidder and has the second lot knocked down to him, or whether another person happens to have that fortune; in either case there is a separate complete contract as to the second lot. That such is at least the presumption of the law seems well recognized.²

§ 296. **Formation of contract at auction.**—As an original question it is fairly open to argument whether the auctioneer by offering goods for sale makes an offer which ripens into a contract or sale when the highest bidder accepts the offer, or whether putting up the goods for sale is merely an invitation to those present to make offers, which they do by making bids, one of which is ultimately accepted by the fall of the hammer. Under the first view each bid would amount to an acceptance of the offer and a completion of the contract subject to the condition subsequent that no higher bid should be made.³ On the second view each bid is an offer and the contract becomes complete only

The English statute also does not contain the latter half of the second sentence of subsection (2). The English act provides that the bidder may retract his bid prior to the fall of the hammer, but is silent as to the auctioneer's rights. In subsection (4) the American act has been made somewhat more comprehensive than the English by the insertion of the words "or induce" where those words first occur and also by the insertion subsequently of the words "to employ or induce any person to bid at such sale on behalf of the seller or." There are also a few slight verbal changes.

² *Emmerson v. Heelis*, [1809] 2

Taunt. 38; *Roots v. Lord Dormer*, [1832] 4 B. & Ald. 77 (compare *Couston v. Chapman*, [1872] L. R. 2 H. L. Sc. App. 250); *Wells v. Day*, 124 Mass. 38; *McManus v. Gregory*, 94 Mo. 370. In *Jenness v. Wendell*, 51 N. H. 63; *Mills v. Hunt*, 20 Wend. 431; *Tompkins v. Haas*, 2 Barr, 74, it was held, however, that there was but one contract though in at least one of these cases the articles were not all purchased even on the same day. It seems hard to support these decisions.

³ This view is suggested and advocated in *Langdell, Summary of Contracts*, § 19.

when the hammer falls. The latter view seems more in accordance with the facts, as the auctioneer may more accurately be said to invite offers than himself to be the offerer, and the law has adopted this doctrine. It follows that the bidder may retract the bid at any time before the hammer falls, for until then the contract is incomplete.⁴ If the contract is incomplete so far as the bidder is concerned, it must also be incomplete so far as the auctioneer is concerned. Consequently the auctioneer, unless he has announced that the sale shall be without reserve (a case which will be considered in the next section), may withdraw the goods from sale at any time before the hammer falls.⁵ Not only is the contract complete when the hammer falls, but the property in the goods passes then, unless some term of the bargain makes it impossible that it should do so.⁶ It is of course possible that such conditions may be imposed by the terms of the sale as to make immediate transfer of the property in the goods impossible.⁷ The condition that the sale is for cash is, however, not such a condition as will prevent immediate transfer of the property,⁸ since this condition may be satisfied by construing it as meaning that possession shall not be delivered until payment.

* *Payne v. Cave*, 3 T. R. 148; Sale of Goods Act, § 58 (2); *Hibernia Savings Society v. Behnke*, 121 Cal. 339; *Mallard v. Curran*, 123 Ga. 872, 875; *McDonald v. Green*, 5 Hawaii, 325; *Grotenkemper v. Achtermeyer*, 11 Bush, 222; *Head v. Clark*, 88 Ky. 362, 364; *Fisher v. Seltzer*, 23 Pa. St. 308, 62 Am. Dec. 335. It is so provided also in the German *Bürgerliches Gesetzbuch*, § 156. Even after the fall of the hammer, if the sale is within the local Statute of Frauds, the bidder may withdraw until a memorandum of the sale is made. See *supra*, § 115.

⁵ *Tillman v. Dunman*, 114 Ga. 406, 40 S. E. 244, 57 L. R. A. 784, 88 Am. St. Rep. 28; *Corryolles v. Mossy*, 2 La. 504; *Baham v. Bach*, 13 La. 287; *McPherson Bros. Co. v. Okanogan County*, 45 Wash. 285, 88 Pac. 199; *Holder v. Jackson*, 11 U. C.

C. P. 543. See also cases cited in preceding note; *Story, Sales*, § 461; 2 Kent's Comm. (14th ed.) *537.

⁶ *Sweeting v. Turner*, L. R. 7 Q. B. 310; *Lucas v. Wallace*, 42 Ill. App. 172; *Jenness v. Wendell*, 51 N. H. 63, 12 Am. Rep. 48. See also *Municipality No. 1 v. Cordeviolle*, 19 La. 235; *Canal Bank v. Copeland*, 6 La. 543; *Noah v. Pierce*, 85 Mich. 70, 48 N. W. 277.

⁷ *McManus v. Fortescue*, [1907] 2 K. B. 1; *Williams v. Connoway*, 3 Houst. 63; *Morgan v. East*, 126 Ind. 42, 25 N. E. 867, 9 L. R. A. 558; *Mazoue v. Caze*, 18 La. Ann. 31; *Matthews v. McElroy*, 79 Mo. 202; *Clark v. Greeley*, 62 N. H. 394.

⁸ *Clark v. Greeley*, 62 N. H. 394. See, however, *Hand v. Matthews*, 208 Pa. St. 149, 57 Atl. 351; *Mervine v. Arndt*, 33 Pa. Super. Ct. 333; *Brown v. Reber*, 36 Pa. Super. Ct. 114.

Such a condition is indeed implied in every sale by auction, as well as in other sales, unless there is an agreement for credit.⁹ Though the contract is complete and the property has passed to the buyer, if the transaction is within the Statute of Frauds, either party still may prevent the bargain from becoming enforceable by withdrawing before a memorandum is signed, and the owner of the property may revoke the auctioneer's authority prior to that time.¹⁰

§ 297. **Sales advertised without reserve.**— If it is true, as stated in the preceding section, that no bargain is complete until the hammer falls, it necessarily follows that whatever may have been the obligation under which the seller or auctioneer would have come by his completion of the bargain, he may withdraw until that time without liability. It seems also to follow from this principle that even though an auction sale is advertised to be without reserve, the auctioneer may, nevertheless, if the highest bid is not considered adequate by him, withdraw the goods from sale. It has, however, been decided in England that there is a collateral contract formed by attending and bidding and that in consideration of this the auctioneer engages to sell without reserve in consideration of the bidders taking part in the auction.¹¹ There seems no decision in this country involving the question. There are, however, statutes in California and one

⁹ *Lucas v. Wallace*, 42 Ill. App. 172; *Jennings v. West*, 40 Kans. 372, 19 Pac. 863; *Mazoue v. Caze*, 18 La. Ann. 31; *Hand v. Matthews*, 208 Pa. St. 149, 57 Atl. 351; *Wakefield v. Gorrie*, 5 U. C. Q. B. 159. See also *Wainscott v. Smith*, 68 Ind. 312, where it was similarly held that a buyer had no right to the possession of the goods until he executed a note for the price, the terms of the sale being that the price was payable in six months with interest; the buyer to give his note.

¹⁰ *Supra*, § 115.

¹¹ *Warlow v. Harrison*, 1 E. & E. 295. The plaintiff in this case bid £63 for a horse at an auction sale which was advertised to be without reserve; nevertheless, the owner bid

more and the auctioneer knocked the horse down to him, which in effect amounted to withdrawing it from sale. It was held that the plaintiff might recover against the auctioneer on the theory that a contract had been made with him that the sale should be without reserve. The principal was not disclosed and, therefore, this collateral contract was with the auctioneer personally. It was held further that the Statute of Frauds did not apply to this collateral contract that the sale should be without reserve. In *Mainprice v. Westley*, 6 B. & S. 420, similar facts were involved, but the auctioneer's principal was disclosed and the court held no action would lie against the auctioneer. *Warlow v. Harrison* was

or two other States giving the buyer a right to enforce his bid if it was the highest, if the sale was announced to be reserved.¹² The Sales Act in effect follows these statutes but it seems to produce a very different result from that produced by the English decisions which have been referred to above. These English decisions make the bidder's right depend upon a collateral contract somewhat artificially created by the court in order to work out a just result. In the American statutes the bidder's right is a direct right to enforce the purchase. The English doctrine evades the Statute of Frauds, but the statute would seem applicable to the obligation created by the American statutes if the auction was of real estate or of goods of sufficient value. Prior to the bidding the auctioneer may withdraw the goods from sale, even though the sale had been advertised to take place without reserve.¹³ If the sale is announced to be subject to a reserve price,

followed by a decision of a single justice in *Johnston v. Boyes*, [1899] 2 Ch. 73. This was an action against the auctioneer for not allowing the completion of a sale of real estate which had been knocked down at auction to the plaintiff. Completion of the sale was refused by the auctioneer because of supposed insolvency of the buyer, and because a check for the price was tendered instead of cash. There were printed conditions of sale which included a statement that the property would be knocked down to the highest bidder. The court held the action could be maintained and that though the Statute of Frauds might prevent the direct enforcement of the sale, it did not prevent enforcement of the collateral contract to sell to the highest bidder.

¹² Cal. Civil Code, § 1796. "If at a sale by auction the auctioneer, having authority to do so, publicly announces that the sale will be without reserve, or makes any announcement equivalent thereto, the highest bidder, in good faith, has an absolute right to the completion of the sale to him; and upon such a sale bids

by the seller or any agent for him, are void." This statute was copied in Dak. Civil Code, § 1026, and on the division of Dakota re-enacted in N. Dak. Civil Code, § 3993; S. Dak. Civil Code, § 1345.

¹³ *Harris v. Nickerson*, L. R. 8 Q. B. 286. In this case the plaintiff came to town to buy at an auction advertised by the defendant, but the articles were withdrawn from sale. The court held the plaintiff could not recover, that the advertisement was not a contract nor a warrant. It was suggested the result might be otherwise if the advertisement had been inserted with an indirect motive. The court said that while there was ground for saying that a contract is entered into between the auctioneer and the highest *bona fide* bidder, that rule has no application where the lots were never put up, and no offer was made by the plaintiff, or promise by the defendant, except the advertisement that certain goods would be sold, and it is impossible to say that there is a contract with everybody attending the sale, that the auctioneer is to be liable for their expenses if any single article is withdrawn.

the knocking down of the article to the highest bidder for less than the reserve price will give the bidder no right to the goods, because the auctioneer had no authority to sell for a price less than that reserved, and no right of action against the auctioneer for breach of warranty of authority, for the terms of the sale indicated the limitation of the auctioneer's authority, and the bidder was not deceived.¹⁴

§ 298. **Puffing.**—Secret bidding by or on behalf of the seller may have a double importance. It may deprive the highest *bona fide* bidder of the goods and be a violation of his rights in this respect. This aspect of the case has been considered in the preceding section, but the bidding of the seller may also have the effect of inducing a buyer to whom the property is ultimately knocked down to make his successful bid, and on learning the facts he may wish to withdraw from the transaction on the ground of fraud. It is well settled that such a bidder has the right to withdraw under these circumstances.¹⁵ A rule was supposed to exist in English courts of equity that the employment of one puffer was justifiable, to prevent a sale of property for less than it was worth,¹⁶ but this rule was first changed by statute in England, so far as land is concerned,¹⁷ and then by the Sale

¹⁴ *McManus v. Fortescue*, [1907] 2 K. B. 1.

¹⁵ *Green v. Baverstock*, 14 C. B. (N. S.) 204; *Veazie v. Williams*, 8 How. 134, 153, 12 L. ed. 1018; *Baham v. Bach*, 13 La. 287, 33 Am. Dec. 561; *Curtis v. Aspinwall*, 114 Mass. 187, 19 Am. Rep. 332; *Springer v. Kleinsorge*, 83 Mo. 152; *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195; *Bowman v. McClenahan*, 20 N. Y. App. Div. 346; *Morehead v. Hunt*, 1 Dev. Eq. 35; *Woods v. Hall*, 1 Dev. Eq. 411; *McDowell v. Simms*, 6 Ired. Eq. 278, Busb. Eq. 130, 57 Am. Dec. 595; N. Dak. Civil Code, § 3994; *Walsh v. Barton*, 24 Ohio St. 28, 46; *Pennock's Appeal*, 114 Pa. St. 446, 53 Am. Dec. 561; *Staines v. Shore*, 16 Pa. St. 200, 55 Am. Dec. 492; *Yerkes v. Wilson*,

81* Pa. St. 9; *Flannery v. Jones*, 180 Pa. St. 338, 36 Atl. 856, 57 Am. St. Rep. 648; S. Dak. Civil Code, § 1346. But see *East v. Wood*, 62 Ala. 313; *McMillan v. Harris*, 110 Ga. 72, 35 S. E. 334, 48 L. R. A. 345, 78 Am. St. Rep. 93. The rule which has been sometimes suggested (*National Bank v. Sprague*, 20 N. J. Eq. 159, 165; *Veazie v. Williams*, 3 Story, 611, 621) that the employment of a puffer will not make the sale voidable, if, after the bid of the puffer, there is a bid by a real buyer before that at which the property is knocked down seems unsound.

¹⁶ *Smith v. Clarke*, 12 Ves. 477, 483; *Flint v. Woodin*, 9 Hare, 618. But see *Mortimer v. Bell*, L. R. 1 Ch. 10, 16.

¹⁷ 30, 31 Vict., c. 48.

of Goods Act, so far as goods and chattels personal other than choses in action are concerned.¹⁸ The distinction between law and equity, in regard to the matter, never existed in this country. Though bidding by the seller or his agents is fraudulent, it seems to be admitted, generally, that a right to bid may be expressly reserved on behalf of the seller.¹⁹ It is, therefore, the secrecy of puffing which renders it a fraud upon bidders. The auctioneer may not himself be a bidder or agent for a bidder, because of the inconsistency of the position of selling as auctioneer and acting as buyer.²⁰ It may be questioned, however, whether an auctioneer may not properly bid a single specified sum for a purchaser.²¹

§ 299. **Contracts not to bid.**—A sale may be fraudulent not only because of conduct of the seller, but because of conduct of the buyer. It is not permissible for intending buyers at auction or other competitive sales to make an agreement for a consideration, that only one of them shall bid in order that the property may be knocked down at a low valuation. It may probably be assumed that if the contract is against public policy, so far as the parties to it are concerned, it is also fraudulent as regards the seller, and the converse of this proposition is undoubtedly true. A somewhat nice distinction is taken in regard to such an agreement which was thus expressed in a Massachusetts case:²² "An agreement between two or more persons that one shall bid for the benefit of all upon property about to be sold at public auction, which they desire to purchase together, either because they propose to hold it together or afterward to divide it into such parts as they wish individually to hold, neither desiring the whole, or for any similar honest or reasonable purpose, is legal in its character and will be enforced;"²³ "but such agreement, if made for

¹⁸ Sale of Goods Act, § 58.

¹⁹ *Thornett v. Haines*, 15 M. & W. 367; *Howard v. Castle*, 6 T. R. 642; *Miller v. Baynard*, 2 Houst. 559, 83 Am. Dec. 168; *Yerkes v. Wilson*, 81* Pa. St. 9.

²⁰ *Veazie v. Williams*, 8 How. 134, 152, 12 L. ed. 1018; *Mapps v. Sharpe*, 32 Ill. 13; *Gallatian v. Cunningham*, 8 Cow. 361; *Randall v. Lautenberger*, 16 R. I. 158, 13 Atl. 100; *Brock v. Rice*, 27 Gratt. 812; *Sugden, Vendors*,

Vol. 2 (14th Am. ed.), 687. *Contra*, *Scott v. Mann*, 36 Tex. 157.

²¹ See *Richards v. Holmes*, 18 How. 143, 15 L. ed. 304.

²² *Gibbs v. Smith*, 115 Mass. 592.

²³ *Kearney v. Taylor*, 15 How. 494, 519, 14 L. ed. 607; *Jenkins v. Frink*, 30 Cal. 586, 89 Am. Dec. 134; *Switzer v. Skiles*, 8 Ill. 529, 44 Am. Dec. 723; *Hunt v. Elliott*, 80 Ind. 245, 41 Am. Rep. 794; *Smith v. Ullman*, 58 Md. 183, 42 Am. Rep. 329;

the purpose of preventing competition and reducing the price of the property to be sold below its fair value, is against public policy and in fraud of the just rights of the party offering it, and, therefore, illegal.”²⁴ Even an open statement, without mis-

Phippen v. Stiekney, 3 Met. 384; *Stillwell v. Glascock*, 91 Mo. 658, 4 S. W. 438; *Murphy v. De France*, 105 Mo. 53, 15 S. W. 949, 16 S. W. 86; *Whalen v. Brennan*, 34 Neb. 129; *Gulick v. Webb*, 41 Neb. 706, 60 N. W. 13, 43 Am. St. Rep. 720; *Olson v. Lamb*, 56 Neb. 104, 76 N. W. 433, 71 Am. St. Rep. 670; *Bellows v. Russell*, 20 N. H. 427, 51 Am. Dec. 238; *Huntington v. Bardwell*, 46 N. H. 492; *National Bank v. Sprague*, 20 N. J. Eq. 159, 168; *De Baun v. Brand*, 61 N. J. L. 624, 41 Atl. 958; *Marsh v. Russell*, 66 N. Y. 288; *Marie v. Garrison*, 83 N. Y. 14; *Smith v. Greenlee*, 2 Dev. L. 126, 18 Am. Dec. 564; *Goode v. Hawkins*, 2 Dev. Eq. 393; *Breslin v. Brown*, 24 Ohio St. 565, 15 Am. Rep. 627; *Smull v. Jones*, 6 W. & S. 122; *Maffet v. Ijams*, 103 Pa. St. 266; *McMinn's Legatees v. Phipps*, 3 Sneed, 196; *James v. Fulcrud*, 5 Tex. 512, 55 Am. Dec. 743; *Flanders v. Wood*, 83 Tex. 277, 18 S. W. 572; *Dailey v. Hollis*, 27 Tex. Civ. App. 570, 66 S. W. 586; *Barnes v. Morrison*, 97 Va. 372, 34 S. E. 93. Compare *Woodruff v. Berry*, 40 Ark. 251; *Marshalltown Stone Co. v. Des Moines Brick Co.*, 114 Iowa, 574, 87 N. W. 496.

²⁴*Hyer v. Richmond Traction Co.*, 80 Fed. Rep. 839, 42 U. S. App. 522, 26 C. C. A. 175, 168 U. S. 471, 18 S. Ct. 114, 42 L. ed. 547; *McMullen v. Hoffman*, 174 U. S. 639, 19 S. Ct. 839, 43 L. ed. 1117; *Atlas Nat. Bank v. Holm*, 71 Fed. Rep. 489, 34 U. S. App. 472, 19 C. C. A. 94; *Swan v. Chorpennig*, 20 Cal. 182; *Ray v. Mackin*, 100 Ill. 246; *Devine v. Harkness*, 117 Ill. 145, 7 N. E. 52; *Conway v. Garden City Co.*, 190 Ill. 89,

60 N. E. 82; *Hunter v. Pfeiffer*, 108 Ind. 197, 9 N. E. 124; *Clark v. Stanhope*, 109 Ky. 521, 59 S. W. 856; *Gardiner v. Morse*, 25 Me. 140; *Weld v. Lancaster*, 56 Me. 453; *Hannah v. Fife*, 27 Mich. 172; *Boyle v. Adams*, 50 Minn. 255, 52 N. W. 860, 17 L. R. A. 96; *Wootton v. Hinkle*, 20 Mo. 290; *Miltenberger v. Morrison*, 39 Mo. 71; *Gobble v. O'Connor*, 43 Neb. 49, 61 N. W. 131; *McClelland v. Citizens' Bank*, 60 Neb. 90, 82 N. W. 319; *Gulick v. Ward*, 5 Halst. 87, 18 Am. Dec. 389; *Brooks v. Cooper*, 50 N. J. Eq. 761, 26 Atl. 978, 21 L. R. A. 617, 35 Am. St. Rep. 793; *Kenny v. Lembeck*, 53 N. J. Eq. 20, 30 Atl. 525; *Jonea v. Caswell*, 3 Johns. Cas. 29, 2 Am. Dec. 134; *Doolin v. Ward*, 6 Johns. 194; *Wilbur v. How*, 8 Johns. 444; *Thompson v. Davies*, 13 Johns. 112; *People v. Stephens*, 71 N. Y. 527; *Hopkins v. Ensign*, 122 N. Y. 144, 25 N. E. 306, 9 L. R. A. 731; *Baird v. Sheehan*, 166 N. Y. 631, 60 N. E. 1107; *Coverly v. Terminal Warehouse Co.*, 83 N. Y. Suppl. 369 (App. Div.); *Ingram v. Ingram*, 4 Jones L. 188; *King v. Winants*, 71 N. C. 469, 17 Am. Rep. 11; *Saxton v. Seiberling*, 48 Ohio St. 554, 562, 29 N. E. 179; *Kine v. Turner*, 27 Or. 356, 41 Pac. 664; *Barton v. Benson*, 126 Pa. St. 431, 17 Atl. 642, 12 Am. St. Rep. 883; *In re Hay's Estate*, 159 Pa. St. 381, 28 Atl. 158; *Dudley v. Odom*, 5 S. C. 131, 22 Am. Rep. 6; *Wilson v. Wall*, 99 Va. 353, 356, 38 S. E. 181; *Ralphsnyder v. Shaw*, 45 W. Va. 680, 31 S. E. 953. See also *Fenner v. Tucker*, 6 R. I. 551; *Herndon v. Gibson*, 38 S. C. 357, 17 S. E. 145, 37 Am. St. Rep. 765, 20 L. R. A. 545, and note. Compare

representation, if calculated to chill bidding may render a sale voidable.²⁵

Breslin v. Brown, 24 Ohio St. 565, 15 Am. Rep. 627. The English authorities, however, seem opposed to the American decisions, and to allow agreements of the kind in question. *Galton v. Emuss*, 1 Coll. Ch. 243; *Re Carew's Estate*, 26 Beav. 187; *Heffer v. Martyn*, 36 L. J. Ch. 372; *Chattock v. Muller*, 8 Ch. D. 177. Compare *Levi v. Levi*, 6 C. & P. 239. See also 20 L. R. A. 543, note; *Phip-*

pen v. Stickney, 3 Metc. 384, 387; 1 Story, Eq. Jur., § 293; Story, Sales, § 484.

²⁵ *Herndon v. Gibson*, 38 S. C. 357, 17 S. E. 145, 20 L. R. A. 545, 37 Am. St. Rep. 765. In this case at a mortgagee's sale, the mortgagor announced that she was a widow dependent on the land for support and intended to bid. It was held that the sale should be set aside.

CHAPTER IX.

RISK OF LOSS.

Section 300. Risk of loss — Provisions of the Sales Act.

301. Risk of loss generally attends title.

302. Risk may by agreement be separated from title.

303. Risk is on buyer where the seller retains a security title only.

304. Risk is on the buyer in a conditional sale.

305. Risk where goods are shipped under a bill of lading.

306. Effect of default upon risk.

307. Risk of loss in the Roman Law.

308. Reasons given for the rule of the Roman Law.

309. Modern civil law.

§ 300. Risk of loss — Provisions of the Sales Act.—

Sec. 22. RISK OF LOSS.— Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except that —

(a.) Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery.

(b.) Where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.¹

The effect and purpose of this section may be gathered from the following statement of the common law:

§ 301. Risk of loss generally attends title.— In the English and

¹This section is copied from section 20 of the English Sale of Goods Act. Subsection (a), however, is not in the English act. The reasons for its insertion will appear from the discussion in §§ 303-305. The English act has an additional para-

graph not copied in the American act because deemed unnecessary: "Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party."

American law of sales of goods there is singularly little discussion in regard to the risk before transfer of the property. It was early assumed without discussion that the maxim *res perit domino* was of universal application,² and this assumption has sufficed to fix the law.³ In the absence of agreement to the contrary, the risk is with the seller, though the goods are identified, till the moment when the property is transferred. If the goods are destroyed or injured before that time, the buyer cannot be compelled to pay the price,⁴ and if he has paid the price in advance, it may be recovered.⁵

§ 302. **Risk may by agreement be separated from title.**—Risk of loss or deterioration is a natural incident of ownership, but there is no rule of law which prevents one who is not the owner from agreeing to bear the risk. He thereby virtually becomes an insurer of goods which he does not own.⁶ It may be a proper

²It is curious that this maxim of the Roman Law should be quoted in our law chiefly in a class of cases to which it did not apply in the Roman Law.

³In Noy's Maxims, c. XLII, it is said: "If I sell my horse for money, I may keep him until I am paid, but I cannot have an action of debt until he be delivered, yet the property of the horse is by the bargain in the bargainee or buyer; * * * and if the horse die in my stable between the bargain and the delivery, I may have an action of debt for my money, because by the bargain the property was in the buyer." It will be observed that the case here supposed is a sale with a lien for the price. As the dependency of mutual promises in any executory bilateral contract was little understood before the present century, and the question whether impossibility is so far an excuse for nonperformance of a dependent promise, that the counter-promise must nevertheless be performed, has been settled still more recently, it is obvious that only

modern decisions have much value in this discussion. In *Rugg v. Minett*, 11 East, 210, it was taken for granted that risk attends title, and the only discussion related to the question whether title had in fact passed. So clear is the law that it is hardly formally stated by so acute a writer as Benjamin. The only statement he makes is a casual one, without citation of authorities, in § 308.

⁴Cases are collected, *supra*, § 164.

⁵Cases are collected, *supra*, § 164.

⁶This question was much considered in *Castle v. Playford*, L. R. 5 Ex. 165, L. R. 7 Ex. 98, and *Martineau v. Kitching*, L. R. 7 Q. B. 436. In the former case it was provided that a cargo of ice should be sold, "the vendors forwarding bill of lading to the purchaser, and upon receipt thereof the said purchaser takes upon himself all risks and dangers of the seas, rivers, and navigation of whatever nature or kind." The action was brought for the price of the cargo and the defense was set up that it did not arrive. The Court of Exchequer gave judgment for the de-

construction of a bargain that risk is to be assumed by one party or the other, even though it is not so expressed in terms. For instance, if it is agreed that one party or the other shall insure the goods, it seems a necessary inference that the parties intended the risk to be borne by this party.⁷ It is perhaps more common for the buyer to assume risk, although the property may not have passed to him, than it is for the seller to retain the risk though the property has passed from him, but it is obvious that the latter arrangement is possible.⁸ Opposite views have been

fendant on the ground that the property had not passed because the price was to be determined by the number of tons, "weighed on board during delivery." In the Exchequer Chamber, however, judgment was unanimously reversed. The majority of the court thought the property had passed when the bill of lading was delivered, but the whole court agreed that this was immaterial, as, in any event, the risk had been expressly assumed by the buyer. *Martineau v. Kitching* involved a contract to sell sugar-loaves, and the contract provided "goods at seller's risk for two months." The exact price was to be settled by the weight of the sugar, and weighing took place on delivery. The approximate amount of the price was, however, paid in advance. The sugar remained in the seller's warehouse and part was taken, from time to time, being weighed as delivered. The remainder was burned after the period of two months had expired and before being weighed. The court seemed of the opinion that the property in the sugar had passed, but held that whether it had or not, as the contract expressly provided that risk should be on the seller for two months, it was a necessary implication that thereafter it should be upon the buyer. Other decisions illustrating the right of the parties to agree expressly for the incidents of risk, irrespective of title, are:

Inglis v. Stock, 10 A. C. 263; *Fragano v. Long*, 4 B. & C. 219; *The Elgee Cotton Cases*, 22 Wall. 180, 22 L. ed. 863.

⁷ *Fragano v. Long*, 4 B. & C. 219. In this case the price was made payable after the goods, which were the subject of the bargain, should arrive, and the defendant asserted that this provision showed that until the goods arrived the buyer had no right in them, but Bayley, J., said: "If the goods were not to be paid for unless they arrived, why should the plaintiff insure them?" See also *Anderson v. Morice*, L. R. 10 C. P. 58, 609, 1 A. C. 713, and *Colonial Ins. Co. v. Adelaide Ins. Co.*, 12 A. C. 128. In both these cases the buyer in fact insured the goods, but the contract did not provide expressly that he should do so.

⁸ *Calcutta Co. v. De Mattos*, 32 L. J. Q. B. 322, 33 L. J. Q. B. 214. This was a contract for 1,000 tons of coal, "payment of one-half of each invoice value in cash on handing you bills of lading and policy of insurance to cover the amount." The balance of the price was to be paid on delivery. The coal was shipped and half of the price paid but the vessel never reached port. The seller brought action for the balance of the price and the buyer brought a cross-action to recover the portion of the price which he had already paid. The judges in the Court of

expressed in regard to the inference to be drawn as to the transfer of the property in the goods when the contract is silent on the point, but makes express provision in regard to the risk. Blackburn, J., said:⁹ "If you * * * * show that the risk attached to one person or the other it is a very strong argument for showing that the property was meant to be in him." On the other hand exactly the opposite inference was suggested in the Supreme Court of the United States:¹⁰ "It needs no agreement that the buyer shall take the risk if it is intended the ownership shall pass to him. Hence the stipulation that the cotton should be at the risk of Lobdell (the buyer) after the date of the contract, instead of showing an intention of the parties that the right of

Queens Bench were equally divided in their opinion, but the majority in the Court of the Exchequer Chamber, following the opinion of Blackburn, J., in the court below, held that under the contract the property in the goods vested in the buyer on shipment, but as to the half of the price still unpaid, there could be no recovery unless the coal was delivered. Blackburn, J., said: "There is no rule of law to prevent the parties in cases like the present from making whatever bargain they please. If they use words in the contract showing that they intend that the goods shall be shipped by the person who is to supply them, on the terms that when shipped they shall be the consignee's property and at his risk, so that the vendor shall be paid for them whether delivered at the port of destination or not, this intention is effectual. If the parties intend that the vendor shall not merely deliver the goods to the carrier, but also undertake that they shall actually be delivered at their destination, and express such intention, this also is effectual. In such a case, if the goods perish in the hands of the carrier, the vendor is not only not entitled to the price, but he is liable for whatever damage may have been

sustained by the purchaser in consequence of the breach of the vendor's contract to deliver at the place of destination. But the parties may intend an intermediate state of things; they may intend that the vendor shall deliver the goods to the carrier, and that when he has done so he shall have fulfilled his undertaking, so that he shall not be liable in damages for a breach of contract, if the goods do not reach their destination, and yet they may intend that the whole or part of the price shall not be payable unless the goods do arrive. They may bargain that the property shall vest in the purchaser as owner as soon as the goods are shipped, that they shall then be both sold and delivered, and yet that the price (in whole or in part) shall be payable only on the contingency of the goods arriving, just as they might, if they pleased, contract that the price should not be payable unless a particular tree fall, but without any contract on the vendor's part in the one case to procure the goods to arrive, or in the other to cause the tree to fall."

⁹ *Martineau v. Kitching*, L. R. 7 Q. B. 436, 453, 454.

¹⁰ *Elgee Cotton Cases*, 22 Wall. 180, 194, 22 L. ed. 863.

property should pass to him seems rather to indicate a purpose that the ownership should remain unchanged. Else why introduce a provision totally unnecessary?" The inference suggested by the English judge seems the sounder. Mercantile contracts are drawn briefly, and provision is frequently made only for the matters which strike the parties as important. Where goods are shipped from a distance the question of risk naturally occurs to prudent business men as desirable to settle in the agreement. The more abstract question when the property in the goods passes is much less likely to occur to them. An agreement that risk shall pass to the buyer is, therefore, not justly construed as an agreement that the property shall remain in the seller, but rather as evidence that the property was intended to pass. It must be admitted that the question is one of fact in each case, and that the argument here suggested is more appropriate to a brief mercantile contract prepared by the parties than to an elaborate agreement based on legal advice.

§ 303. **Risk is on the buyer where the seller retains a security title only.**— That the risk should be thrown upon the buyer if the seller retains title merely to enforce performance by the buyer of his obligations under the contract, as enacted in the Sales Act,¹¹ is a consequence of the theory that such a bargain is, in effect, though not in form, a sale to the buyer and a mortgage back by him of the property to secure the price. Two classes of cases especially commonly present the question— first, conditional sales; and, second, shipments under bills of lading. These two cases will now be separately considered.

§ 304. **Risk is on the buyer in a conditional sale.**— Where goods are delivered to the buyer but title is retained by the seller until the price is paid, the buyer immediately acquires the right to use the goods as his own, and has indeed exactly the same power over them, and right in regard to them, that he would have if he had bought them, and mortgaged them back to secure the price.¹² The time for payment in such sales frequently extends over months and sometimes over years. It is necessarily to be

¹¹ Section 22 (a).

¹² See *supra*, § 284. The risk of loss is borne by a chattel mortgagee.

Blue v. American Soda Fountain Co., 146 Ala. 682, 40 So. 218, 150 Ala. 165, 43 So. 709.

expected by the parties that the goods will deteriorate during this period, and, nevertheless, that the buyer will be bound to pay the price. It seems properly to follow that if the goods are accidentally destroyed or injured, the buyer must stand the loss; that is, he must pay the price in full at the time agreed. The decisions upon the point are in conflict, but the weight of authority sustains the view here expressed.¹³ There are, however, a number of decisions to the contrary.¹⁴ Doubtless the question of risk may be settled by the parties in any way they please, and some of the apparently conflicting decisions may be reconciled on this basis.¹⁵ But the parties rarely express a direct intention in regard to the matter and a rule based on general principles is, therefore, required. In a recent decision in Mississippi,¹⁶ where the plaintiff sued for the price of a soda fountain which had been delivered to the defendant under a conditional sale, the court held the plaintiff entitled to recover though the property had been destroyed and said: "Burnley unconditionally and absolutely promised to pay a certain sum

¹³ *Chicago Equipment Co. v. Merchants' Bank*, 136 U. S. 268, 283, 34 L. ed. 349; *Phillips v. Hollenberg Music Co.*, 82 Ark. 9, 99 S. W. 1105; *Jessup v. Fairbanks*, 38 Ind. App. 673, 78 N. E. 1050; *Burnley v. Tufts*, 66 Miss. 48, 5 So. 627, 14 Am. St. Rep. 540; *Tufts v. Wynne*, 45 Mo. App. 42; *American Soda Fountain Co. v. Vaughn*, 69 N. J. L. 582, 55 Atl. 54; *Whitlock v. Auburn Lumber Co.*, 145 N. C. 120, 58 S. E. 909, 12 L. R. A. (N. S.) 1214; *Topp v. White*, 12 Heisk. 165; *Marion Mfg. Co. v. Buchanan* (Tenn.), 99 S. W. 984, 8 L. R. A. (N. S.) 590, *La Valley v. Ravenna*, 78 Vt. 152, 62 Atl. 47, 2 L. R. A. (N. S.) 97, 112 Am. St. Rep. 898. See also *Cooper v. Chicago Organ Co.*, 58 Ill. App. 248; *Osborn v. South Shore Lumber Co.*, 91 Wis. 526, 65 N. W. 184; *Hesselbacher v. Ballantyne*, 28 Ont. 182; *Goldie v. Harper*, 31 Ont. 284. In *Whitlock v. Auburn Lumber Co.*, 145 N. C. 120,

58 S. E. 909, 12 L. R. A. (N. S.) 1214, the property had not been delivered, but was held in the seller's possession subject to the buyer's order. The risk of loss was nevertheless held to be on the buyer.

¹⁴ *Arthur v. Blackman*, 63 Fed. Rep. 536; *Bishop v. Minderhout*, 128 Ala. 162, 29 So. 11, 52 L. R. A. 395, 86 Am. St. Rep. 134; *American Soda Fountain Co. v. Blue*, 146 Ala. 682, 40 So. 218, 150 Ala. 165, 43 So. 709; *Randle v. Stone*, 77 Ga. 501; *Glisson v. Heggie*, 105 Ga. 30, 32, 31 S. E. 118; *Mountain City Mill Co. v. Butler*, 109 Ga. 469, 34 S. E. 565; *Swallow v. Emery*, 111 Mass. 355; *Sloan v. McCarty*, 134 Mass. 245; *Cobb v. Tufts* (Tex. Civ. App.), 2 Willson, 154.

¹⁵ See a discussion based on the presumed intent of the parties in *American Soda Fountain Co. v. Vaughn*, 69 N. J. L. 582, 55 Atl. 54.

¹⁶ *Burnley v. Tufts*, 66 Miss. 48.

for the property, the possession of which he received from Tufts. The fact that the property has been destroyed while in his custody, and before the time for the payment of the note last due, on payment of which only his right to the legal title of the property would have accrued, does not relieve him of payment of the price agreed on. He got exactly what he contracted for, viz., the possession of the property and the right to acquire an absolute title by payment of the agreed price. The transaction was something more than an executory conditional sale. The seller had done all he was to do, except to receive the purchase price; the purchaser had received all that he was to receive as the consideration of his promise to pay. The inquiry is not whether, if he had foreseen the contingency which has occurred, he would have provided against it, nor whether he might have made a more prudent contract, but it is whether, by the contract, he has made his promise absolute or conditional. The contract was a lawful one, and, as we have said, imposed upon the buyer an absolute obligation to pay. To relieve him from this obligation, the court must make a new agreement for the parties, instead of enforcing the one made, which it cannot do." This language was quoted with approval by the North Carolina Supreme Court in a case involving similar facts.¹⁷ The analogous question of the right to accruing benefits is discussed in a later section.¹⁸

§ 305. Risk where goods are shipped under a bill of lading.—

It is evident there can be no possibility of throwing the risk of loss or deterioration upon the buyer where goods are shipped to him unless the goods are sent in conformity with an order or contract and by a proper method of shipment.¹⁹ The property will not otherwise pass to him, and no reason can be suggested for imposing the risk upon him of goods which he did not order or which for any reason were improperly sent. On the other hand if goods are properly shipped to the buyer, in accordance with an order or contract, the buyer being named as consignee in the bill of lading, there can be equally little doubt that the risk of loss and deterioration is upon the buyer, for the property has passed to him. This

¹⁷ *Tufts v. Griffin*, 107 N. C. 47,

12 S. E. 68, 10 L. R. A. 526, 22 Am. St. Rep. 863.

¹⁸ Section 335.

¹⁹ See *supra*, § 278.

is very evident if the bill of lading is a straight bill — that is, one which names the buyer as consignee without making use of the word “order,” for here the bill of lading does not in any way qualify the inferences to be drawn from the shipment.²⁰ The same principle is applicable, moreover, even though the bill is an “order” bill and negotiable, provided that the buyer is named as consignee. It is true that the seller by retaining the possession of the bill may prevent the buyer from obtaining the delivery of the goods. This, however, is because the seller is enabled to control the possession of the goods by means of the bill of lading. The goods are the buyer’s, but the carrier will not surrender them until the bill of lading is surrendered. The situation is similar where an order bill is taken by the shipper in his own name and indorsed.²¹ In the cases thus far considered in this section, the general principle that risk attends title is, therefore, applicable. But it may be supposed that the seller instead of consigning the goods directly to the buyer, either by negotiable or nonnegotiable bill, consigns them to himself or to a third person with a view to retain title until the buyer pays the price and has not indorsed the bill prior to the loss. The situation on principle seems analogous to that where a conditional sale is made. The seller either retains the property himself or transfers it to a third person for the purpose of securing payment of the price, but the beneficial interest in the goods vests in the buyer on shipment, assuming always that the goods were properly shipped in conformity with the buyer’s order. Where the bill of lading names a third person as consignee, who advances the price on the security of the bill of lading, it is evident that the risk must be with the buyer and not with the holder of the legal title. The consignee has the legal title of the goods,²² but he has no interest in the shipment other than to secure repayment of the money which he has advanced. He is usually a banker and the transaction is merely one form of making a loan on security. It is evident then that the holder of the legal title in such a case does not bear the risk, nor can the risk remain with the seller, for

²⁰ See *supra*, §§ 281, 282, 286.

²¹ *Forcheimer v. Stewart*, 65 Iowa, 593, 22 N. W. 886, 54 Am. Rep. 30;

Washburn Crosby Co. v. Boston & Albany R. Co., 180 Mass. 252, 257.

²² See *supra*, § 272.

it may be that the price has already been paid or a bill of exchange accepted for the price. It, therefore, rests on the buyer. That the risk should fall on him follows not simply from the foregoing process of elimination of the other parties, but also from a direct consideration of the buyer's position. The shipment has been made in accordance with his order and is solely for his benefit. The English law sustains the view here suggested.²³ The same doctrine has been expressed in a New York decision.²⁴ In

²³ The question was one much considered in the case of *Browne v. Hare*, 3 H. & N. 484, 4 H. & N. 822. The defendants, merchants at Bristol, contracted to buy of the plaintiffs, merchants at Rotterdam, ten tons of refined oil to be shipped "free on board" at Rotterdam at £45 15s. per ton to be paid for on delivery of the bills of lading by bill of exchange, payable in three months and dated on the day of shipment of the oil. The plaintiffs, accordingly, shipped on a general ship, trading between Rotterdam and Bristol, five tons of the oil, and the master signed a bill of lading making the oil deliverable to "shippers' order." The plaintiffs indorsed the bill of lading specially to the defendants and forwarded it with a bill of exchange drawn on the defendants to the broker through whom the original contract had been made. On the following night the ship was wrecked and the oil lost. The plaintiffs' letter reached its destination shortly afterward and the broker presented the bill of lading with the bill of exchange to the defendants, requesting acceptance of the latter. The defendants refused. It was held that the plaintiffs were entitled to recover upon the defendants' promise to pay the price of the oil. This decision was affirmed by the Exchequer Chamber. The court rested the decision on the ground that the

property in the oil passed to the buyer on shipment of the goods but as the court also admitted that the seller had control of the oil, and as it is evident from other decisions that the seller had complete power of disposition of the oil by virtue of the form of the bill of lading (See *supra*, § 283), it follows that the court's decision must be taken as holding that the beneficial interest as distinguished from a mere title for security was in the buyer. See also *Shepherd v. Harrison*, L. R. 4 Q. B. 196, per Cockburn, C. J.; *Mirabita v. Imperial Ottoman Bank*, 3 Ex. D. 164.

"Farmers' & Mechanics' Bank v. Logan, 74 N. Y. 568. In this case Sears & Daw, commission merchants, who had bought wheat for one Brown with their own money, shipped the goods under a bill of lading in which they were named as consignees, but which contained a direction to notify Brown. The court, in its opinion, asserts both that the title remained in Sears & Daw and that the risk was upon Brown, saying: "We are asked, would not the profit have been Brown's, had the wheat advanced in value, and the loss his, had it declined, or if it had been destroyed by fire? To which the ready answer is, whatever had chanced to it, it would not have been his, as between him and Sears & Daw and the plaintiff, until he complied with the con-

some cases, however, courts have somewhat hastily assumed that the risk necessarily accompanied legal title, and on being satisfied that the legal title was by virtue of the bill of lading or mode of shipment in one party or the other, have assumed that the risk necessarily was there also.²⁵

§ 306. **Effect of default upon risk.**—There has not been much discussion in our law upon the effect of default by buyer or seller upon the risk of loss or deterioration. The principles which must govern the question are, however, reasonably clear. If the buyer repudiates or commits a total breach of the contract it is obviously impossible for the seller to retain the goods as his own, or deal with them as such, and yet claim that the risk of their continued existence rests with the buyer, even if the property in the goods has already passed to the buyer. The seller must choose what attitude he will take. As repudiation or breach by the buyer where the property has passed relates merely to taking delivery of the goods, the risk has clearly passed to the buyer under the principles stated in the preceding sections, and his default cannot enable him to get rid of the burden. The seller, however, as will hereafter more

ditions on which it was bought for him, that is to say, had accepted and paid the draft. As soon as he paid the draft, it would have been his, with whatever enhancement of value. Had it lessened in value, or been burned up, he would still have been liable to Sears & Daw, for the price of their services and for their expenses, and to the plaintiff, first, on his promise to accept the draft, and after acceptance, on that obligation to pay it."

²⁵ In *Willman Mercantile Co. v. Fussy*, 15 Mont. 511, 39 Pac. 738, 48 Am. St. Rep. 698, the plaintiff received an order for a carload of apples from the defendant. The apples were to be f. o. b. cars at the seller's residence, "sight draft with bill of lading attached." The apples were shipped in good order but froze on their way. The plaintiff took a bill of lading for the con-

signment in his own name, and forwarded this, with sight draft attached, through a bank of the defendant's who refused to honor the draft. The court said, no doubt with truth: "The plaintiff, the vendor in this case, dealt with the bill of lading with the manifest purpose of securing the payment for the apples," but the court seems wrong in holding that it necessarily follows that the risk is on the seller because the control remains with him. In *Vaughn v. New York, etc., R. R. Co.*, 27 R. I. 235, it appeared that a carload of corn was shipped by one Shultis of Boston, to the plaintiff, to Davisville, R. I. The corn was duly shipped and a bill of lading, with draft attached, was sent through a bank to the plaintiff. While the corn was standing on a spur track of the defendant, adjacent to the plaintiff's warehouse, a fire broke out

fully appear,²⁶ may by rescission or resale of the goods deprive the buyer of his title, and if the seller elects to do this, the risk thereupon is removed from the buyer. Until manifestation of an election by the seller to rescind, or until a resale, as the property remains in the buyer, so the risk will remain with him. If the buyer's repudiation or default relates not simply to taking delivery, but to taking title to the goods, the situation is different. Here, as the seller has the property he normally would bear the risk, and as the buyer's conduct will generally amount to a total breach of the contract, whatever rights the seller has will arise immediately. In England, and many States in this country, the seller's right is limited to a right of action for the difference between the contract price and the market price of the goods at the time the contract should have been carried out.²⁷ In many jurisdictions in this country, however, the seller may elect to store the goods for the buyer, or to notify the buyer that he holds them as bailee for the buyer and recover the full price as if the property in the goods had passed.²⁸ Under the Sales Act this remedy is allowed the seller if the goods are of a kind that cannot readily be resold for a reasonable price.²⁹ If the law allows a seller thus to treat goods as if they were the buyer's, and the seller makes an election so to do, it would seem that the buyer must thereafter bear the risk. If the seller had not indicated which course he intended to pursue, the loss would fall on him. Since the property is in him, until he manifests an election to transfer it to the buyer, it could not be assumed, in the absence of some overt act manifesting an election, that the seller held the property for the buyer's

which consumed both the warehouse and the car of corn. The court held that the plaintiff could not recover from the railroad for the loss of the corn, saying: "As to the carload of corn, we are of the opinion, upon all the testimony, that title to the same had not passed to the plaintiff at the time of the fire. He could only obtain title to the same by paying the draft and obtaining the bill of lading, which he had not done prior to the destruction. The sale was conditional upon the payment of the draft,

and title still remained in Shultz at the time of the fire; and the carload of corn had not been delivered to the plaintiff at that time; it was still locked and sealed with the lock and seal of the defendant." See also *Cragun v. Todd*, 131 Iowa, 250, 108 N. W. 450, where the loss caused by injury to peaches damaged in transit was thrown upon the seller.

²⁶ See *infra*, § 501 *et seq.*

²⁷ See *infra*, § 562.

²⁸ See *infra*, § 562.

²⁹ Section 63 (3).

benefit and as his bailee.³⁰ If the repudiation or breach is committed by the seller the same principles are applicable. The risk will be upon the seller if the property in the goods has not been transferred, and even if it has been an election to rescind the transfer, manifested by the buyer, will throw back the risk and the property upon the seller.³¹ It has hitherto been assumed that one party or the other had totally repudiated his obligation or committed a final and complete breach of it. The situation for which section 22(b) provides is rather for a delay or temporary fault, which is not, and perhaps cannot be, treated as sufficient breach to terminate the bargain. This is called in the civil law *mora*, as distinguished from an ultimate breach. Speaking of such a situation, Blackburn, J., said:³² "The delay in weighing is quite as much the fault of the purchaser as of the sellers. When the prompt day (*i. e.*, the day appointed by agreement or usage of trade for payment) comes the sellers have a right to require that the goods should be weighed at once, so as to ascertain the price, and have it paid to the last farthing * * *. Now by the civil law it always was considered that, if there was any weighing, or anything of the sort which prevented the contract being *perfecta emptio*, whenever that was occasioned by one of the parties being *in mora*, and it was his default, though the *emptio* is not *perfecta*, yet if it is clearly shown that the party was in *mora*, he shall have the risk just as if the *emptio* was *perfecta*. That is perfectly good sense, and justice, though it is not necessary to the decision of the present case, that * * * because the noncompletion of the bargain and sale, which would absolutely transfer the property, was owing to the delay of the purchaser, the purchaser should bear the risk just as much as if the property had passed." A New York decision also presents facts involving the point,³³ but the

³⁰ See *Neal v. Shewalter*, 5 Ind. App. 147, 31 N. E. 848, where the loss was thrown on the sellers because they "did not place themselves in the position of bailees" for the purchasers.

³¹ See *Doane v. Dunham*, 79 Ill. 131.

³² *Martineau v. Kitching*, L. R. 7 Q. B. 436, 456. See statement of this case, *supra*, § , note.

³³ *McConihe v. New York & Lake Erie R. R. Co.*, 20 N. Y. 495, 75 Am. Dec. 420. The defendants had agreed to buy fifteen cars of the plaintiff, fitted with boxes which the defendants were to supply. The cars were to be finished by a certain time, but, owing to the failure of the defendants to furnish the boxes, the cars were never finished. Seven of

court held that the risk remained with the seller in spite of the buyer's default, since this default was not the cause of the loss. A decision in the Supreme Court of the United States follows the same line of argument.³⁴ It seems probable from the authorities cited, that the provision of the English Sale of Goods Act, copied in the American Sales Act, goes farther in throwing the risk upon the party in default than the common law has hitherto gone. The original draft of the English act provided that the risk should be upon the party in fault "as regards any loss which would not have occurred but for such fault."³⁵ The expression "might not have occurred" was substituted at the instance of Lord Watson. The effect of this substitution seems to be to shift the burden to the wrongdoer to show that his default was not a cause of the loss. It seems reasonable, in case of doubt as to the proximate causation of the loss by the delay, that the party in default who is confessedly a wrongdoer should suffer rather

them were finished as far as was possible without the boxes, and these cars were destroyed by fire while still in the plaintiff's possession, but without any negligence, more than two months after the time when all the cars were to have been finished. The court held that property had not passed to the defendants, and as the loss was not a necessary consequence of the defendants' delay in furnishing the boxes, the risk also had not passed.

³⁴ Grant v. United States, 7 Wall. 331, 19 L. ed. 194. The United States government had agreed to buy supplies which were to be furnished by the plaintiff. By the terms of the contract the government was to inspect the supplies at the place of shipment. The government unreasonably delayed the appointment of an inspector. The goods were finally inspected and shipped but were delayed on the road and were finally captured by the troops of Texas, then in a state of rebellion against the

United States. It is to be noticed, however, that the delay in shipment was not caused by the government's delay, for the plaintiffs were unable to deliver at the point of shipment all the supplies which were to go forward until after the government was ready to proceed with the inspection, and the inspection was delayed after the appointment of an inspector at the request of the plaintiff. The action was to recover for the goods lost. It was held that no recovery could be had. The court said: "If, however, it be admitted that the government was in default in not inspecting sooner, that default had no connection with the subsequent injury suffered by the claimant, and was not the proximate cause of it. In such a case the rule of law applies, that where property is destroyed by accident, the party in whom the title is vested must bear the loss."

³⁵ Section 20.

than the innocent party. This view also has the support of the civil law.³⁶

§ 307. **Risk of loss in the Roman Law.**—In the Roman Law, as has been seen,³⁷ title to the goods did not pass to the buyer until delivery, but risk passed as soon as the contract of sale between the parties was fully completed, or, to use the Latin phrase, there was then *emptio perfecta*. The obligation of the parties to go forward might be complete, yet the sale might not be perfect. To make a perfect sale it was necessary for the bargain to be unconditional, to relate to specific goods, and for the price to be certain.³⁸ If a sale was subject to a suspensive (precedent) condition, and the subject-matter was destroyed before fulfillment of the condition, the loss fell on the seller, since the obligation could never become complete; but if the injury to the subject-matter did not destroy it or change its identity, the loss fell on the buyer, if the condition was fulfilled, for the fulfillment was held to relate back to the time when the agreement was concluded. If a resolute (subsequent) condition was attached to a bargain, the risk of destruction nevertheless passed immediately, but the risk of injury not amounting to destruction did not necessarily pass, for such injury would not prevent the rescission of the contract by the happening of the condition; and if the condition were dependent on the will of the buyer, he would naturally exercise his right.³⁹ A sale was also imperfect if the amount of the price was not exactly determined, or if the goods were not exactly defined. Thus, in sales by count, weight, or measure the risk did not pass to the buyer till the goods were counted, weighed, or measured. This was so where a definite quantity or proportion of a specified mass was sold at a price to be determined by calculation when the goods should be counted, weighed, or measured;⁴⁰ and it has been held that though the whole of such mass were purchased, the sale is

³⁶ Moyle, *Contract of Sale*, 86; Pothier, *Contrat de Vente*, § 58. See also *infra*, § 307.

³⁷ *Supra*, §§ 170, 267.

³⁸ "Si id quod venierit appareat quid quale quantum sit, sit et pretium, et pure venit, perfecta est emptio." Dig. 18, 6, 8. Pothier, *Contrat de Vente*, § 309; Moyle, *Contract of Sale in the Civil Law*, 77.

³⁹ Moyle, *Contract of Sale*, 78–82; Pothier, *Contrat de Vente*, §§ 311–313; Voet, *Compendium Juris*, Lib. 18 Pandectarum (Tit. VI), 4. Compare the French Code Civil, § 1182.

⁴⁰ Moyle, *Contract of Sale*, 84, 85; Pothier, *Contrat de Vente*, § 309; Code Civil, § 1585.

still imperfect and the risk on the seller,⁴¹ but the contrary view certainly seems more sensible.⁴² So if a fixed proportion of a specified mass were purchased, that should also be regarded as a sale *per aversionem* — that is, a sale of a specified thing for a lump sum.⁴³ After the risk had passed to the buyer, the seller before delivery was liable for willful default (*dolus*), and also negligence (*culpa*), whether gross or slight, unless the buyer were in default (*mora*) in receiving delivery, in which case the seller was thereafter responsible only for willful default.⁴⁴ If the seller were in default in making delivery, the property was thereafter at his risk.⁴⁵

§ 308. **Reasons given for the rule of the Roman Law.**—The reason uniformly given by the older writers in support of the doctrine of the Roman Law, that the risk passes as soon as there is *emptio perfecta*, though the title has not passed, is thus expressed by Noodt:⁴⁶ “The buyer, as soon as the bargain is made, is a creditor of the thing sold. The seller, on the other hand, is a debtor. By the natural destruction of it, the debtor of a specific thing is freed from his debt.”⁴⁷ This argument is, of course, sufficiently conclusive to prove that the seller is freed from liability,

* Moyle, Contract of Sale, 84, citing Demante, Cours Analytique de Code Civil, VII, p. 10; Pothier, Contrat de Vente, § 309. So in Peterkin v. Martin, 30 La. Ann. 894, 896, it is laid down: “There can be no sale in lump except for a lump-sum price.” This is because by the civil law to make a perfect sale it is necessary that the price as well as the goods should be ascertained.

* Aubry & Rau, Cours de Droit Civil Français (4th ed., IV), § 349, p. 341, citing Duvergier, I, 90, Dijon, 13 Décembre, 1867, Sir., 68, 2, 311. As delivery is no longer necessary in France for the transfer of title, the title in the case supposed would in that country pass to the buyer; and if the risk remains with the seller, the curious case is presented of a seller retaining the risk after he has parted with title and per-

haps possession. But such, it seems, is the law of Louisiana. It was so held in Shuff v. Morgan, 9 Mart. 592. In Larue v. Rugely, 10 La. Ann. 242, however, the court expressly leave open the question whether transfer of possession as well as title would transfer the risk. See also Goodwyn v. Pritchard, 10 La. Ann. 249; Rhea v. Otto, 19 La. Ann. 123; Peterkin v. Martin, 30 La. Ann. 894.

* Moyle, Contract of Sale, 86.

* Voet, Compendium Juris, Lib. 18 Pandectarum, Tit. VI, 2.

* Ibid., Tit. VI, 3. See also Moyle, p. 87.

* Lib. XVIII, Tit. VI.

* See also Voet, Lib. XVIII, Tit. VI; Sandars' Justinian (Hammond's ed.), p. 446; Pothier, Contrat de Vente, § 308; C. G. Wächter, Archiv. f. Civil Pr. XV, 97 (1832). See also Moyle, p. 90.

but it does not prove that the buyer is liable. That it is assumed to have this effect would naturally induce the belief that the Roman Law did not have the principle of the English law, that if one party to a contract of mutual obligation is excused from performing by the impossibility of performance, the other party is likewise excused; or, as it may be put more tersely, that impossibility excuses breach of a promise, but not breach of a condition, whether express or implied. Certainly writers on the civil law prior to this century did not understand that their system of jurisprudence recognized that principle,⁴⁸ or the insufficiency of their arguments as to risk would have been apparent. Nevertheless, there is a text in the Digest which seems to apply the principle.⁴⁹ At the present day the general rule in the civil law is almost universally recognized to be the same as in the English law.⁵⁰ It only remained, therefore, for the civilians to find another and better reason, or to change their rule. The subject has been a popular one with legal writers on the continent of Europe, especially in Germany; and many and various have been the reasons, theoretical and practical, suggested. It is not necessary to examine all of them,⁵¹ but three lines of reasoning seem entitled

⁴⁸ Thus Pothier, *Contrat de Vente*, § 308, states that though Barbeyrac and Puffendorf object "that the buyer's obligation to pay the price is dependent upon the condition that the thing sold shall be delivered to him, I deny the proposition. The buyer is under an obligation to pay the price, not upon condition that the seller shall give him the thing, but rather upon the condition that the seller is on his part obliged to cause him to have the thing; it is sufficient, therefore, if the seller is legally subject to such obligation, and does not fail in its performance, in order that the obligation of the buyer may have a cause and subsist."

⁴⁹ Dig. 19, 1, 50. "Bona fides non patitur, ut, cum emptor alicujus legis beneficio pecuniam rei venditæ debere desisset antequam res ei trada-

tur, venditor tradere compelletur et re sua careret."

⁵⁰ Windscheid, *Lehrbuch des Pandektenrechts*, § 321, 3; Hofmann, *Periculum beim Kauf*, pp. 8, 9. Both writers cite a number of other authorities. Some authorities, however, still maintain that in order to make out the *exceptio non adimpleti contractus* it is necessary that the plaintiff shall be in default in the performance of his obligation, not simply have failed to perform it under circumstances making his failure excusable. A few writers hold that a bilateral contract consists of two wholly independent promises. See citations above.

⁵¹ As an illustration of the fertility of the Teutonic intellect when in search of a reason, the suggestion of a writer, not inaptly named Goose,

to consideration — 1. The buyer is entitled to the *commodum rei*, and the *periculum rei* should always go to the same party. But there is no *commodum rei* that can be classed with the risk of destruction. Changes in the pecuniary value of the subject-matter of a bargain have of course no effect upon it. But if a case can be supposed of an accidental change in the subject-matter of a contract of sale, so that it is no longer substantially the same thing, it is not certain that the seller would be bound to perform.⁵² As this argument rests on an assumption which, though it cannot be disproved, cannot be proved, it does not advance the discussion. 2. Immediately after the contract, the seller can no longer deal with the subject-matter of it freely for his own benefit. His hands are tied. If an accident befalls the thing, and the loss is thrown upon the seller, he has incurred a loss because of holding the thing for the seller's benefit instead of disposing of it otherwise. But it must be observed that every bilateral contract, if the parties respect their promises, involves the consequence that neither party is as free as he was before; and in a contract of sale the loss of freedom on the part of the buyer is just as real, and just as much for the benefit of the other party, as is the seller's sacrifice. True, the seller's obligation relates to a specific thing; but, generally speaking, the only result of a failure by the seller to have the thing ready for delivery is liability in damages to the buyer, and the latter suffers the same consequence if he has not the price ready at the appointed time. 3. Windscheid's explanation⁵³ is

may be mentioned. He says: "Even if the buyer were not required to pay the price, he would be injured by the calamity, for the thing purchased was of more value to him than the money; the seller also would not be freed from loss, for the money was worth more to him than the thing. If the buyer is required to pay the price, he only suffers loss. A contrary view would be very like the justice of St. Crispin, only worse. It injures both, and indemnifies neither." Jahrb. f. Dogm. IX, § 203. So able a writer as Ihering puts forward as the reason of the rule the theory that failure to make an im-

mediate delivery and transfer of title is generally due to the wrongful delay of the buyer, and that to prevent controversy, the law assumes this to be always the case. Jahrb. f. Dogm. III, 463-465.

⁵² "It is said, 'the buyer is not unfairly treated, the *commodum* also belongs to him.' This is only saying that the *commodum rei* and the *periculum rei* must always fall to the same party, but to which one?" Hofmann, p. 33.

⁵³ Lehrbuch, § 321, 3. A similar theory is expressed in Austin, Jurisprudence (4th ed.), p. 1001.

that the contract of sale itself is from its very nature in effect an alienation of the thing sold. A contract of sale, he says, is an immediate declaration of surrender of the owner's rights in a thing (*Entaüsserungserklärung*). "It has for its content that the thing sold is given; it is not that an obligation is undertaken to give it. An obligation on the part of the seller first arises when the actual state of affairs does not correspond to the declaration." It is another and somewhat less carefully analyzed way of saying the same thing, to say that when a contract of sale is entered into, an immediate completion is ordinarily expected and a delay is accidental. This line of argument in a sense includes also the second reason suggested. It may be doubted, however, whether the parties to a contract to sell at a future day look at the matter in this way; and it is not unlikely that Windscheid was led to adopt his view in order to furnish an explanation of the rule of the Roman Law as to risk. The doctrine that the risk should remain with the seller until delivery or transfer of title is also supported by able civilians.⁵⁴

§ 309. **Modern civil law.**—The reasons brought forward in support of the doctrine of the Roman Law seem generally to have been thought inadequate by European legislators. In France the risk of loss now remains with the seller until the title passes.⁵⁵ In Germany,⁵⁶ and Austria⁵⁷ the risk is on the seller until delivery,

⁵⁴ See Titze, *Unmöglichkeit*, 255-264; Oesterlen, *Mehrfacher Verkauf*, 66.

⁵⁵ This change in the French law has been effected by putting back the time of the transfer of title to the time of the contract. *Code Civil*, Art. 711: "*La propriété des biens s'acquiert . . . par l'effet des obligations.*" Art. 1138. "*L'obligation de livrer la chose est parfaite par le seul consentement des parties contractantes. Elle rend le créancier propriétaire et met la chose à ses risques dès l'instant où elle a dû être livrée, encore que la tradition n'en ait point été faite.*" The French law is, therefore, now quite similar to the English; and the rule of French law that *en fait de meubles possession*

vaut titre bears some analogy to the rule generally prevailing in this country, that as regards an innocent third person delivery is necessary, though unnecessary so far as the buyer and seller are concerned.

⁵⁶ *Bürgerliches Gesetzbuch*, § 446. With delivery of the property sold, the risk of chance destruction and deterioration passes to the buyer. From the time of delivery the buyer is entitled to the benefits and is liable for the burdens of the property. See further Titze, *Unmöglichkeit*, 255-264.

⁵⁷ *Gesetzbuch*, §§ 1048-1050, 1064; Hofmann, p. 52. If a time for delivery is fixed by the contract, after that time the risk is transferred to the buyer.

which is also generally the moment when the title passes.⁵⁸ No difference was made by the Roman Law or seems to be made by the modern civil law on this subject between movable and immovable property.

⁵⁸ The case may arise, certainly in the case of real estate, where delivery is made but title has not passed, because a necessary formality has not been complied with. In such a case

it is held, in Prussia at least, that the risk is upon the buyer. *Entscheidungen des Rechtsgerichts, Civilsachen*, Vol. 7, p. 241.

CHAPTER X.

TRANSFER OF TITLE.

Section 310. Attempted sale by one not the owner — Provisions of Sales Act.

- 311. No one but the owner can give title.
- 312. Estoppel of the owner.
- 313. Transfer of possession does not in itself create an estoppel.
- 314. Possession intrusted to one who habitually sells such goods.
- 315. Possession intrusted to one who has authority to obtain offers.
- 316. Possession intrusted of indicia of title.
- 317. Possession intrusted to agent with power of sale.
- 318. Early English Factors' Acts.
- 319. Later English Factors' Acts.
- 320. Factors' Acts in the United States.
- 321. The shipper treated as owner to protect advances of consignee.
- 322. Power of consignee or factor to deal with goods.
- 323. Questions of construction under American Factors' Acts.
- 324. The seller in a conditional sale is not estopped to assert his title.
- 325. In a few jurisdictions the seller is estopped.
- 326. Creditors' rights where property is sold conditionally.
- 327. Statutes requiring the record of conditional sales.
- 328. Effect of notice.
- 329. Other circumstances of estoppel in conditional sales.
- 330. Conditions precedent and subsequent in conditional sales.
- 331. Seller cannot effectively refuse to transfer title.
- 332. Assignability of the buyer's right.
- 333. The seller may recover the price.
- 334. Risk of loss is upon the buyer.
- 335. Conflicting authority.
- 336. Distinction between conditional sales and leases.
- 337. Distinction between conditional sales and chattel mortgages.
- 338. Distinction between conditional sales and assignments.
- 339. Conflict of laws.
- 340. Substitution of a different agreement for a conditional sale.
- 341. Cash sales — Meaning of the term.
- 342. Cash sales — Early law.
- 343. Cash sales — Modern law.
- 344. Sales conditional on the signing of negotiable paper.
- 345. Sales, C. O. D.
- 346. Waiver of the condition of payment.
- 347. Market overt.
- 348. Sale by one having voidable title — Provisions of the Sales Act.

§ 310. Attempted sale by one not the owner — Provisions of Sales Act.—

Sec. 23. SALE BY A PERSON NOT THE OWNER.

— (1.) Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2.) Nothing in this act, however, shall affect —

(a.) The provisions of any factors' acts, recording acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof,

(b.) The validity of any contract to sell or sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

This section follows section 21 of the English Sale of Goods Act with only slight verbal changes except that in 2 (a) "recording acts" are inserted in the American statute. The effect of section 21 of the English Act is also qualified by the next section in that act, which provides that where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller. In this country the law has never adopted the doctrines of market overt,¹ and it was unnecessary to make any reference in the Sales Act to the doctrine.

§ 311. **No one but the owner can give title.**— It is a fundamental doctrine of the law of property that no one can give what he has not. One who has a title, which in his hands is voidable or subject to a right of rescission by another, may transfer a title to a purchaser for value without notice, free from the possibility of avoidance or rescission, but one who has no title at all can transfer none, and that a buyer from him pays value in good faith without notice makes no difference.² It is usual to say that bills of ex-

¹ See *infra*, § 347.

² "The universal and fundamental principle of our law of personal property is, that no man can be divested of his property without his own consent; and, consequently, that even

the honest purchaser under a defective title cannot hold against the true proprietor. That 'no one can transfer to another a better title than he himself has' is a maxim, says Chancellor Kent, 'alike of the com-

change and promissory notes form an exception to this rule in that a thief or finder of such an instrument, if payable to bearer or indorsed in blank, can give a good title to a *bona fide* purchaser for value without notice. Whether the better explanation of this doctrine is that an exception is here to be noted to the rule that one who has no title can give none, or whether it is more accurate to say that mere possession of negotiable paper payable to bearer or indorsed in blank carries title with it, as in the case of money, so that a thief or finder may properly be said to have the legal title to the instrument, though of course his title can be divested by the true owner, need not here be considered. It is enough to call attention to the distinction between negotiable paper and ordinary chattels. How far such documents as bills of lading and warehouse receipts partake of the nature of strictly negotiable paper in this respect is considered in another connection.³ Certificates of stock also are to be distinguished from ordinary chattels, the sale of which is here under consideration. An approach to the doctrines of negotiable paper is made in regard to such certificates.⁴ As to ordinary chattel property, however, the general rule stated at the beginning of the section must apply in the absence of estoppel or something akin to estoppel.

§ 312. **Estoppel of the owner.**—If the owner is by his conduct precluded from denying the seller's authority to sell, the buyer

mon and the civil law, and a sale *ex vi termini* imports nothing more than that the *bona fide* purchaser succeed to the rights of the vendor." *Saltus v. Everett*, 20 Wend. 267, 32 Am. Dec. 541, by Senator Verplanck. See also *London Bank v. Simmons*, [1892] A. C. 201, 215; *Leigh v. Mobile, etc., R. R. Co.*, 58 Ala. 165; *Lightman v. Boyd*, 132 Ala. 618, 619, 32 So. 714; *Klein v. Seibold*, 89 Ill. 540; *Fuller Co. v. Feinberg*, 86 Ill. App. 585; *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332; *McPheters v. Page*, 83 Me. 234, 22 Atl. 101, 23 Am. St. Rep. 772; *Moody v. Blake*, 117 Mass. 23, 19 Am. Rep. 394; *Baker v. Taylor*, 54 Minn. 71, 55 N. W. 823; *Kloes v. Wurmser*, 36 Mo. App. 453; *Brower*

v. Peabody, 13 N. Y. 121; *Soltau v. Gerdau*, 119 N. Y. 380, 23 N. E. 864, 16 Am. St. Rep. 843; *Velsian v. Lewis*, 15 Or. 539, 16 Pac. 631, 3 Am. St. Rep. 184; *Walker v. First Nat. Bank*, 43 Or. 102, 105, 72 Pac. 635; *Quinn v. Davis*, 78 Pa. St. 15; and cases in the following sections, *passim*.

³ See *infra*, § 406 *et seq.*

⁴ See *First Bank v. Lanier*, 11 Wall. 369, 20 L. ed. 172; *McNeil v. Tenth Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Knox v. Eden Musée Co.*, 148 N. Y. 441, 454, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700; *Central Trust Co. v. West India Co.*, 169 N. Y. 314, 328, 62 N. E. 387; *Cook, Corporations*, §§ 358, 437.

may acquire a valid title although the seller had neither title nor authority to transfer title. This is an application of the familiar doctrine of estoppel. In order to give rise to an estoppel, it is essential that the party estopped shall have made a representation or statement and that some one shall have acted on the faith of this representation in such a way that he cannot without damage withdraw from the transaction. The cases in the law of sales which present questions of estoppel to deny the validity of a transfer of title may be summarized under two headings: Apparent ownership, and apparent authority. In both classes of cases the possession of the goods by the seller with the permission of the owner is generally an important element. In the former class of cases the owner of goods has intrusted possession to another under such circumstances that the possession amounts to a representation that the possessor is the owner of the goods; in the latter class of cases under such circumstances that the doctrines of the apparent authority of an agent are applicable; and Factors' Acts have in some jurisdictions extended to the common-law doctrines of agency.⁵ This division into classes is not so absolute as it might appear at first sight, for often the circumstances apparent to the buyer are equally explicable on the assumption that the seller has title or that he has authority to sell for another. In other words the possessor appears to have a right to sell, however that right may be derived. In one respect the cases under consideration differ from ordinary cases of estoppel. If the owner of goods intrusts possession to a third person, this possession is equally deceptive to a subsequent innocent buyer, whatever may have been the terms on which the possessor was intrusted with the goods. Yet the innocent buyer is protected, as will be seen in the following sections, if the intrusting was for certain purposes, but is not protected if the intrusting was for other purposes. The law takes into account not simply the deception of the subsequent buyer by the appearance of title in the possessor of the goods, but also whether this appearance of title was created by the original owner for a purpose so essential and proper that the original title must be protected irrespective of the injury to the subse-

⁵ See for the general doctrine, Bigelow, *Estoppel*, p. 238 *et seq.*; Ewart, *Estoppel*, p. 238 *et seq.*

quent buyer. So generally, in the law of agency, a principal may be bound under the doctrines of apparent authority in one case and not bound in another, though so far as the person who deals with the agent is concerned, the situation in the two cases seems identical. But though deception by means of apparent ownership or apparent authority of an agent is not reducible in every case to strict estoppel, the broad general principle covering the cases is that of estoppel, a deceptive situation created by the true owner and relied upon by the subsequent purchaser.

§ 313. **Transfer of possession does not in itself create an estoppel.**

—Although intrusting possession to another may lead an innocent third person to believe the possessor is the owner, no court has ever gone so far as to hold that the mere intrusting with possession would preclude the owner from asserting his title. It is an entirely proper thing for the owner of property to intrust another with it either for the advantage of the owner or of the possessor, and the law has never attempted to debar the owner from so doing. He may intrust his goods to another to be repaired or he may lend them to another for the latter's use.⁶

*“Simply intrusting the possession of a chattel to another as depositary, pledgee, or other bailee, or even under a conditional executory contract of sale, is clearly insufficient to preclude the real owner from reclaiming his property, in case of an unauthorized disposition of it by the person so intrusted. ‘The mere possession of chattels, by whatever means acquired, if there be no other evidence of property or authority to sell from the true owner, will not enable the possessor to give a good title.’” *McNeil v. Tenth Bank*, 46 N. Y. 325, by *Rapallo, J.* See also *Brewster v. Sime*, 42 Cal. 139; *Shafer v. Lacy*, 121 Cal. 574, 579, 54 Pac. 72; *Romeo v. Martucci*, 72 Conn. 504, 45 Atl. 1, 99, 47 L. R. A. 601, 77 Am. St. Rep. 327; *Charles Moe Co. v. J. H. Logue Co.*, 108 Ill. App. 128; *Nichols v. Monjeau*, 132 Mich. 582, 94 N. W.

6; *Ball Co. v. Lane*, 135 Mich. 275, 97 N. W. 727; *Ullman v. Biddle*, 53 W. Va. 415, 44 S. E. 280. In *Oyler v. Renfro*, 86 Mo. App. 321, it was held that where the owner of a team lent it for the crop season to another, a sale of the team by the latter conveyed no title to a purchaser for value without notice. It is to be observed, however, that Mo. Rev. St. (1899), § 3401, would protect the purchaser in such a case had the loan of the property been for a greater time than five years. So in *Meggy v. Imperial Discount Co.*, 3 Q. B. D. 711, the plaintiff had allowed his furniture to remain some years in the house of a friend who was insolvent, and who finally mortgaged the furniture to the defendant. It was held that the plaintiff was not estopped to assert his title.

§ 314. Possession intrusted to one who habitually sells such goods.

— In the leading case of *Pickering v. Busk*,⁷ Lord Ellenborough said: "If the principal send his commodity to a place, where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one send goods to an auction-room, can it be supposed that he sent them thither merely for safe custody? Where the commodity is sent in such a way and to such a place as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser safe." Doubtless in the case here supposed the owner's action in sending his goods to a salesroom is some evidence of authority to make a sale, but Lord Ellenborough seems to have supposed that a sale by the person intrusted would transfer a title to a purchaser even though the original owner intrusted the goods to the possessor for some purpose other than sale, which clearly appeared from the evidence. So far as Lord Ellenborough's remarks contain this implication, they go beyond the law both before and since the decision of the case in which the remarks were made.⁸ It is enough to put the typical case of sending a watch for repair to a jeweler who habitually sells watches, to make it clear that such an intrusting

⁷ 15 East, 38.

⁸ In *Wilkinson v. King*, 2 Campb. 335, decided three years before *Pickering v. Busk*, Lord Ellenborough, himself, held that a wharfinger who was accustomed to sell lead from his wharf could not give a valid title to the defendants to lead intrusted to him at his wharf by the plaintiff without authority to sell. In *Biggs v. Evans*, [1894] 1 Q. B. 88, the plaintiff was the owner of an opal matrix table-top which he intrusted to an agent who was a dealer in jewels and gems, and as a known part of his business sold jewels and gems for other people. The table top was intrusted to the agent on the terms it should not be

sold to any person nor at any price without the plaintiff's authority and that the check received in payment should be handed to the plaintiff intact. The agent sold the table top to the defendant for £200, paid by satisfying a judgment creditor of the agent, by giving the creditor a diamond worth £120 and £50 in cash, and paying the £30 in cash to the agent. The plaintiff was held by Wills, J., entitled to recover the table top from the defendant: "In one sense every person who intrusts an article to any person who deals in second-hand articles of that description enables him, if so disposed, to commit a fraud by selling it as his

will not without more, prevent the owner from asserting his title against a purchaser.⁹

§ 315. **Possession intrusted to one who has authority to obtain offers.**—It is a step beyond the situation considered in the preceding section if the owner has not only intrusted possession to one who is in the habit of selling such goods, but has given him authority to exhibit the goods to possible purchasers and obtain offers from them. Even in this case an innocent purchaser is not protected.¹⁰

own. A man who lends a book to a second-hand bookseller puts it into his power, in the same sense, to sell it as his own. A man who intrusts goods for safe custody to a wharfinger, who also deals in his own goods, or in other people's goods intrusted to him for sale, in such a sense enables him to commit a fraud by selling them to a customer. But such a transaction clearly could not give a title to a purchaser as against the owner." So in *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332, where the plaintiff intrusted a diamond ring to an itinerant dealer in jewelry in order to have the stone matched, or if the dealer was unable to match the stone to obtain an offer for it, and the dealer wrongfully sold the ring to the defendant, the plaintiff was held entitled to recover. See also *Gilman Linseed Oil Co. v. Norton*, 89 Iowa, 434, 56 N. W. 663, 48 Am. St. Rep. 400; *Quinn v. Davis*, 78 Pa. St. 15.

⁹ It is true that *Bramwell, J.*, said, in *Meggy v. Imperial Discount Co.*, 3 Q. B. D. 711: "If a wine merchant be left in possession of wine, the fair inference is that it is his own, and a person may be justified in advancing money upon the security of it; here the goods being household furniture no inference would be drawn that the insolvent had them in his possession for the purpose of selling them." This remark, however, was but a *dictum* and the same comment must

be made upon it as is made above upon Lord Ellenborough's remarks in *Pickering v. Busk*.

¹⁰ *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332, stated *supra* in note 8. The case of *Smith v. Clews*, 105 N. Y. 283, 11 N. E. 632, 59 Am. Rep. 502, and 114 N. Y. 190, 21 N. E. 160, 11 Am. St. Rep. 627, is very instructive on the point. The plaintiffs who were diamond merchants delivered to one Miers, a diamond broker, a pair of diamond ear-knobs, taking from him the following receipt: "Received from Alfred H. Smith & Co. * * * a pair of single stone diamond ear-knobs * * * on approval to show to my customer, said knobs to be returned to said A. H. Smith & Co. on demand." Miers sold the diamonds to the defendant and the plaintiffs brought action to recover their possession. At the first trial of the case the plaintiffs obtained judgment which was reversed in the Court of Appeals on the ground that the plaintiffs had actually or apparently authorized the sale. At the second trial evidence was offered by the plaintiffs that the words "on approval" in the receipt had a recognized meaning in the diamond trade well known to Miers; that these words were understood not to confer a power of sale but authority merely to show diamonds to a customer and report to the owner. This evidence was ex-

§ 316. Possession intrusted of indicia of title.— Sometimes the owner of goods not only intrusts the possession of the goods to another, but either makes or allows to be made written or oral

cluded and the complaint dismissed. The Court of Appeals held this was error, saying: "The rightful owner may be estopped by his own acts from asserting his title. If he has invested another with the usual evidence of title, or an apparent authority to dispose of it, he will not be allowed to make claim against an innocent purchaser dealing on the faith of such apparent ownership. *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341. But mere possession has never been held to confer a power to sell, and an unauthorized sale, although for a valuable consideration, and to one having no notice that another is a true owner, vests no higher title in the vendee than was possessed by his vendor. *Covill v. Hill*, 4 Denio, 323. Clews' title to the diamonds, therefore, depended wholly on Miers' authority to sell, and he was bound by such limitation as the owner had placed upon Miers' possession, and unless authority to sell existed, Clews, although acting in entire good faith, obtained no title to the stones. It was, therefore, of no consequence whether or not Clews knew of the custom of the trade. The inquiry was, Did Miers know of it, and had he contracted with reference to it? The offer was to show that the term 'on approval' had a well-understood meaning in the diamond trade, and as Miers was a dealer and broker in diamonds, if it had appeared that the term had a well-understood meaning in the diamond business, he might fairly be presumed to have been acquainted with the meaning of the expression, and to have contracted in reference to such meaning. But the offer went

further and proposed to show actual knowledge in Miers of the meaning of this term; and if such had been the fact, it would not have lain with him to have denied the well-understood meaning of an expression used by himself in the agreement by which he acquired possession of the property, nor could he escape the effect of the application of such meaning to the subject-matter of the contract. This evidence was, therefore, admissible, and the exclusion error, for which there must be a new trial, unless the contract between the parties expressed the power to sell in language so well understood that there is no ambiguity, and no room, under the rules of law, for parol testimony, to aid in its interpretation. On the former appeal of this case the court construed the contract, in the light of the evidence then before it, to confer on Miers a power of sale, and if the same evidence was now before us we should feel constrained to follow that decision. It then appeared that plaintiffs, prior to the transaction in question, knew Miers to be a dealer in diamonds, and that the stones which on two former occasions he had sold to Clews had been obtained from plaintiffs, through Plumb, who was their agent. The court emphasized these facts, saying: 'The plaintiffs were dealers in diamonds, and they knew Miers, and that he was engaged in the business of a diamond dealer. They had, on two former occasions, intrusted, through their agent, diamonds to Miers, who had sold them and accounted for the proceeds of the sale without any fault being found, so far as appears, on account of any lack of authority to sell. Now, upon

statements inconsistent with any other supposition than that the possessor is the owner. Cases illustrating this are very various in their facts and as illustrations some of the leading cases may be

these facts, what other meaning can be attached to that receipt than that Miers had power to take these diamonds and show them to the customer, and, if approved of by the customer, sell them to him? It can mean nothing else than an authority to sell the stones to the customer if they met his approval.' These facts do not appear in the case presented to us. On the contrary, it appears that Miers was personally unknown to plaintiffs until introduced by Plumb on April 11, and there is not the slightest evidence to justify the inference that the other stones sold to Clews had been obtained from plaintiffs or from Plumb. We have, therefore, no other dealings between the parties to aid us in interpreting the contract, and are confined to the single transaction out of which this action has grown. Upon the face of the contract it does not import an authority to sell. If the words 'on approval' are stricken from the paper, it would appear to be a complete agreement, of plain meaning, in which the authority given is 'to show' the diamonds, and the obligation is absolute 'to return on demand.' Such expressions are wholly inconsistent with an authority 'to sell,' and its meaning could not be plainer if the parties had inserted after the words 'to show' the words 'but not to sell.' The words 'on approval,' as ordinarily interpreted, are neither inconsistent with an authority 'to show' or an obligation 'to return on demand.' We must, however, presume that the parties intended some meaning by their use, and, as the meaning does not appear from the context, we have a case where parol

evidence is admissible to enlighten the court, and to show the intent of the parties to the contract." The same point was involved in *Biggs v. Evans*, [1894] 1 Q. B. 88, stated *supra* in note 8. In that case *Wills, J.*, said, at pages 90 and 91: "The true test is, I take it, whether the authority given in fact is of such a nature as to cover a right to deal with the article at all. If it does, and the dealing effected is of the same nature as the dealing contemplated by the authority, and the agent carries on a business in which he ordinarily effects for other people such dispositions as he does effect, what he has done is within the general authority conferred, and any limitations imposed as to the terms on which, or manner in which, he is to sell are matters which may give a right of action by the principal, but cannot affect the person who contracts with the agent. It is within the scope of the authority that the agent should sell the goods on some terms, and it is not usual in the trade to inquire into the limits or conditions of an authority of that kind; and, therefore, the principal is supposed, as respects other people, to have clothed the agent with the usual authority. The foundation, however, of the whole thing is that the agent should be authorized to enter into some such transaction. If the principal has intrusted the goods to the agent for some other purpose, the agent is acting outside his authority in selling at all; and then the principal, whose goods have been disposed of without any authority at all to do so, is entitled to recover them in spite of the disposition." With this

briefly stated. Where a hemp merchant allowed a broker who had purchased hemp for him to transfer the hemp on the books of the warehouse, where it was stored, to the broker's name, it was held that a purchaser from the broker obtained valid title.¹¹ Where the owner of goods was induced by various representations to direct the warehousemen, where goods were stored, to transfer them to the order of the fraudulent person, a purchaser from the latter was held entitled to recover from the warehouseman who, at the request of the seller, refused to deliver the goods.¹² Where owners of goods gave a dock company authority to accept all transfer orders signed by a specified clerk, who thereupon transferred goods to himself under a fictitious name, and then under that name sold them to the defendants and gave delivery orders signed in his fictitious name, it was held the original owner could recover from the defendants.¹³ Where the plaintiff ordered a steamboat built under the supervision of an agent and gave the agent directions to hold himself out as owner, and to have the vessel enrolled in the agent's name, a purchaser from the agent was

case should be compared *Eisenberg v. Nichols*, 22 Wash. 70. The case was very similar in its facts to the preceding, but the decision was opposite because of the statute making void as to innocent third persons unrecorded conditional sales. Jewelry was sent on demand by the plaintiff to one Rogers, and evidence was offered that the meaning of this was that a selection could be made from the goods and that all could be kept or a portion, or none. If any were selected and kept it was essential, according to the plaintiff's evidence, for the jeweler either to pay cash or come to some agreement as to terms of credit. Without doing either of these things Rogers sold some articles of the jewelry to the defendant. The Washington statute provided that "all conditional sales of personal property or leases thereof containing a conditional right to purchase where the property is placed in the posses-

sion of the vendee" must be recorded in order to be valid against innocent third persons. Under this statute it was held that the purchaser was protected. The decision was followed in *Kossuth Marx Jewelry Co. v. Nichols*, 22 Wash. 694, 60 Pac. 1135. Compare *Rumpf v. Barto*, 10 Wash. 382, 38 Pac. 1129.

¹¹ *Pickering v. Busk*, 15 East, 38.

¹² *Henderson v. Williams*, [1895] 1 Q. B. 521 (C. A.). It is to be noticed in this case that the plaintiff before paying for the goods inquired of the defendant if he held the goods for Fletcher (the fraudulent seller) and would hold the goods for the plaintiff, and the defendant replied that he would do so. Compare with this case *Anderson v. Read*, 106 N. Y. 333, 13 N. E. 292; *Hollins v. Hubbard*, 165 N. Y. 534, 59 N. E. 317.

¹³ *Farquharson Bros. v. King*, [1902] A. C. 325. Compare *Collins v. Ralli*, 20 Hun, 246, 85 N. Y. 637.

protected.¹⁴ Where a purchaser of goods allowed a bill of sale for the goods to be made out in the name of his agent, who was also intrusted with the possession of the goods, the principal was held estopped to claim the goods against a purchaser from the agent.¹⁵ Where the owner of a wagon allowed one of his employees to have his name painted on it for the purpose of inducing the public to believe the property belonged to the latter, an innocent purchaser was protected.¹⁶ It should be noticed that it is not simply the *indicia* of title in these cases which is important, but possession coupled with the *indicia* of title. Where the apparent vendee under a bill of sale of a piano sold the piano to the plaintiff, the defendant, the vendor under the bill of sale, was allowed to show that the bill of sale was in fact a mortgage to secure a usurious loan and that possession of the piano had been continuously held by the defendant.¹⁷

§ 317. **Possession intrusted to agent with power of sale.**—It is going a step beyond the cases hitherto considered, if the person to whom possession of the goods is intrusted is authorized to make a sale of them to some person or upon some terms, though not to the person or upon the terms on which the sale was in fact made. In such cases the decision must depend somewhat upon circumstances apparently indicating ownership or authority and upon the strictness or liberality with which the court deciding the question treats the law of ostensible authority of an agent. The usage of trade in regard to sales of goods of the kind in question is also a circumstance of importance. Where the possession of goods is intrusted to an agent with authority to sell to a particular person, an attempted sale by the agent to another person would probably pass no title.¹⁸ If the person to whom the goods are intrusted is a factor or general commission agent a sale

¹⁴ Calais Steamboat Co. v. Van Pelt's Admr., 2 Black, 372, 17 L. ed. 282.

¹⁵ Nixon v. Brown, 57 N. H. 34. See also Goldstone v. Merchants' Ice Co., 123 Cal. 625, 56 Pac. 776.

¹⁶ O'Connor v. Clark, 170 Pa. St. 318, 32 Atl. 1029, 29 L. R. A. 607.

¹⁷ Armstrong v. Freimuth, 78 Minn. 94, 80 N. W. 862.

¹⁸ See Collateral Loan Co. v. Salinger, 195 Mass. 135, 80 N. E. 811. In this case the agent pawned the goods, and the pawnbroker, it was held, acquired no lien. Had the goods been sold to the pawnbroker, it may be guessed the court would have reached the same decision.

upon credit will bind the principal although such a sale may not, in fact, have been authorized.¹⁹ But a factor cannot bind the principal by a disposition of his property out of the ordinary course of business.²⁰ Therefore, in a trade where the usage is to sell for ready money only, a sale upon credit would not be

¹⁹ *Scott v. Surman*, Willes, 400, 407; *De Lazard v. Hewitt*, 7 B. Mon. 697; *Greely v. Bartlett*, 1 Greenl. 172, 179, 10 Am. Dec. 54; *Pinkham v. Crocker*, 77 Me. 563, 1 Atl. 827; *Goodenow v. Tyler*, 7 Mass. 36, 5 Am. Dec. 22; *Roosevelt v. Doherty*, 129 Mass. 301, 303, 37 Am. Rep. 356; *Van Alen v. Vanderpool*, 6 Johns. 69, 5 Am. Dec. 192; *Geyer v. Decker*, 1 Yeates, 486. *Dias v. Chickering*, 64 Md. 348, 1 Atl. 709, 54 Am. Rep. 770, presents the case of a sale for cash but under circumstances which were not contemplated by the owner. A piano was consigned by the plaintiffs (the owners) to Buckland & Ebeling, with instructions to sell it for cash. With the consent of Ebeling the piano was moved to Buckland's house and used there for nine or ten months. It was then sold by Buckland, as belonging either to himself or his wife, to Dias who paid cash to Buckland in good faith. It was held that Dias obtained good title. The court said: "Assuming that Buckland had not purchased the piano himself in fact, or that having undertaken to buy it, his character as agent rendered such a purchase voidable in law; he was, nevertheless, as one of the firm of Buckland & Ebeling, put in possession of the piano and specifically clothed with the power to sell it for cash to any outside party. Such a sale he actually did make; he sold the piano for cash and received the money; and assuming the ownership of the property not to be in him, he should have transmitted the proceeds to the Chickerings to whom it was due, and who are legally entitled to

recover it from him. But so far as the purchaser is concerned, his obligation ended with his payment. The private instructions from the principal to their agent, he is not a party to nor bound by. Buckland being clothed, not only with possession of the piano but the right to sell it also, and, moreover, having been allowed to treat it as his own property, and so use it in his private family, without objection or interference by the Chickerings for nine or ten months, we think, under the common law, without pausing to consider the factor's act, the Chickerings are now estopped from making any demand upon Dias, and that the latter took a good title to the piano." Alvey, C. J., delivered a dissenting opinion. He said: "Here the piano was not sold in the usual course of the business by the firm to whom it was intrusted, and to whom authority of sale was delegated; nor was it sold by that firm at all, according to the testimony on the part of the plaintiffs. The sale to the defendant was not made by Buckland in his representative character as a member by the firm of Buckland, Ebeling & Co., but in his own name and right, or that of his wife, as owner of the piano. In such state of case, if it should be so found by the jury, clearly the plaintiffs have not been divested of their property, and they may maintain an action therefor."

²⁰ *Commercial Nat. Bank v. Heilbronner*, 108 N. Y. 439, 444, quoted with approval in *Romeo v. Martucci*, 72 Conn. 504, 512, 45 Atl. 1, 99, 47 L. R. A. 601.

binding.²¹ As barter is not a usual method of disposing of goods intrusted to a factor such a transaction does not bind the principal,²² and even a sale in a different place from that authorized has been said to give no valid title.²³ Probably the same may be said in regard to a transfer for an antecedent debt.²⁴ And

²¹ Anonymous, 12 Mod. 514; Warner v. Martin, 11 How. 209, 224, 13 L. ed. 667.

²² *Guerreiro v. Peile*, 3 B. & Ald. 616; *Warner v. Martin*, 11 How. 209, 226, 13 L. ed. 667; *Potter v. Dennison*, 5 Gilm. 590; *Benny v. Rhodes*, 18 Mo. 147; *Benny v. Pegram*, 18 Mo. 191, 59 Am. Dec. 298; *Holton v. Smith*, 7 N. H. 446.

²³ *Wootters v. Kaufman*, 73 Tex. 395, 399; *Romeo v. Martucci*, 72 Conn. 504, 512, 45 Atl. 1, 99, 47 L. R. A. 601, 77 Am. St. Rep. 327, citing *Catlin v. Bell*, 4 Camp. 183; *Marr v. Barrett*, 41 Me. 403. These cases, however, merely decide that the agent is liable to his principal—a very different proposition from that stated in the text.

²⁴ In *Warner v. Martin*, 11 How. 209, 225, 13 L. ed. 667, Mr. Justice Wayne said: "Again, it has been supposed that the right of a factor to sell the merchandise of his principal to his own creditor, in payment of an antecedent debt, finds its sanction in the fact of the creditor's belief that his debtor is the owner of the merchandise, and his ignorance that it belongs to another; and if in the last he has been deceived, that the person by whom the delinquent factor has been trusted shall be the loser. The principle does not cover the case. When a contract is proposed between factors, or between a factor and any other creditor, to pass property for an antecedent debt, it is not a sale in the legal sense of that word or in any sense in which it is used in reference to the commission which a factor has to sell. See *Williamson v. Berry*,

8 How. 495, 12 L. ed. 1170. It is not according to the usage of trade. It is a naked transfer of property in payment of a debt. Money, it is true, is the consideration of such a transfer, but no money passes between the contracting parties. The creditor pays none, and when the debtor has given to him the property of another in release of his obligation, their relation has only been changed by his violation of an agency which society in its business relations cannot do without, which every man has a right to use, and which every person undertaking it promises to discharge with unbroken fidelity. When such a transfer of property is made by a factor for his debt, it is a departure from the usage of trade, known as well by the creditor as it is by the factor. It is more; it is the violation of all that a factor contracts to do with the property of his principal. It has been given to him to sell. He may sell for cash, or he may do so upon credit, as may be the usage of trade. A transfer for an antecedent debt is not doing one thing or the other. Both creditor and debtor know it to be neither. That their dealing for such a purpose will be a transaction out of the usage of the business of a factor. It does not matter that the creditor may not know, when he takes the property, that the factor's principal owns it; that he believed it to be the factor's in good faith. His dealing with his debtor is an attempt between them to have the latter's debt paid by the accord and satisfaction of the common law. That is, when, instead of a sale

likewise a sale in bulk of the seller's whole stock including goods consigned for sale at retail.²⁵ It may be thought courts have gone to an extreme in protecting the principal from the consequences of slight variations by the agent from the authority granted him. A factor also has no power to make an effective pledge of his principal's goods.²⁶ In some jurisdictions, however, this doctrine has been affected by legislation known as Factors' Acts, which are considered in the following sections.

§ 318. **Early English Factors' Acts.**—The first Factors' Act was passed in 1824.²⁷ This statute protected a pledgee from a factor

for a price, a thing is given by the debtor to the creditor in payment, in which we all know that, if the thing given is the property of another, there will be no satisfaction. It is the *dation en payement* of the civil law as it prevails in Louisiana, which is, when a debtor gives, and the creditor receives, instead of money, a movable or immovable thing in satisfaction of the debt." See also Benny v. Pegram, 18 Mo. 191, 59 Am. Dec. 298.

²⁵ *Romeo v. Martucci*, 72 Conn. 504, 45 Atl. 1, 99, 47 L. R. A. 601, 77 Am. St. Rep. 327. Two judges of a court of five, however, dissented.

²⁶ *Paterson v. Tash*, 2 Strange, 1178; *Cole v. Northwestern Bank*, L. R. 10 C. P. 354; *Johnson v. Credit Lyonnais Co.*, 3 C. P. D. 32; *Warner v. Martin*, 11 How. 209, 13 L. ed. 667; *Allen v. St. Louis Bank*, 120 U. S. 20, 7 S. Ct. 460, 30 L. ed. 573; *Kelly v. Smith*, 1 Blatchf. 290, 293; *Wright v. Solomon*, 19 Cal. 64, 79 Am. Dec. 196; *Gray v. Agnew*, 95 Ill. 315; *First Nat. Bank v. Schween*, 127 Ill. 573, 11 Am. St. Rep. 174; *Michigan State Bank v. Gardner*, 15 Gray, 362, 374; *Hazard v. Fiske*, 83 N. Y. 287; *Laussatt v. Lippincott*, 6 S. & R. 386, 9 Am. Dec. 440; *McCreary v. Gaines*, 55 Tex. 485, 40 Am. Rep. 818. See also *Collateral Loan Co. v. Sallinger*, 195 Mass. 135, 80 N. E. 811.

²⁷ 4 GEORGE IV, CAP. 83. *An Act for the better Protection of the Property of Merchants and others, who may hereafter enter into Contracts or Agreements in relation to Goods, Wares or Merchandizes intrusted to Factors or Agents.* "Whereas it has been found that the Law, as it now stands, relating to Goods shipped in the Names of Persons who are not the actual Proprietors thereof, and to the Deposit or Pledge of Goods, affords great Facility to Fraud, produces frequent Litigation, and proves, in its Effects, highly injurious to the Interests of Commerce in general"; Be it therefore enacted That from and after the passing of this Act, any Person or Persons intrusted, for the Purpose of Sale, with any Goods, Ware or Merchandize. and by whom such Goods, Wares or Merchandize shall be shipped, in his, her or their own Name or Names, or in whose Name or Names any Goods, Wares or Merchandize shall be shipped by any other Person or Persons, shall be deemed and taken to be the true Owner or Owners thereof, so far as to entitle the Consignee or Consignees of such Goods, Wares and Merchandize to a Lien thereon, in respect of any Money or negotiable Security or Securities advanced or given by such Consignee or Consignees to or for the Use of the

who shipped goods, if the pledgee had no notice that the pledgor was a factor; and also gave a pledgee through a consignee the same

Person or Persons in whose Name or Names such Goods, Wares or Merchandize shall be shipped, or in respect of any Money or negotiable Security or Securities received by him, her or them to the Use of such Consignee or Consignees, in the like Manner to all Intents and Purposes as if such Person or Persons was or were the true Owner or Owners of such Goods, Wares and Merchandize; provided such Consignee or Consignees shall not have Notice, by the Bill of Lading for the Delivery of such Goods, Wares or Merchandize or otherwise, at or before the Time of any Advance of such Money or negotiable Security, or of such Receipt of Money or negotiable Security, in respect of which such Lien is claimed, that such Person or Persons so shipping in his, her or their own Name or Names, or in whose Name or Names any Goods, Wares or Merchandize shall be shipped by any Person or Persons, is or are not the actual and *bona fide* Owner or Owners, Proprietor or Proprietors of such Goods, Wares and Merchandize so shipped as aforesaid, any Law, Usage or Custom to the contrary thereof in any wise notwithstanding: Provided also, that the Person or Persons in whose Name or Names any such Goods, Wares or Merchandize are so shipped as aforesaid, shall be taken for the Purposes of this Act to have been intrusted therewith, unless the contrary thereof shall appear or be shown in Evidence by any Person disputing such Fact.

II. And be it further enacted, That it shall be lawful to and for any Person or Persons, Body or Bodies Politic or Corporate, to accept and take any Goods, Wares or Merchan-

dize, or the Bill or Bills of Lading for the Delivery thereof, in Deposit or Pledge, from any Consignee or Consignees thereof; but then and in that Case such Person or Persons, Body or Bodies Politic or Corporate, shall acquire no further or other Right, Title or Interest, in or upon or to the said Goods, Wares or Merchandize, or any Bill of Lading for the Delivery thereof, than was possessed, or could or might have been enforced by the said Consignee or Consignees at the Time of such Deposit or Pledge as a Security as aforesaid; but such Person or Persons, Body or Bodies Politic or Corporate, shall and may acquire, possess and enforce such Right, Title or Interest, as was possessed, and might have been enforced, by such Consignee or Consignees, at the Time of such Deposit or Pledge as aforesaid; any Rule of Law, Usage or Custom to the contrary notwithstanding.

III. Provided always, That nothing herein contained shall be deemed, construed or taken to deprive or prevent the true Owner or Owners, Proprietor or Proprietors of such Goods, Wares or Merchandize, from demanding and recovering the same from his, her or their Factor or Factors, Agent or Agents, before the same shall have been so deposited or pledged, or from the Assignee or Assignees of such Factor or Factors, Agent or Agents, in the Event of his, her or their Bankruptcy; nor to prevent any such Owner or Owners, Proprietor or Proprietors, from demanding or recovering of and from any Person or Persons, or of or from the Assignees of any Person or Persons in case of his or her Bankruptcy, or of or from any Body or Bodies

right and no greater against the goods than the consignee himself had.²⁸ Another statute was passed two years later.²⁹ The com-

Politie or Corporate, such Goods, Wares or Merchandize, so consigned, deposited or pledged, upon Repayment of the Money, or on Restoration of the negociable Security or Securities, or on Payment of a Sum of Money equal to the Amount of such Security or Securities, for which Money or negociable Security or Securities such Person or Persons, his, her or their Assignee or Assignees, or such Body or Bodies Politic or Corporate, may be entitled to any Lien upon such Goods, Wares or Merchandize; nor to prevent the said Owner or Owners, Proprietor or Proprietors, from recovering of and from such Person or Persons, Body or Bodies Politic or Corporate, any Balance or Sum of Money remaining in his, her or their Hands, as the Produce of the Sale of such Goods, Wares or Merchandize, after deducting thereout the Amount of the Money or negociable Security or Securities so advanced or given upon the Security thereof as aforesaid: Provided always, that in case of the Bankruptcy of such Factor or Agent, the Owner of the Goods so pledged and redeemed as aforesaid shall be held to have discharged *pro tanto* the Debt due by him to the Bankrupt's Estate.

²⁸ In *Cole v. Northwestern Bank*, L. R. 10 C. P. 354, Blackburn, J., said of this act: "When we look at the language used in the two earlier Factors' Acts with reference to this state of the law, it seems to us clear that the Legislature intended by 4 Geo. IV, c. 83, to alter the law in favor of consignees, so far as to enact that, where goods were shipped in the names of persons 'intrusted for the purpose of sale' with goods, the

consignees might advance money on the security of the goods as if the consignors were the true owners, unless they had notice to the contrary; with a proviso (which may have some bearing on the construction of § 4 of 5 & 6 Vict., c. 39) that the persons in whose names such goods are so shipped shall be taken to have been intrusted therewith, unless the contrary 'appear or be shown in evidence by any person disputing the fact.'" And by the second section of that act, the Legislature repealed *M'Combie v. Davies*, 7 East, 5, in so far as it was applicable to those taking pledges from consignees; but that act did not alter the established law as to pledging, with regard to others than consignors and consignees. In *M'Combie v. Davies*, 7 East, 5, the court held that a pledge by a factor was so totally tortious as to not transfer the lien which the pledgor himself had. It is probable that this decision would not be followed in this country even in jurisdictions where no Factors' Act existed. First Bank *v. Boyce*, 78 Ky. 42, 39 Am. Rep. 198.

²⁹ 6 GEORGE IV, CAP. 94. *An Act to alter and amend an Act for the better Protection of the Property of Merchants and others, who may hereafter enter into Contracts or Agreements in relation to Goods, Wares or Merchandize intrusted to Factors or Agents.* "Whereas an Act passed in the Fourth Year of the Reign of His present Majesty, intituled *An Act for the better Protection of the Property of Merchants and others, who may hereafter enter into Contracts or Agreements in relation to Goods, Wares or Merchandize intrusted to Factors or Agents:* And

Whereas it is expedient to alter and amend the said Act, and to make further Provisions in relation to such Contracts or Agreements, as hereinafter provided": Be it therefore enacted

That from and after the passing of this Act, any Person or Persons intrusted, for the Purpose of Consignment or of Sale, with any Goods, Wares or Merchandize, and who shall have shipped such Goods, Wares or Merchandize in his, her or their own Name or Names, and any Person or Persons in whose Name or Names any Goods, Wares or Merchandize shall be shipped by any other Person or Persons, shall be deemed and taken to be the true Owner or Owners thereof, so far as to entitle the Consignee or Consignees of such Goods, Wares and Merchandize to a Lien thereon, in respect of any Money or negotiable Security or Securities advanced or given by such Consignee or Consignees to or for the Use of the Person or Persons in whose Name or Names such Goods, Wares or Merchandize shall be shipped, or in respect of any Money or negotiable Security or Securities received by him, her or them, to the Use of such Consignee or Consignees, in the like Manner to all Intents and Purposes as if such Person or Persons was or were the true Owner or Owners of such Goods, Wares and Merchandize: Provided such Consignee or Consignees shall not have Notice by the Bill of Lading for the Delivery of such Goods, Wares or Merchandize or otherwise, at or before the Time of any Advance of such Money or negotiable Security, or of such Receipt of Money or negotiable Security in respect of which such Lien is claimed, that such Person or Persons so shipping in his, her or their own Name or Names, or in whose Name or Names any Goods, Wares or Merchandize shall be

shipped by any Person or Persons, is or are not the actual and *bona fide* Owner or Owners, Proprietor or Proprietors of such Goods, Wares and Merchandize so shipped as aforesaid, any Law, Usage or Custom to the contrary thereof in any wise notwithstanding: Provided also, that the Person or Persons in whose Name or Names any such Goods, Wares or Merchandize are so shipped as aforesaid, shall be taken, for the Purposes of this Act, to have been intrusted therewith for the Purpose of Consignment or of Sale, unless the contrary thereof shall be made to appear by Bill of Discovery or otherwise, or be made to appear, or be shown in Evidence by any Person disputing such Fact. II. And be it further enacted, That from and after the First Day of *October* One thousand eight hundred and twenty six, any Person or Persons intrusted with and in Possession of any Bill of Lading, *India* Warrant, Dock Warrant, Warehouse Keepers' Certificate, Wharfinger's Certificate, Warrant or Order for Delivery of Goods, shall be deemed and taken to be the true Owner or Owners of the Goods, Wares and Merchandize described and mentioned in the said several Documents hereinbefore stated respectively, or either of them, so far as to give Validity to any Contract or Agreement thereafter to be made or entered into by such Person or Persons so intrusted and in Possession as aforesaid, with any Person or Persons, Body or Bodies Politic or Corporate, for the Sale or Disposition of the said Goods, Wares and Merchandize, or any Part thereof, or for the Deposit or Pledge thereof or any Part thereof, as a Security for any Money or negotiable Instrument or Instruments advanced or given by such Person or Persons, Body or Bodies Politic or Corporate, upon the Faith

of such several Documents or either of them: Provided such Person or Persons, Body or Bodies Politic or Corporate, shall not have Notice by such Documents or either of them or otherwise, that such Person or Persons so intrusted as aforesaid is or are not the actual and *bona fide* Owner or Owners, Proprietor or Proprietors of such Goods, Wares or Merchandize so sold or deposited or pledged as aforesaid; any Law, Usage or Custom to the contrary thereof in any wise notwithstanding. III. Provided always, and be it further enacted, That in case any Person or Persons, Body or Bodies Politic or Corporate, shall, after the passing of this Act, accept and take any such Goods, Wares, or Merchandize in Deposit or Pledge from any such Person or Persons so in Possession and intrusted as aforesaid, without Notice as aforesaid, as a Security for any Debt or Demand due and owing from such Person or Persons so intrusted and in Possession as aforesaid, to such Person or Persons, Body or Bodies Politic or Corporate, before the Time of such Deposit or Pledge, then and in that Case such Person or Persons, Body or Bodies Politic or Corporate, so accepting or taking such Goods, Wares or Merchandize in Deposit or Pledge, shall acquire no further or other Right, Title or Interest in or upon, or to the said Goods, Wares or Merchandize, or any such Document as aforesaid, than was possessed or could or might have been enforced by the said Person or Persons so possessed and intrusted as aforesaid, at the Time of such Deposit or Pledge as a Security as last aforesaid; but such Person or Persons, Body or Bodies Politic or Corporate, so accepting or taking such Goods, Wares or Merchandize in Deposit or Pledge, shall and may acquire, possess and

enforce such Right, Title or Interest as was possessed and might have been enforced by such Person or Persons so possessed and intrusted as aforesaid; any Rule of Law, Usage or Custom to the contrary notwithstanding. IV. And be it further enacted, That from and after the First Day of *October* One thousand eight hundred and twenty six, it shall be lawful to and for any Person or Persons, Body or Bodies Politic or Corporate, to contract with any Agent or Agents, intrusted with any Goods, Wares or Merchandize, or to whom the same may be consigned, for the Purchase of any such Goods, Wares and Merchandize, and to receive the same of and pay for the same to such Agent or Agents; and such Contract and Payment shall be binding upon and good against the Owner of such Goods, Wares and Merchandize, notwithstanding such Person or Persons Body or Bodies Politic or Corporate, shall have Notice that the Person or Persons, making and entering into such Contract, or on whose Behalf such Contract is made or entered into, is an Agent or Agents: Provided such Contract and Payment be made in the usual and ordinary Course of business, and that such Person or Persons, Body or Bodies Politic or Corporate, shall not, when such Contract is entered into or Payment made, have Notice that such Agent or Agents is or are not authorized to sell the said Goods, Wares and Merchandize, or to receive the said Purchase Money. V. And be it further enacted, That from and after the passing of this Act, it shall be lawful to and for any Person or Persons, Body or Bodies Politic or Corporate, to accept and take any such Goods, Wares or Merchandize, or any such Document as aforesaid, in Deposit or Pledge from any such Factor or Factors, Agent or Agents, notwith-

standing such Person or Persons, Body or Bodies Politic or Corporate, shall have such Notice as aforesaid, that the Person or Persons making such Deposit or Pledge is or are a Factor or Factors, Agent or Agents; but then and in that Case such Person or Persons, Body or Bodies Politic or Corporate, shall acquire no further or other Right, Title or Interest in or upon or to the said Goods, Wares or Merchandize, or any such Document as aforesaid, for the delivery thereof, than was possessed or could or might have been enforced by the said Factor or Factors, Agent or Agents, at the Time of such Deposit or Pledge as a Security as last aforesaid; but such Person or Persons, Body or Bodies Politic or Corporate, shall and may acquire, possess and enforce such Right, Title or Interest as was possessed and might have been enforced by such Factor or Factors, Agent or Agents, at the Time of such Deposit or Pledge as aforesaid; any Rule or Law, Usage or Custom to the contrary notwithstanding. VI. Provided always, and be it enacted, That nothing herein contained shall be deemed, construed or taken to deprive or prevent the true Owner or Owners, or Proprietor or Proprietors, of such Goods, Wares or Merchandize, from demanding and recovering the same from his, her or their Factor or Factors, Agent or Agents, before the same shall have been so sold, deposited or pledged, or from the Assignee or Assignees of such Factor or Factors, Agent or Agents, in the Event of his, her or their Bankruptcy; nor to prevent such Owner or Owners, Proprietor or Proprietors, from demanding or recovering of and from any Person or Persons, Body or Bodies Politic or Corporate, the Price or Sum agreed to be paid for the Purchase of such Goods, Wares

or Merchandize, subject to the Right of Setoff on the Part of such Person or Persons, Body or Bodies Politic or Corporate, against such Factor or Factors, Agent or Agents; nor to prevent such Owner or Owners, Proprietor or Proprietors, from demanding or recovering of and from such Person or Persons, Body or Bodies Politic or Corporate, such Goods, Wares or Merchandize so deposited or pledged, upon Repayment of the Money, or on Restoration of the negotiable Instrument or Instruments so advanced or given on the Security of such Goods, Wares or Merchandize as aforesaid, by such Person or Persons, Body or Bodies Politic or Corporate, to such Factor or Factors, Agent or Agents; and upon Payment of such further Sum of Money, or on Restoration of such other negotiable Instrument or Instruments (if any) as may have been advanced or given by such Factor or Factors, Agent or Agents, to such Owner or Owners, Proprietor or Proprietors, or on Payment of a Sum of Money equal to the Amount of such Instrument or Instruments; nor to prevent the said owner or Owners, Proprietor or Proprietors, from recovering of and from such Person or Persons, Body or Bodies Politic or Corporate, any Balance or Sum of Money remaining in his, her or their Hands, as the Produce of the Sale of such Goods, Wares or Merchandize, after deducting thereout the Amount of the Money or negotiable Instrument or Instruments so advanced or given upon the Security thereof as aforesaid: Provided always, that in case of the Bankruptcy of any such Factor or Agent, the Owner or Owners, Proprietor or Proprietors of the Goods, Wares and Merchandize so pledged and redeemed as aforesaid, shall be held to have discharged *pro tanto* the Debt due by him, her or

ment of Blackburn, J., on this statute is instructive.³⁰ About seventeen years later still another statute was passed.³¹ This

them to the Estate of such Bankrupt. VII. [*This section provides the penalty for the misdemeanor of agents fraudulently pledging goods of their principals.*] VIII. Provided always, and be it further enacted, That nothing herein contained shall extend or be construed to extend to subject any Person or Persons to Prosecution, for having deposited or pledged any Goods, Wares or Merchandize so intrusted or consigned to him, her or them, provided the same shall not be made a Security for or subject to the Payment of any greater Sum or Sums of money than at the Time of such Deposit or Pledge was justly due and owing to such Person or Persons from his, her or their Principal or Principals: Provided nevertheless, that the Acceptance of Bills of Exchange by such Person or Persons drawn by or on account of such Principal or Principals, shall not be considered as constituting any Part of such Debt so due and owing from such Principal or Principals within the true Intent and Meaning of this Act, so as to excuse the Consequence of such a Deposit or Pledge, unless such Bills shall be paid when the same shall respectively become due. IX. Provided also, and be it further enacted, That the Penalty by this Act annexed to the Commission of any Offence intended to be guarded against by this Act, shall not extend or be construed to extend to any Partner or Partners, or other Person or Persons of or belonging to any Partnership, Society or Firm, except only such Partner or Partners, Person or Persons, as shall be necessary or privy to the Commission of such Offence; any Thing herein contained to the contrary in any wise

notwithstanding. X. [*This section provides for remedies at law or equity.*]

³⁰ In *Cole v. Northwestern Bank*, L. R. 10 C. P. 354. "We are not in the present case concerned with the rights of consignees, except in so far as the provisions respecting them throw light on the other sections of the acts. The second section of 6 Geo. IV, c. 94, made an important alteration in the law, as by it the possession of bills of lading or other documents of title gave a power of selling or pledging the goods to those dealing *bona fide* with the possessor, beyond any which either by common law or by any provision of that statute the possession of the goods themselves gave. This solved one of the doubts expressed in *Dyer v. Pearson*, 3 B. & C. 38, by enacting that the possession of the documents of title might enable the person so possessed to deal with others as if he were the owner of the goods. It was confined, however, to the possession by 'persons intrusted with' these documents of title; on which words a construction was put by the courts in the two cases of *Phillips v. Huth*, 6 M. & W. 572, and *Hatfield v. Phillips*, 9 M. & W. 647. 12 Cl. & F. 343." These cases held that where a factor was intrusted with a document of title by means of which he procured another document of title he was not intrusted with the latter within the meaning of the Factors' Acts. Immediately after these decisions Parliament passed the statute next referred to, section 4 of which overrides the decisions. In New York the court has held a factor, under the circumstances suggested, intrusted with the document of title,

statute for the first time made a really substantial change in the rule of the common law. A pledge by a factor even though the

although the New York statute is similar to the earlier English acts and contains no provision similar to 5 and 6 Vict., c. 39, § 4. *Cartwright v. Wilmerding*, 24 N. Y. 521.

31 5 AND 6 VICTORIA, CAP. 39.

An Act to amend the Law relating to Advances bona fide made to Agents intrusted with Goods. Whereas . . .

Be it therefore enacted . . . That from and after the passing of this Act any Agent who shall thereafter be intrusted with the Possession of Goods, or of the Documents of Title to Goods, shall be deemed and taken to be the Owner of such Goods and Documents, so far as to give Validity to any Contract or Agreement by way of Pledge, Lien, or Security *bona fide* made by any Person with such Agent so intrusted as aforesaid, as well for any original Loan, Advance, or Payment made upon the Security of such Goods or Documents, as also for any further or continuing Advance in respect thereof, and such Contract or Agreement shall be binding upon and good against the Owner of such Goods, and all other Persons interested therein, notwithstanding the Person claiming such Pledge or Lien may have had Notice that the Person with whom such Contract or Agreement is made is only an Agent. II. And be it enacted, That where any such Contract or Agreement for Pledge, Lien, or Security shall be made in consideration of the Delivery or Transfer to such Agent of any other Goods or Merchandise, or Document of Title, negotiable Security upon which the Person so delivering up the same had at the Time a valid and available Lien and Security for or in respect of a previous Advance by virtue of some Contract or Agreement made with such Agent,

such Contract and Agreement, if *bona fide* on the Part of the Person with whom the same may be made, shall be deemed to be a Contract made in consideration of an Advance within the true Intent and Meaning of this Act, and shall be as valid and effectual, to all Intents and Purposes, and to the same Extent, as if the Consideration for the same had been a *bona fide* present Advance of Money: Provided always, that the Lien acquired under such last-mentioned Contract or Agreement upon the Goods or Documents deposited in exchange shall not exceed the Value at the Time of the Goods and Merchandize which, or the Documents of Title to which, or the negotiable Security which shall be delivered up and exchanged. III. Provided always, and be it enacted, That this Act, and every Matter and Thing herein contained, shall be deemed and construed to give Validity to such Contracts and Agreements only, and to protect only such Loans, Advances, and Exchanges, as shall be made *bona fide*, and without Notice that the Agent making such Contracts or Agreements as aforesaid has not Authority to make the same, or is acting *mala fide* in respect thereof against the Owner of such Goods and Merchandize; and nothing herein contained shall be construed to extend to or protect any Lien or Pledge for or in respect of any antecedent Debt, owing from any Agent to any Person with or to whom such Lien or Pledge shall be given, nor to authorize any Agent intrusted as aforesaid in deviating from any express Orders or Authority received from the Owner; but that, for the Purpose and to the Intent of protecting all such *bona fide* Loans, Advances, and Exchanges as aforesaid

(though made with Notice of such Agent not being the Owner, but without Notice of the Agent's acting without Authority), and to no further or other Intent or Purpose, such Contract or Agreement as aforesaid shall be binding on the Owner and all other Persons interested in such Goods. IV. And be it enacted, That any Bill of Lading, *India* Warrant, Dock Warrant, Warehouse Keeper's Certificate, Warrant, or Order for Delivery of Goods, or any other Document used in the ordinary Course of Business as Proof of the Possession or Control of Goods, or authorizing or purporting to authorize, either by Indorsement or by Delivery, the Possessor of such Document to transfer or receive Goods thereby represented, shall be deemed and taken to be a Document of Title within the Meaning of this Act; and any Agent intrusted as aforesaid, and possessed of any such Document of Title, whether derived immediately from the Owner of such Goods, or obtained by reason of such Agent's having been intrusted with the Possession of the Goods, or by any other Document of Title thereto, shall be deemed and taken to have been intrusted with the Possession of the Goods represented by such Document of Title as aforesaid, and all Contracts pledging or giving a Lien upon such Document of Title as aforesaid shall be deemed and taken to be respectively Pledges of and Liens upon the Goods to which the same relates; and such Agent shall be deemed to be possessed of such Goods or Documents, whether the same shall be in his actual Custody, or shall be held by any other Person subject to his Control or for him or on his Behalf; and where any Loan or Advance shall be *bona fide* made to any Agent intrusted with and in possession of any such Goods or Documents of Title as aforesaid, on the

Faith of any Contract or Agreement in writing to consign, deposit, transfer, or deliver such Goods or Documents of Title as aforesaid, and such Goods or Documents of Title shall actually be received by the Person making such Loan or Advance, without Notice that such Agent was not authorized to make such Pledge or Security, every such Loan or Advance shall be deemed and taken to be a Loan or Advance on the Security of such Goods or Documents of Title within the Meaning of this Act, though such Goods or Documents of Title shall not actually be received by the Person making such Loan or Advance till the Period subsequent thereto; and any Contract or Agreement, whether made direct with such Agent as aforesaid, or with any Clerk or other Person on his Behalf, shall be deemed a Contract or Agreement with such Agent; and any Payment made, whether by Money or Bills of Exchange, or other negotiable Security, shall be deemed and taken to be an Advance within the Meaning of this Act; and an Agent in possession as aforesaid of such Goods or Documents shall be taken, for the Purpose of this Act, to have been intrusted therewith by the Owner thereof, unless the contrary can be shown in Evidence. V. Provided always, and be it enacted, That nothing herein contained shall lessen, vary, alter, or affect the civil Responsibility of an Agent for any Breach of Duty or Contract, or Non-fulfilment of his Orders or Authority in respect of any such Contract, Agreement, Lien, or Pledge as aforesaid. VI. [*This section declares an agent making consignments contrary to instruction of principal, guilty of misdemeanor.*] VII. Provided also, and be it enacted, That nothing herein contained shall prevent such Owner as aforesaid from having the Right to

pledgee knew that he was a factor, provided the pledgee did not know the factor had no authority to pledge, has been protected in England since the enactment of this statute.³²

redeem such Goods or Documents of Title pledged as aforesaid, at any Time before such Goods shall have been sold, upon Repayment of the Amount of the Lien thereon, or Restoration of the Securities in respect of which such Lien may exist, and upon Payment or Satisfaction to such Agent, if by him required, of any Sum of Money for or in respect of which such Agent would by Law be entitled to retain the same Goods or Documents, or any of them, by way of Lien as against such Owner, or to prevent the said Owner from recovering of and from such Person with whom any such Goods or Documents may have been pledged, or who shall have any such Lien thereon as aforesaid, any Balance or Sum of Money remaining in his Hands as the Produce of the Sale of such Goods, after deducting the Amount of the Lien of such Person under such Contract or Agreement as aforesaid. Provided always, that in case of the Bankruptcy of any such Agent the Owner of the Goods which shall have been so redeemed by such Owner as aforesaid shall, in respect of the Sum paid by him on account of such Agent for such Redemption, be held to have paid such Sum for the Use of such Agent before his Bankruptcy, or in case the Goods shall not be so redeemed the Owner shall be deemed a Creditor of such Agent for the Value of Goods so pledged at the Time of the Pledge, and shall, if he shall think fit, be entitled in either of such Cases to prove for or set off the Sum so paid, or the Value of such Goods as the Case may be.

³² Blackburn, J., said of this statute in *Cole v. Northwestern Bank*,

L. R. 10 C. P. 354: "The 5 & 6 Vict., c. 39, in consequence of these decisions, altered the law as to what should constitute intrusting. The second section of 6 Geo. IV, c. 94, also contained a proviso that the purchaser or pledgee had not notice, by the documents or otherwise, that the seller or pledgor was not 'the actual and *bona fide*' owner of the goods sold or pledged—a proviso which, especially after the decision of *Fletcher v. Heath*, 7 B. & C. 517, rendered it unsafe to make advances on goods or documents to persons known to have possession thereof as agents only. This also has been altered by 5 & 6 Vict., c. 39. But, in the fourth section of 6 Geo. IV, c. 94, the language used by the Legislature is completely changed. It does not in this section give any power to pledge at all; nor does it use the language of the second section, and authorize 'any person intrusted with the possession of the goods' to sell them to any one not having notice that this person is not the true owner; but it enacts that it shall be lawful to contract with 'any agent' intrusted with any goods, or to whom they may be consigned, for the purchase of such goods, and to pay for the same to 'such agent;' and such sale and payment is to be good, notwithstanding the purchaser has notice that the party selling or receiving payment is only an agent: provided such contract or payment is made in the usual course of business—a proviso which by itself alone shows that the Legislature meant by the word 'agent' only such agents as in the usual course of business sell goods

§ 319. **Later English Factors' Acts.**—In general the English courts showed a tendency to construe rather narrowly these Factors' Acts. Especially, difficulties arose in regard to determining who was a person intrusted with goods for sale within the meaning

for their principals and receive payments, such as factors, brokers, etc., and did not mean to include bailees, warehousemen, carriers, and others who may in one sense no doubt be called agents, but who do not sell or receive payment for goods intrusted to them by those employing them. It therefore solves the second doubt in *Dyer v. Pearson, supra*, by declaring that, if the evidence should be such as to show that the person in possession of the goods was intrusted as 'an agent,' a sale by him should bind the true owner. Then follows a further proviso, that the person dealing with the agent has not notice that the agent is not authorized to sell or receive payment. This latter proviso shows that the framer of the act remembered that a factor might, as between him and his principal, be restrained from selling except on particular terms, or possibly forbidden to sell at all, and yet that the sale on the usual terms, though in contravention of those secret instructions, would be good as regards those who had not notice of this restriction, but bad as regards those who had. It seems to us, therefore, that the Legislature by this section intended to confirm (to use Lord Tenterden's expression) the common law as laid down in *Pickering v. Busk, supra*, but did not mean to extend it to all cases in which any person is intrusted with the custody of goods, though that person may in one sense be an agent for the intruster. And it seems to us that, on the construction of the act, and without reference to authority, it must be intended to

apply only to cases in which the intrusting is in the course of that kind of agency, so as to create the relation of principal and agent between the intruster and the intrusted. In effect, that the decision in *Wilkinson v. King, supra*, was not overruled or shaken in *Pickering v. Busk, supra*, and was not intended to be affected by the Legislature. For example, if a furnished house be let to one who carries on the business of an auctioneer, he is intrusted as tenant with the furniture, being in fact an auctioneer; but it never was the common law, and could not be intended to be enacted, that if he carried the furniture to his auction-room and there sold it, he could confer any better title on the purchaser than if he had as auctioneer acted for some other tenant who committed a similar larceny, as a fraudulent bailee; nor, to come nearer to the present case, that a warehouseman or wharfinger who as such is intrusted with the custody of goods, if he happens also to pursue the trade of a factor, can give a better title by the sale of the goods than he could if they had been intrusted to some other warehouseman who employed him to sell. This was the construction put upon the act in *Monk v. Whittenbury*, 2 B. & Ad. 484, decided in 1831; and that decision has never been questioned. That decision was before 5 & 6 Vict., c. 39; and the Legislature might easily have altered the enactments, if they had been so minded, so as to avoid the effect of that decision, as they did alter them so as to avoid the effect of other de-

of the statute. An intending buyer who had been given possession and who wrongfully resold the goods was held not to be

cisions. The 5 & 6 Vict., c. 39, commences with a preamble; and though, of course, the enacting part may either go further than or fall short of effecting what is recited in that preamble as being the object of the Legislature, that preamble is of great importance. It first recites that, under 6 Geo. IV, c. 94, 'and the present state of the law, advances cannot safely be made upon goods or documents of title to persons known to have possession as agents only.' This points to *Fletcher v. Heath*, *supra*, and shows an intention to alter the law as there decided. It then recites that 'advances on the security of goods and merchandise have become an usual and ordinary course of business, and it is expedient and necessary that reasonable and safe facilities should be afforded thereto, and that the same protection and validity should be extended to *bona fide* advances upon goods and merchandise as by the said recited act is given to sales, and that owners intrusting agents with the possession of goods and merchandise, or of documents of title thereto, should in all cases where such owners by the said recited act or otherwise would be bound by a contract or agreement of sale be in like manner bound by any contract or agreement of pledge or lien for any advances *bona fide* made on the security thereof.' This recital shows a plain intention to enact that what had, ever since the case of *Paterson v. Tash*, 2 Strange, 1178, been the law, should no longer be so; and that an agent having power to sell should be also enabled to pledge. But there is no indication

of any intention to give a power to pledge where there is not power to sell; nor to extend the power to sell beyond that which by the common law and 6 Geo. IV, c. 94, § 4, was given; nor to alter the construction put upon that enactment by the decision in *Monk v. Whittenbury*, *supra*. There is a further recital that the act does not extend to protect exchanges of securities *bona fide* made. This refers to *Taylor v. Kymer*, 3 B. & Ad. 320, and perhaps *Bonzi v. Patrick*, 4 M. & G. 295, though that latter case (after very protracted litigation) was not decided till a few weeks before 5 & 6 Vict., c. 39, received the royal assent, and this recital shows an intention to alter the law as there decided. There is no express recital pointing to the decision in *Phillips v. Huth*, *supra*, and the case of *Hatfield v. Phillips*, *supra*, which had then been decided in the Exchequer Chamber and was still pending in the House of Lords; but, from the enactment in the fourth section it is plain that these cases were in contemplation, and that it was intended to alter the law as laid down in those cases. The Legislature then proceeded in the first section to enact that 'any agent' who shall thereafter be intrusted with the possession of goods or of the documents of title to goods, may pledge the same. The Legislature, it is to be observed, does not use the words 'person intrusted,' which are those used in the second section of 6 Geo. IV, c. 94, but 'agent intrusted,' being the words used in the fourth section of the act, on which words a judicial construction had been put in *Monk v. Whitten-*

able to give a good title,³³ so a seller left in possession is not an agent intrusted with the goods, and a wrong dealing with the goods by such a seller creates no title.³⁴ An agent who did a double business of warehousing wool and selling it as a broker was held incapable of making a valid pledge of wool which had been intrusted to him to store, but which he had not been authorized to sell though it was the course of business between him and his customer to make sales, when directed, of wool sent to him for storage.³⁵ Again, where the agent's authority was revoked, but he still remained in possession of the principal's goods, a pledge by the agent was held invalid.³⁶ On the other hand, if the owner intrusted the agent with the goods as an agent to sell, a pledge by the agent was valid though the agent procured the goods to be intrusted to him by fraud.³⁷ In 1877 another Factors' Act was

bury, *supra*. The second section alters the law as declared in *Taylor v. Kymer*, *supra*. The fourth section alters the law as laid down in *Phillips v. Huth*, *supra*, by enacting 'that any agent intrusted as aforesaid and in possession of any such documents of title, whether derived immediately from the owner of such goods or obtained by reason of such agent's having been intrusted with the possession of the goods or of any other document of title, shall be deemed and taken to be intrusted with the possession of the goods: * * * and an agent in possession as aforesaid of such goods or documents shall be taken, for the purposes of this act, to have been intrusted therewith by the owner thereof, unless the contrary can be shown in evidence.' It is not necessary to notice any other parts of the act."

³³ *Jenkyns v. Usborne*, 7 M. & G. 678. This case has been overridden by the later English Factors' Acts.

³⁴ *Johnson v. Credit Lyonnais Co.*, 3 C. P. D. 32. This case has been overridden by the later English Factors' Acts.

³⁵ *Cole v. Northwestern Bank*, L. R.

10 C. P. 354. Blackburn, J., said: "The Legislature seem to us to have wished to make it the law, that, where a third person has intrusted goods or the documents of title to goods to an agent who in the course of such agency sells or pledges the goods, he should be deemed by that act to have misled any one who *bona fide* deals with the agent and makes a purchase from or an advance to him without notice that he was not authorized to sell or to procure the advance. And we think that, if this was the intention, it is carried out by the enactments. We do not think that it was wished to make the owner of goods lose his property if he trusted the possession to a person who in some other capacity made sales, in case that person sold them. If such was the wish of those who framed the act, we think they have not used language sufficient to express an intention so to enact."

³⁶ *Fuentes v. Montis*, L. R. 3 C. P. 268. This decision was overridden by the later Factors' Acts hereafter referred to.

³⁷ *Sheppard v. Union Bank*, 7 H. & N. 661; *Baines v. Swainson*, 4 B. & S. 270.

passed,³⁸ and finally in 1889 a statute consolidated and extended the Factors' Acts.³⁹ As these statutes have not been copied in

³⁸ 40 AND 41 VICTORIA, CAP. 39. *An Act to amend the Factors Acts.* II. Where any agent or person has been intrusted with and continues in the possession of any goods, or documents of title to goods, within the meaning of the principal Acts as amended by this Act, any revocation of his instrument or agency shall not prejudice or affect the title or rights of any other person who, without notice of such revocation, purchases such goods, or makes advances upon the faith or security of such goods or documents. III. Where any goods have been sold, and the vendor or any person on his behalf continues or is in possession of the documents of the title thereto, any sale, pledge, or other disposition of the goods or documents made by such vendor or any person or agent intrusted by the vendor with the goods or documents within the meaning of the principal Acts as amended by this Act so continuing or being in possession, shall be as valid and effectual as if such vendor or person were an agent or person intrusted by the vendee with the goods or documents within the meaning of the principal Acts as amended by this Act, provided the person to whom the sale, pledge, or other disposition is made has not notice that the goods have been previously sold. IV. Where any goods have been sold or contracted to be sold, and the vendee, or any person on his behalf, obtains the possession of the documents of title thereto from the vendor or his agents, any sale, pledge, or disposition of such goods or documents by such vendee so in possession or by any other person or agent intrusted by the vendee with the documents within

the meaning of the principal Acts as amended by this Act shall be as valid and effectual as if such vendee or other person were an agent or person intrusted by the vendor with the documents within the meaning of the principal Acts as amended by this Act, provided the person to whom the sale, pledge, or other disposition is made has not notice of any lien or other right of the vendor in respect of the goods. V. Where any document of title to goods has been lawfully indorsed or otherwise transferred to any person as a vendee or owner of the goods, and such person transfers such document by indorsement (or by delivery where the document is by custom, or by its express terms transferable by delivery, or makes the goods deliverable to the bearer) to a person who takes the same *bona fide* and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*.

³⁹ 52 AND 53 VICTORIA, CAP. 45. *An Act to Amend and Consolidate the Factors Acts.* Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, as follows.—1. For the purposes of this Act. (1) The expression "mercantile agent" shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods or to consign goods for the purpose of sale, or to buy goods or to raise money on the

the United States, it is unnecessary to examine their provisions in detail. It is sufficient to point out how far some sections of the latest act go. Thus a vendor in possession may pledge or sell to a

security of goods: (2) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf: (3) The expression "goods" shall include wares and merchandise:

(4) The expression "document of title" shall include any bill of lading, dock-warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented:

(5) The expression "pledge" shall include any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability: (6) The expression "person" shall include any body of persons corporate or unincorporate.

2. (1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge or other disposition of the goods made by him, when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time

of the disposition notice that the person making the disposition has not authority to make the same.

(2) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be notwithstanding the determination of the consent: provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined. (3) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first mentioned documents shall, for the purpose of this Act, be deemed to be with the consent of the owner. (4) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

3. A pledge of the documents of title to goods shall be deemed to be a pledge of the goods. 4. Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge. 5. The consideration necessary for the validity of a sale, pledge, or other disposition, of goods, in pursuance of this Act, may be either a payment in cash, or the

delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, documents, or security when so delivered or transferred in exchange. 6. For the purposes of this Act an agreement made with a mercantile agent through a clerk or other person in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent. 7. (1) Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person. (2) Nothing in this section shall limit or affect the validity of any sale, pledge, or disposition, by a mercantile agent. 8. Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith, and without notice of the previous

sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same. 9. Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith, and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner. 10. Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*. 11. For the purposes of this Act, the transfer of a document may be by indorsement, or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery. 12. (1) Nothing in this Act shall authorize an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing. (2) Nothing in

bona fide purchaser with the same effect as a mercantile agent.⁴⁰ This virtually adopts the rule generally laid down in this country,⁴¹ but not common law in England⁴² that delivery, though not necessary to transfer the property as between the parties, is essential as against an innocent subsequent purchaser. It is also provided⁴³ that a pledge or sale by a buyer in possession to a *bona fide* purchaser is effective. This provision enables a conditional vendee in England to transfer title to a *bona fide* purchaser.⁴⁴ Though possession of goods is obtained by a mercantile agent by means which amount to larceny by trick, the Factors' Act protects a pledge by the agent.⁴⁵

this Act shall prevent the owner of goods from recovering the goods from an agent or his trustee in bankruptcy at any time before the sale or pledge thereof, or shall prevent the owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would be by law entitled to retain the goods or the documents of title thereto, or any of them, by way of lien as against the owner, or from recovering from any person with whom the goods have been pledged any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien. (3) Nothing in this Act shall prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject to any right of set-off on the part of the buyer against the agent. 13. The provisions of this Act shall be construed in amplification and not in derogation of the powers exercisable by an agent independently of this Act. 14. The enactments mentioned in the schedule to this Act are hereby repealed as from the com-

mencement of this Act, but this repeal shall not affect any right acquired or liability incurred before the commencement of this Act. 15. This Act shall commence and come into operation on the first day of January one thousand eight hundred and ninety. 16. This Act shall not extend to Scotland. 17. This Act may be cited as the Factors Act, 1889.

⁴⁰ See § 8.

⁴¹ See *infra*, § 349 *et seq.*

⁴² Blackburn, Sales, §§ 327, 328; *Meyerstein v. Barber*, L. R. 2 C. P. 38, 51.

⁴³ See § 9.

⁴⁴ *Lee v. Butler*, [1893] 2 Q. B. 318. But one who hires goods though with an option to purchase them cannot give a good title. *Helby v. Matthews*, [1895] A. C. 471, overruling *Shenstone v. Hilton*, [1894] 2 Q. B. 452.

⁴⁵ *Oppenheimer v. Frazer*, [1907] 1 K. B. 519. The court held it sufficient that the owner of the goods consented to give possession to the agent. The court called attention, however, to the fact that a case might arise where the agent's trick would negative any contract of bailment; "as where by a trick a man persuades the owner to give him actual possession of the goods; the owner believing that he is another

§ 320. **Factors' Acts in the United States.**—A few States, and only a few, have passed Factors' Acts; namely, Maine,⁴⁶ Maryland,⁴⁷ Massachusetts,⁴⁸ New York,⁴⁹ Ohio,⁵⁰ Pennsylvania,⁵¹ Rhode Island,⁵² Wisconsin,⁵³ also Ontario.⁵⁴ These statutes are derived in the main from the three earlier English statutes, but the wording of the American statutes is not identical with that of the English acts, nor are the American statutes identical with each other. Their effect may, however, be summarized.

§ 321. **The shipper treated as owner to protect advances of consignee.**—In the statutes of all the States referred to in the preceding section, it is provided that where merchandise is shipped, the shipper is to be regarded as the true owner so far as to protect a consignee of the goods who has made advances upon them. This general provision is qualified in the Massachusetts statute by the requirement that the goods must have been shipped for sale by a person in lawful possession of them; and in Pennsylvania the shipper must have been intrusted with the merchandise with authority to sell or consign it. Even in States where there is no such qualification, the language of the statute would probably not be literally enforced. According to the literal language of the statutes a thief could make a valid pledge of goods to a consignee to whom the goods were shipped. The New York court, at least, has repudiated this construction.⁵⁵ It is probable that other States having statutes worded similarly would follow the New York decisions. A further qualification of the provisions of the statute is expressly made in the statutes of Maryland, Massachusetts, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin; namely, if the consignee had notice, by the bill of lading or otherwise, that the shipper was not the actual owner, the advances of the consignee will not be protected.

person." See also *Oppenheimer v. Attenborough*, [1907] 1 K. B. 510, [1908] 1 K. B. 221.

⁴⁶ Rev. St. (1903), c. 33.

⁴⁷ Pub. Gen. Laws (1904), Art. 2.

⁴⁸ Rev. Laws (1902), c. 68.

⁴⁹ Acts of 1830, c. 179.

⁵⁰ Bates Ann. St., §§ 3214–3220.

⁵¹ Brightly's Purdon's Dig. (1894), p. 867.

⁵² Gen. Laws (1896), c. 158.

⁵³ Sanborn & Berryman Annot. St., §§ 3345, 3346.

⁵⁴ Rev. St. (1897), c. 150.

⁵⁵ *Covill v. Hill*, 4 Denio, 323; *First Nat. Bank of Toledo v. Shaw*, 61 N. Y. 283; *Kinsey v. Leggett*, 71 N. Y. 387. In the case last cited the court held that the act "only applies when the shipment is made

§ 322. **Power of consignee or factor to deal with goods.**—The statutes of all the States having Factors' Acts provide for the validity of certain dispositions of the goods made by a factor intrusted with possession of merchandise. In New York, Ohio, and Wisconsin, it is enough if the factor is intrusted with the merchandise, either for the purpose of sale or to secure advances. In the other States it is essential that the merchandise shall be intrusted to the factor for the purpose of sale. A factor intrusted with goods, as the statute requires, is deemed a true owner so far as to give validity to any sale or pledge of the merchandise to a person who enters into such transaction in good faith. In Massachusetts and Wisconsin it is immaterial that the purchaser or pledgee is aware that he is dealing with a factor, and in Maryland and Rhode Island, one who knows he is dealing with a factor is protected in regard to any purchases from the factor and payments for purchases made to him, provided, of course, that there was no notice of the factor's lack of authority. It is generally provided that a pledge for an antecedent debt will give the pledgee no greater right than the factor had, and the original owner is allowed to redeem pledged goods on repayment of the amount for which they are pledged. The statutes of all the States in question also have provisions in regard to intrusting bills of lading, warehouse receipts, and similar documents of title. It may be said broadly that the factor is given at least as much power in the disposition of such documents as in the disposition of ordinary merchandise. The limits of the power to transfer such documents must, however, be sought not only in Factors' Acts but in the custom of merchants and in legislation aimed at carrying that custom into effect, for as to documents of title negotiable in form at least, the custom of merchants is much more far-reaching than the Factors' Acts, and much legislation has been enacted to make the custom effectual.⁵⁶

with the consent of the real owner in the name of another;" and that "the act was not intended to deprive actual owners (of their property) who had not parted with their title or who had by fraud and without

any fault on their part lost control over it."

⁵⁶ In regard to the transfer of property by means of documents of title, see *supra*, § 282 *et seq.*, and *infra*, § 405 *et seq.*

§ 323. Questions of construction under American Factors' Act.—

The same question that has been so much considered in the English cases — Who is an “agent intrusted” within the meaning of the statute with goods for the purpose of sale? has been the subject of litigation in this country. The English authorities would doubtless be followed generally, but one or two exceptions must be noted. As has already been seen, it is held in England,⁵⁷ that even though a factor procures goods to be intrusted to him by fraud, he is, nevertheless, within the terms of the act. The contrary has been held in Massachusetts.⁵⁸ Who is such an agent, as to come within the meaning of the statutes, is also a question which has not been decided in the same way in Massachusetts as in England.⁵⁹

§ 324. The seller in a conditional sale is not estopped to assert his title.—Another situation which has given rise to much litigation is that where a seller delivers goods to one who contracts to buy them on credit, and the seller stipulates that title shall not pass until the price has been paid. This is universally known as

⁵⁷ See *supra*, § 319.

⁵⁸ *Prentice Co. v. Page*, 164 Mass. 276, 41 N. E. 279. In this case jewelry was delivered to one Gregg, owing to fraudulent representation on the part of the latter, for the purpose of making conditional sales of the goods. It was held that Gregg could not be regarded as intrusted with the goods, in view of the fraudulent and, indeed, criminal means by which he secured them. The court took a further distinction in order to avoid the authority of *Baines v. Swainson*, 4 B. & S. 270, that the English Factors' Acts simply provide that the goods shall be “intrusted” and, not like the Massachusetts act, “intrusted for sale.” See also *Soltau v. Gerdau*, 119 N. Y. 380, 23 N. E. 864, 16 Am. St. Rep. 843; *Miller v. Laws*, 7 Am. L. Rec. 606 (Ohio).

⁵⁹ In *Cairns v. Page*, 165 Mass. 552, 43 N. E. 503, a salesman of a jeweler

obtained goods from him, not by fraudulent representation but pursuant to a custom of the jeweler to deliver goods to the salesman with authority to sell them either for cash or on conditional sale. The salesman thereafter pledged them with the defendant. It was held that the jeweler could not replevy the goods. The salesman was a person “intrusted with merchandise and having authority to sell the same.” The court distinguished the case of *H. A. Prentice Co. v. Page*, 164 Mass. 276 (stated in the preceding note), both on the ground that no fraudulent representation appeared to have been made in the later case, but also that in this case the salesman had the power to make cash sales as an alternative means of disposing of the goods, whereas in the earlier case the power was confined to making conditional sales. On the other hand in *Hastings v. Pearson*,

a conditional sale.⁶⁰ Although, as has been seen,⁶¹ the term "conditional sale" may properly include bargains on other conditions that the payment of the price, the name is generally confined to sales upon this condition. It is settled by an overwhelming weight of authority that the seller is not estopped by his conduct in delivering possession of the goods to the buyer upon such a bargain from asserting his title against one who purchases from the buyer, relying upon the apparent title of the latter.⁶² As will be

[1893] 1 Q. B. 62, a salesman having substantially the same powers and duties as the salesman in *Cairns v. Page* was held not to be a "mercantile agent." *Thacher v. Moors*, 134 Mass. 156, decided that a warehouseman to whom goods were intrusted as a warehouseman was not an agent within the Factors' Act although he was also engaged as part of his business as a commission merchant. See also *Schwab v. Oatman*, 56 N. Y. Misc. Rep. 393, 106 N. Y. Suppl. 741. These cases are similar to *Cole v. Northwestern Bank*, L. R. 10 C. P. 354, stated *supra*, § 319.

⁶⁰ Such a transaction is not possible under the laws of Louisiana. *Barber Asphalt Paving Co. v. St. Louis Cypress Co.*, La., 46 So. 193.

⁶¹ See *supra*, § 7.

⁶² ENGLAND.—See *Helby v. Matthews*, [1894] 2 Q. B. 262, [1895] A. C. 471; *Payne v. Wilson*, [1895] 1 Q. B. 653, 2 Q. B. 537; *Ex parte Brooks*, 23 Ch. D. 261; *Crawcour v. Salter*, 18 Ch. D. 30; *Ex parte Turquand*, 14 Q. B. D. 636. All these cases do not relate strictly to conditional sales; some of them relate to agreements to hire with an option to purchase, not merely formal, given to the buyer, and to apply the rent to the price; but the reasoning of the courts makes it clear that the Bills of Sales Acts which require bills of sale if written to be recorded, and the Factors' Act of 1889, which pro-

tests purchasers, whether by absolute sale or by mortgage or pledge, from a buyer in possession, are the only bars in England to the seller's right of recovery in any form of bargain resembling a conditional sale.

CANADA.—*Stevenson v. Rice*, 24 U. C. C. P. 245; *Mason v. Johnson*, 27 U. C. C. P. 208; *Tufts v. Mottashed*, 29 U. C. C. P. 539; *Boyce v. McDonald*, [1893] 9 Man. 297; *Mason v. Bickle*, 2 Ont. App. 291; *Nordheimer v. Robinson*, 2 Ont. App. 305.

FEDERAL COURTS.—The Federal courts will apply the local law of the jurisdiction where the transaction took place. See *Harkness v. Russell*, 118 U. S. 663, 7 S. Ct. 51, 30 L. ed. 285; *Ryle v. Knowles Loom Works*, 87 Fed. Rep. 976, 59 U. S. App. 653, 31 C. C. A. 340.

ALABAMA.—*Piedmont Land, etc., Co. v. Thomson-Houston Motor Co.*, (Ala.), 12 So. 768; *Sumner v. Woods*, 67 Ala. 139, 42 Am. Rep. 104 (overruling *Sumner v. Woods*, 52 Ala. 94, and *Dudley v. Abner*, 52 Ala. 572); *Weinstein v. Freyer*, 93 Ala. 257, 9 So. 285, 12 L. R. A. 700; *Adams Machine Co. v. Interstate Building Assoc.*, 119 Ala. 97, 24 So. 857; *Ensley Lumber Co. v. Lewis*, 121 Ala. 94, 25 So. 729; *Goodgame v. Sanders*, 140 Ala. 247, 37 So. 200; *Bronson v. Russell*, 142 Ala. 360, 37 So. 672; *Riley v. Dillon*, 148 Ala. 283, 41 So. 768.

ARKANSAS.—*Carroll v. Wiggins*,

30 Ark. 402; *Simpson v. Shackelford*, 49 Ark. 63, 4 S. W. 165; *Triplett v. Mansur, etc., Co.*, 68 Ark. 230, 57 S. W. 261, 82 Am. St. Rep. 284.

CALIFORNIA.—*Kohler v. Hayes*, 41 Cal. 455; *Rodgers v. Bachman*, 109 Cal. 552, 42 Pac. 448; *Van Allen v. Francis*, 123 Cal. 474, 56 Pac. 339; *Houser-Haines Mfg. Co. v. Hargrove*, 129 Cal. 90, 61 Pac. 660.

CONNECTICUT.—*Brown v. Fitch*, 43 Conn. 512.

DELAWARE.—*Watertown Steam Engine Co. v. Davis*, 5 Houst. 192 (but a delay of nine months in enforcing his right was held to bar the seller. *Mathews v. Smith*, 8 Houst. 22, 31 Atl. 879).

FLORIDA.—*Roof v. Chattanooga Pulley Co.*, 36 Fla. 284, 18 So. 597.

GEORGIA.—*Sims v. James*, 62 Ga. 260 (now changed by statute).

INDIANA.—*Sears v. Shrout*, 24 Ind. App. 313, 56 N. E. 728; *Baals v. Stewart*, 109 Ind. 371, 9 N. E. 403.

IOWA.—*Baker v. Hall*, 15 Iowa, 277; *National Cash Register Co. v. Langs*, 127 Iowa, 710, 104 N. W. 360.

KANSAS.—*Sumner v. McFarlan*, 15 Kans. 600 (now changed by statute).

MAINE.—*Brown v. Haynes*, 52 Me. 578.

MASSACHUSETTS.—*Wentworth v. Woods Mach. Co.*, 163 Mass. 28, 39 N. E. 414; *Cottrell v. Carter*, 173 Mass. 155, 53 N. E. 375; *Lorain Steel Co. v. Norfolk & Bristol Street Ry. Co.*, 187 Mass. 500, 73 N. E. 646.

MICHIGAN.—*Lansing Iron Works v. Wilbur*, 111 Mich. 413, 69 N. W. 667; *Pettyplace v. Groton Mfg. Co.*, 103 Mich. 155, 61 N. W. 266.

MISSISSIPPI.—*Ketchum v. Brennan*, 53 Miss. 596; *Journey v. Priestly*, 70 Miss. 584, 12 So. 799; *Young v. Salley*, 83 Miss. 362, 35 So. 571; *Watts v. Ainsworth*, 89 Miss. 40, 42 So. 672; *Fairbanks Co. v. Graves*, 90 Miss. 453, 43 So. 675.

MISSOURI.—*Ridgeway v. Kennedy*,

52 Mo. 24; *Wangler v. Franklin*, 70 Mo. 659.

MONTANA.—*Heinbockle v. Zugbaum*, 5 Mont. 344, 5 Pac. 897, 51 Am. Rep. 59; *Bennett Bros. Co. v. Tam*, 24 Mont. 457, 62 Pac. 780.

NEBRASKA.—*Aultman v. Mallory*, 5 Neb. 178.

NEW HAMPSHIRE.—*Weeks v. Pike*, 60 N. H. 447; *Michelson v. Collins*, 72 N. H. 554, 58 Atl. 50.

NEW JERSEY.—*Marvin Safe Co. v. Norton*, 48 N. J. L. 410, 7 Atl. 418, 57 Am. Rep. 566.

NEW MEXICO.—*Redewill v. Gillen*, 4 N. Mex. 72, 12 Pac. 872.

NEW YORK.—*Ballard v. Burgett*, 40 N. Y. 314; *Austin v. Dye*, 46 N. Y. 500; *Comer v. Cunningham*, 77 N. Y. 391, 33 Am. Rep. 626. Compare *Smith v. Lynes*, 5 N. Y. 41; *Wait v. Green*, 36 N. Y. 556. In *Comer v. Cunningham*, 77 N. Y. 391, 33 Am. Rep. 626, a not wholly successful attempt was made to reconcile the New York decisions on the theory that in the cases where the *bona fide* purchaser prevailed the contract between the original buyer and seller contemplated a delivery conditional upon the payment of the price, and that delivery having been made without insisting upon the condition there had been a waiver of the condition.

NORTH CAROLINA.—*Clayton v. Hester*, 80 N. C. 275; *Harris v. Woodard*, 96 N. C. 232, 1 S. E. 544.

OHIO.—*Sanders v. Keber*, 28 Ohio St. 630; *Call v. Seymour*, 40 Ohio St. 670.

OREGON.—*Singer Mfg. Co. v. Graham*, 8 Or. 17, 34 Am. Rep. 572; *Christenson v. Nelson*, 38 Or. 473, 63 Pac. 648.

RHODE ISLAND.—*Carpenter v. Scott*, 13 R. I. 477.

TENNESSEE.—*Price v. Jones*, 3 Head, 84; *McCombs v. Guild*, 9 Lea, 81.

seen,⁶³ the effect of the decisions sustaining the seller's title is modified in many jurisdictions by recording acts. And the seller's title is subordinated to an innkeeper's lien;⁶⁴ in this respect, however, not differing from other forms of ownership.

§ 325. **In a few jurisdictions the seller is estopped.**—The decisions of a few jurisdictions are opposed to the doctrine stated in the preceding section, and hold that a seller who has delivered possession of his goods on a contract of conditional sale cannot thereafter assert his title against a *bona fide* purchaser from the buyer.⁶⁵ The transaction is, however, even in such States valid between the parties.⁶⁶ But in Louisiana a conditional sale is wholly impossible.⁶⁷

§ 326. **Creditors' rights where property is sold conditionally.**—The Sales Act makes no special provision in regard to the rights of creditors of the buyer or seller when property is sold conditionally. But the principles applicable to the subject are plain. Creditors of the seller after the property has been delivered to the buyer can have no right to take the property from the possession of the buyer, at least while he is in no default upon his contract. As will more fully be shown,⁶⁸ the buyer's right is a property right and the seller's creditors, no more than the seller can disturb it, though the seller also has an interest in the property which should be subject to sale on execution.⁶⁹ The rights,

TEXAS.—Leath v. Uttley, 66 Tex. 82, 17 S. W. 401.

UTAH.—Lippincott v. Rich, 19 Utah, 140, 56 Pac. 806.

VERMONT.—Clark v. Wells, 45 Vt. 4, 12 Am. Rep. 187.

VIRGINIA.—McComb v. Donald's Admr., 82 Va. 903, 5 S. E. 558.

WASHINGTON.—Johnston v. Wood, 19 Wash. 441, 443, 53 Pac. 707.

⁶³ *Infra*, § 327.

⁶⁴ Waters v. Gerard, 189 N. Y. 302, 82 N. E. 143, 121 Am. St. Rep. 886. The owner of a piano made a conditional sale of it to a guest of a hotel. It will be observed that the seller voluntarily delivered it at the hotel.

⁶⁵ COLORADO.—Jones v. Clark, 20 Colo. 353, 38 Pac. 371.

ILLINOIS.—Murch v. Wright, 46 Ill.

487, 95 Am. Dec. 455; Van Duzor v. Allen, 90 Ill. 499.

KENTUCKY.—Vaughn v. Hopson, 10 Bush, 337; Greer v. Church, 13 Bush, 430.

MARYLAND.—Hall v. Hinks, 21 Md. 406; Lincoln v. Quynn, 68 Md. 299, 11 Atl. 848, 6 Am. St. Rep. 446.

PENNSYLVANIA.—Stadtfeld v. Huntsman, 92 Pa. St. 53, 37 Am. Rep. 661; Dearborn v. Raysor, 132 Pa. St. 231, 20 Atl. 690.

⁶⁶ W. W. Kimball Co. v. Cruikshank, 123 Ill. App. 580.

⁶⁷ Barber Asphalt Paving Co. v. St. Louis Cypress Co., La., 46 So. 193.

⁶⁸ See *infra*, § 331 *et seq.*

⁶⁹ McMillan v. Larned, 41 Mich. 521, 2 N. W. 662.

of the buyer's creditors to seize the property while the price is still unpaid can be no greater, aside from the same principle of estoppel which has just been considered with reference to *bona fide* purchasers of the property from the buyer, and aside from statutes hereafter more especially referred to. For the buyer's creditors, apart from estoppel or statute, can take no greater right than the buyer himself had, and in the case under consideration, by the express terms of the contract, the buyer has no title to the goods. The interest of the buyer may be subjected to the claims of creditors,⁷⁰ but not the goods, as such. Nor can there be any greater estoppel in favor of the buyer's creditors than in favor of a *bona fide* purchaser from the buyer, for the situation is certainly no more deceptive to the buyer's creditors than to those who buy from him. Accordingly in jurisdictions where a *bona fide* purchaser from the buyer is not protected,⁷¹ creditors also are not allowed by levy of attachment or execution to treat the goods as the property of the buyer.⁷² As will hereafter appear,⁷³ this rule is qualified by recording acts in many States. Even apart from such statutes a few States give the buyer's creditors a right to levy on the property, following the same line of reasoning which has led a few courts to protect pur-

⁷⁰ *Newhall v. Kingsbury*, 131 Mass. 445. See also *infra*, note 76.

⁷¹ See *supra*, § 324.

⁷² *Harkness v. Russell*, 118 U. S. 663, 7 S. Ct. 51, 30 L. ed. 285; *Thornton v. Cook*, 97 Ala. 630, 12 So. 403; *Rodgers v. Bachman*, 109 Cal. 552, 42 Pac. 448; *Cooley v. Gillan*, 54 Conn. 80, 6 Atl. 180; *Mack v. Story*, 57 Conn. 407, 18 Atl. 707; *Sanders v. Wilson*, 19 D. C. 555; *Keck v. State*, 12 Ind. App. 119, 39 N. E. 899; *Knoulton v. Redenbaugh*, 40 Iowa, 114; *Peabody v. Maguire*, 79 Me. 572, 12 Atl. 630; *Barrett v. Pritchard*, 2 Pick. 512, 13 Am. Dec. 449; *Thaxter v. Foster*, 153 Mass. 151, 26 N. E. 434; *Nichols v. Ashton*, 155 Mass. 205, 29 N. E. 519; *Dewes Brewery Co. v. Merritt*, 82 Mich. 198, 46 N. W. 379; *W. F. Zimmerman Lumber Co. v. Elder*,

(Miss.), 29 So. 466; *Wangler v. Franklin*, 70 Mo. 659; *Silver Bow Min., etc., Co. v. Lowry*, 6 Mont. 288, 12 Pac. 652; *Aultman v. Mallory*, 5 Neb. 178, 25 Am. Rep. 478; *Cardinal v. Edwards*, 5 Nev. 36; *Cleveland Mach. Works v. Lang*, 67 N. H. 348, 68 Am. St. Rep. 675, 31 Atl. 20; *Cole v. Berry*, 42 N. J. L. 308, 36 Am. Rep. 511; *Herring v. Hoppock*, 15 N. Y. 409; *Cole v. Mann*, 62 N. Y. 1; *Parris v. Roberts*, 12 Ired. L. 268, 55 Am. Dec. 415; *Call v. Seymour*, 40 Ohio St. 670; *Goodell v. Fairbrother*, 12 R. I. 233, 34 Am. Rep. 631; *Hawthorne v. Bowman*, 3 Sneed, 524; *City Nat. Bank v. Tufts*, 63 Tex. 113; *Duncan v. Stone*, 45 Vt. 118; *Dodd v. Bowles*, 3 Wash. Terr. 383, 19 Pac. 156.

⁷³ See *infra*, § 327.

chasers from the buyer.⁷⁴ As the buyer's right is in its nature analogous to that of a mortgagor,⁷⁵ the rights of his creditors should be defined in the same way as the rights of a mortgagor's creditors; that is, the creditors should be given the right to discharge the mortgage; namely, pay the portion of the price remaining due upon the conditional sale and by so doing acquire the right to treat the full ownership as belonging to the mortgagor or buyer. This method has been allowed in several States.⁷⁶ An assignee for the benefit of creditors under a common-law assignment can stand in no better position than an individual creditor.⁷⁷ Indeed, the doctrine that such an assignee is to be placed on the footing of a purchaser for value is even more exceptional than a similar doctrine in regard to an individual attaching creditor.⁷⁸ The trust-

⁷⁴ *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. ed. 1003; *George v. Tufts*, 5 Colo. 162; *Weber v. Diebold Safe, etc., Co.*, 2 Colo. App. 68, 29 Pac. 747; *Ketchum v. Watson*, 24 Ill. 591; *Lucas v. Campbell*, 88 Ill. 447; *Van Duzor v. Allen*, 90 Ill. 499; *Martin v. Mathiot*, 14 S. & R. 214, 16 Am. Dec. 491; *Edwards' Appeal*, 105 Pa. St. 103; *Forrest v. Nelson*, 108 Pa. St. 481; *Ott v. Sweatman*, 166 Pa. St. 217, 31 Atl. 102; *Duplex Printing Press Co. v. Clipper Pub. Co.*, 213 Pa. St. 207, 62 Atl. 841.

⁷⁵ See *infra*, § 331.

⁷⁶ *Bingham v. Vandegrift*, 93 Ala. 283, 9 So. 280; Conn. Gen. St. (1902), § 834; *Hervey v. Dimond*, 67 N. H. 342, 39 Atl. 331, 68 Am. St. Rep. 673; *Towner v. Bliss*, 51 Vt. 59. But not if possession had previously been taken by the seller upon default by the buyer. *Sage v. Sleutz*, 23 Ohio St. 1. If the property is, in fact, seized by an officer on behalf of a creditor of the buyer, it has been held that the seller cannot bring trespass or trover or other possessory action against the officer until the time for payment has come. *New-*

hall v. Kingsbury, 131 Mass. 445; *Hurd v. Fleming*, 34 Vt. 169. Compare *Plymouth Foundry Co. v. Fee*, 182 Mass. 31, 64 N. E. 419; *United Shoe Machinery Co. v. Holt*, 185 Mass. 97, 69 N. E. 1056. Where the buyer is in default, his creditors cannot pay the balance due to the seller and thereby entitle themselves to forfeit the buyer's rights because of his failure to pay when due. The creditors succeed only to the buyer's rights, not the seller's. *Pearne v. Coyne*, 79 Conn. 570, 65 Atl. 973.

⁷⁷ *Hercules Iron Works v. Hummer*, 49 Ill. App. 598; *Ballantyne v. Appleton*, 82 Me. 570, 20 Atl. 235; *Edwards v. Symons*, 65 Mich. 348, 32 N. W. 796; *Gayden v. Tufts*, 68 Miss. 691, 10 So. 53; *Adams v. Lee*, 64 N. H. 421, 13 Atl. 736; *Campbell Printing Press Co. v. Walker*, 114 N. Y. 7, 20 N. E. 625; *Collins v. Houston*, 138 Pa. St. 481, 21 Atl. 234; *Wadleigh v. Buckingham*, 80 Wis. 230, 49 N. W. 745.

⁷⁸ Virginia seems to be the only State which treats an assignee for the benefit of creditors as a purchaser for value. *Wickham v. Martin*, 13 Gratt. 427; *Oberdorfer v. Meyer*, 88

tees in bankruptcy under the Federal law, however, seem to have a somewhat larger right. By the express terms of the Bankruptcy Act,⁷⁹ the trustee takes all the property "which might have been levied upon and sold under judicial process against" the bankrupt. This would seem to give the trustee a right to the property in a case where a creditor could successfully have levied upon it. The Supreme Court of the United States has held, and obviously correctly, that in each case the question must depend upon the rights which the State law gives to creditors. Therefore, if under the local law a creditor of the buyer could not levy upon the property it is clear that it will not pass to the buyer's trustee in bankruptcy. Even in dealing with jurisdictions where by statute or otherwise an individual creditor may levy upon the property, the Supreme Court seems disposed to narrow rather than to enlarge the effect of the words of the Bankruptcy Act quoted above.⁸⁰

Va. 384, 13 S. E. 756. And as Virginia is one of the States which hold that even a purchaser for value from the buyer in a conditional sale is not protected (*McComb v. Donald's Admr.*, 82 Va. 903, 5 S. E. 558), it is evident that the rule referred to in the following sections is universal, aside from statutes, that an assignee under a common-law assignment for the benefit of creditors does not acquire property which his assignor held under a conditional sale.

⁷⁹ Section 70a (5).

⁸⁰ *York Mfg. Co. v. Cassell*, 201 U. S. 344, 26 S. Ct. 481, 50 L. ed. 782. In this case the Supreme Court held that an unrecorded Ohio conditional sale was good against the buyer's trustee in bankruptcy, although an Ohio statute made such a sale void as to creditors who, before the filing of the sale, had fastened upon the property by some specific lien. As the sale in question had never been filed, at the time the bankruptcy took place, any creditor could have fastened upon the property by a specific lien by the levy

of an attachment or execution. No creditor, however, had, in fact, done so. See also *Re Great Western Manufacturing Co.*, 152 Fed. Rep. 123, 81 C. C. A. 341; *Dunlop v. Mercer*, 156 Fed. Rep. 545 C. C. A. ; *Re Pierce* (N. Dak.), 157 Fed. Rep. 755, C. C. A. ; *Re Atlanta News Pub. Co.* (Ga.), 160 Fed. Rep. 519. And in *Falaenau v. Reliance Steel Foundry Co.*, N. J. Eq. , 69 Atl. 1098, an unrecorded conditional sale was held good against the receiver of an insolvent under the New Jersey statute which makes such sales void against judgment creditors and subsequent purchasers and mortgagees. Compare *Re Hammond* (Mass.), 98 Fed. Rep. 845; *Bradley v. McAfee* (Mo.), 149 Fed. Rep. 254; *Missouri Moline Plow Co. v. Spilman* (Mo.), 117 Fed. Rep. 746; *Re Cavagnaro* (N. H.), 143 Fed. Rep. 668; *Re Franklin Lumber Co.* (N. J.), 147 Fed. Rep. 852; *Logan v. Nebraska Moline Plow Co.* (Neb.), 93 N. W. 1128, where conditional sales which would have been ineffectual against the levy of indi-

§ 327. **Statutes requiring the record of conditional sales.**—Conditional sales have become so common under modern methods of business and are so deceptive both to purchasers from the buyer and to the buyer's creditors, since the buyer not only has possession of the property but ordinarily is entitled to use it and does use it as if it were his own, that recording acts have been passed in many States. The purpose of these statutes is to give notice to the public of the seller's title and to invalidate that title unless the bargain is in writing and a record of it made. Such statutes have been passed in Alabama,⁸¹ Arizona,⁸² Colorado,⁸³ Connecticut,⁸⁴ Florida,⁸⁵ Georgia,⁸⁶ Iowa,⁸⁷ Kansas,⁸⁸ Maine,⁸⁹ Minnesota,⁹⁰

vidual creditors were held equally ineffectual against a trustee in bankruptcy, the beginning of bankruptcy proceedings being held equivalent to seizure under a levy made by an individual executor. See further, *Colender Co. v. Marshall*, 57 Vt. 232; *Sheldon v. Mayers*, 81 Wis. 627, 51 N. W. 1082; *Conrad v. Kelley*, 106 Wis. 252, 254, 82 N. W. 141, where under State laws vesting in an assignee property which might have been taken on execution against a debtor, the assignee of the buyer was held to take property which was the subject of an unrecorded conditional sale.

⁸¹ Code (1896), §§ 1016, 1017.

⁸² Rev. St. (1901), § 2700.

⁸³ Mills Annot. St., c. 25. See *Tufts v. Beach*, 8 Colo. App. 33, 44 Pac. 771; *Coors v. Reagan*, Colo. 96 Pac. 966.

⁸⁴ Gen. St. (1902), §§ 4864-4867. This statute does not apply to household furniture, musical instruments, bicycles, and exempt property. See further, *Lee Bros. Furniture Co. v. Cram*, 63 Conn. 433, 28 Atl. 540; *Cohen v. Schneider*, 70 Conn. 505, 40 Atl. 455; *National Cash Register Co. v. Lesko*, 77 Conn. 276, 58 Atl. 967; *Re Legg*, 96 Fed. Rep. 326.

⁸⁵ Gen. St. (1906), §§ 2496, 2497. See *Hudnall v. Paine*, 39 Fla. 67.

⁸⁶ Code (1895), §§ 2776, 2777. This statute protects subsequent purchasers and creditors. *Steen v. Harris*, 81 Ga. 681, 8 S. E. 206; *Gartrell v. Clay*, 81 Ga. 327, 7 S. E. 161; *Mann v. Thompson*, 86 Ga. 347, 12 S. E. 746; *Rhode Island v. Empire Lumber Co.*, 91 Ga. 639, 17 S. E. 1012; *Merchants' Bank v. Cottrell*, 96 Ga. 168, 22 S. E. 127; *Bond v. Brewer*, 96 Ga. 443, 23 S. E. 421; *Holland v. Adams*, 103 Ga. 610, 30 S. E. 432; *Wheeler Mfg. Co. v. Irish-American Bank*, 105 Ga. 57, 31 S. E. 48; *English v. Hill*, 116 Ga. 415, 42 S. E. 717; *Anderson v. Leverette*, 116 Ga. 732, 42 S. E. 1026; *Anderson v. Adams*, 117 Ga. 919, 43 S. E. 982; *In re Gosch*, 126 Fed. Rep. 627, 61 C. C. A. 363. But lack of record does not give any right to a judgment creditor of the buyer whose judgment is prior to the date of the sale. *Conder v. Holleman*, 71 Ga. 93. And an unrecorded conditional sale cannot be attacked by a mortgagee whose mortgage also is not recorded. *Cottrell v. Merchants' Bank*, 89 Ga. 508, 15 S. E. 944.

⁸⁷ Code (1897), §§ 2905, 2906. See for the construction of this statute, *Pash v. Weston*, 52 Iowa, 675, 3 N. W. 713; *Budlong v. Cottrell*, 64 Iowa, 234, 20 N. W. 166; *Warner v. Johnson*, 65 Iowa, 126, 21 N. W. 483;

Missouri,⁹¹ Montana,⁹² Nebraska,⁹³ New Hampshire,⁹⁴ New Jer-

Moline Plow Co. v. Braden, 71 Iowa, 141, 32 N. W. 247; Vorse v. Loomis, 86 Iowa, 522, 53 N. W. 314; Dorsey v. Banks, 88 Iowa, 595, 55 N. W. 574; Wright v. Barnard, 89 Iowa, 166, 56 N. W. 424; Union Bank v. Creamery Mfg. Co., 105 Iowa, 136, 74 N. W. 921; National Cash Register Co. v. Schwab, 111 Iowa, 605, 82 N. W. 1011; Rock Island Plow Co. v. Maynard Sav. Bank, 123 Iowa, 640, 99 N. W. 298; National Cash Register Co. v. Zangs, 127 Iowa, 710, 104 N. W. 360; Myer v. Car Co., 102 U. S. 1, 26 L. ed. 59; So. Bend Iron Works v. Cottrell, 31 Fed. Rep. 254; Manhattan Trust Co. v. Sioux City Co., 76 Fed. Rep. 658.

⁹⁰ Gen. St. (1897), c. 120, §§ 1, 4, 5, 13.

⁸⁹ Rev. St. (1903), c. 113, § 5. Until 1895, the statute only applied to notes (Morris v. Lynde, 73 Me. 88), but the statute was made to cover conditional sales whatever their form, by Laws of 1895, c. 32. For further authority on the construction of the statute before and since amendment, see Boynton v. Libby, 62 Me. 253; Nichols v. Ruggles, 76 Me. 25; Field v. Gellerson, 80 Me. 270, 14 Atl. 70; Cunningham v. Trevitt, 82 Me. 145, 19 Atl. 110; Hill v. Nutter, 82 Me. 199, 19 Atl. 170; Holt v. Knowlton, 86 Me. 456, 29 Atl. 1113; Thomas v. Parsons, 87 Me. 203, 32 Atl. 876; Hopkins v. Maxwell, 91 Me. 247, 39 Atl. 573.

⁹⁰ Rev. Laws (1905), §§ 3476-3478. See also §§ 2729-2731. The sections last referred to relate to sales of railroad equipment. See Kinney v. Cay, 39 Minn. 210, 39 N. W. 140; National Bank of Commerce v. Chicago, etc., Ry. Co., 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263; Creamery Mfg. Co. v. Tagley, 91 Minn.

79, 97 N. W. 412. The statute has no application to cash sales, where there is no intention to deliver possession until the price is paid. Freeman v. Kraemer, 63 Minn. 242, 65 N. W. 455. Failure to record does not make the sale invalid against the seller's trustee in bankruptcy. Dunlop v. Mercer, 156 Fed. Rep. 545.

⁹¹ Rev. St. (1899), §§ 3412, 3413. See Oester v. Sitlington, 115 Mo. 247, 21 S. W. 280; Redenbaugh v. Kelton, 130 Mo. 558, 32 S. W. 67; Eidson v. Hedger, 38 Mo. App. 52; Michigan Buggy Co. v. Woodson, 59 Mo. App. 550; Peters v. Featherstun, 61 Mo. App. 466; Loeffler v. Damoree, 75 Mo. App. 207; John S. Brittain Co. v. Buchanan, 79 Mo. App. 528; Mansur-Tebbetts Co. v. Price, 81 Mo. App. 243; Barnes v. Rawlings, 83 Mo. App. 185; Fairbanks v. Baskett, 98 Mo. App. 53, 71 S. W. 1113. Under the Missouri statute, unlike the Georgia statute (see note 86, *supra*), a creditor prior to the sale is protected. Collins v. Wilhoit, 35 Mo. App. 585.

⁹² Laws of 1899, p. 124.

⁹³ Comp. St. (1899), §§ 3200-3203. See Romberg v. Hughes, 18 Neb. 579, 26 N. W. 351; Peterson v. Tufts, 34 Neb. 8, 51 N. W. 297; Regier v. Craver, 54 Neb. 507, 74 N. W. 830; Jones v. Reed, Neb. , 109 N. W. 738. The statute in terms protects a "purchaser or judgment creditor of the vendee." The word "purchaser" has been held not to include a mortgagee, an unfortunate construction. Campbell Printing Co. v. Dyer, 46 Neb. 830, 65 N. W. 904; McCormick Co. v. Callen, 48 Neb. 849, 67 N. W. 863; Racine Sattley Co. v. Meinen, Neb. , 114 N. W. 602.

⁹⁴ Pub. St. (1901), c. 140, §§ 23-26. See Gerrish v. Clark, 64 N. H.

sey,⁹⁵ New York,⁹⁶ North Carolina,⁹⁷ North Dakota,⁹⁸ Ohio,⁹⁹ Oklahoma,¹ South Carolina,² Texas,³ Vermont,⁴ Virginia,⁵ Wash-

492, 13 Atl. 870; *Churchill v. Demeritt*, 71 N. H. 110, 51 Atl. 254.

⁹⁵ Laws of 1898, c. 232, §§ 71-73, revising Gen. St. (1896), p. 891. See *Knowles Loom Works v. Vacher*, 57 N. J. L. 490, 31 Atl. 306, 33 L. R. A. 305; *Wooley v. Geneva Wagon Co.*, 59 N. J. L. 278, 35 Atl. 789; *Behn v. Nat. Bank*, 65 N. J. L. 591, 48 Atl. 527; *General Electric Co. v. Transit Equipment Co.*, 57 N. J. Eq. 460, 42 Atl. 101. The statute makes unrecorded conditional sales void only against judgment creditors and subsequent purchasers and mortgagees in good faith. *Falaenau v. Reliance Steel Foundry Co.*, N. J. Eq. , 69 Atl. 1098; *Smith v. Hotel Ritz Co.*, N. J. Eq. , 70 Atl. 137.

⁹⁶ Laws 1897, c. 418; Laws 1884, c. 315. A section excepting some kinds of goods was repealed by Laws of 1905, chapter 503. The statute does not protect creditors except as to sales or leases of railroad equipment. As to other property subsequent purchasers, pledgees or mortgagees, in good faith, are protected. See *Frank v. Batten*, 49 Hun, 91; *Fennikoh v. Gunn*, 59 N. Y. App. Div. 132, 69 N. Y. Suppl. 12; *Kirk v. Crystal*, 103 N. Y. Suppl. 17. Formerly pledgees were not within the protection of the statute. *Kauffman v. Klang*, 16 N. Y. Misc. Rep. 379, 38 N. Y. Suppl. 56. See further on the construction of the statute, *Hirsch v. Graves Elev. Co.*, 24 N. Y. Misc. Rep. 472, 53 N. Y. Suppl. 664; *Ryan v. Wollowitz*, 25 N. Y. Misc. Rep. 498, 54 N. Y. Suppl. 988; *Gerber v. Mandel*, 26 N. Y. Misc. Rep. 825, 56 N. Y. Suppl. 1030; *Nichols v. Potts*, 35 N. Y. Misc. Rep. 273, 71 N. Y. Suppl. 765; *Duntz v. Granger Brewing Co.*, 41 N. Y. Misc. Rep. 177, 83 N. Y. Suppl. 957; *affd.*,

96 N. Y. App. Div. 631, 89 N. Y. Suppl. 1103.

⁹⁷ Revisal of 1905, § 983. See *Foreman v. Drake*, 98 N. C. 311, 3 S. E. 482; *Glasscock v. Hazell*, 109 N. C. 145, 13 S. E. 789; *Clark v. Hill*, 117 N. C. 11, 23 S. E. 91, 53 Am. St. Rep. 574; *Barrington v. Skinner*, 117 N. C. 47, 23 S. E. 90; *Manufacturing Co. v. Gray*, 121 N. C. 168, 28 S. E. 257; *Hinkle v. Greene*, 125 N. C. 489, 34 S. E. 554; *Re Franklin*, 151 Fed. Rep. 642.

⁹⁸ Rev. Code (1895), §§ 4732, 4733, 4737.

⁹⁹ *Bates Annot. St.* (1908), § 4155-2. See *Speyer v. Baker*, 59 Ohio St. 11, 51 N. E. 442. Under the Ohio statute an unrecorded conditional sale is good against a trustee in bankruptcy. *York Mfg. Co. v. Cassell*, 201 U. S. 344, 26 S. Ct. 481, 50 L. ed. 782.

¹ Laws of 1897, c. 26, Art. 1.

² Code (1902), § 2456. This statute in terms covers chattel mortgages only, but the courts of South Carolina have held that the conditional sale is in effect a chattel mortgage, and must be recorded according to the terms of the statute. See *McKnight v. Gordon*, 13 Rich. Eq. 222; *Talbridge v. Oliver*, 14 S. C. 522; *Herring v. Cannon*, 21 S. C. 212, 53 Am. Rep. 661.

³ *Sayles' Civil St., Arts.* 3190a, 3190b. See *Knittel v. Cushing*, 57 Tex. 354, 44 Am. Rep. 598; *Sinker v. Comparet*, 62 Tex. 470; *Key v. Brown*, 67 Tex. 300, 3 S. W. 443; *Loving Pub. Co. v. Johnson*, 68 Tex. 273, 4 S. W. 532; *Bowen v. Lansing Wagon Works*, 91 Tex. 385, 43 S. W. 872; *Parlin Co. v. Harrell*, 8 Tex. Civ. App. 368, 27 S. W. 1084; *Man-sur, etc., Co. v. Beeman-St. Clair Co.*

ington,⁶ West Virginia,⁷ Wisconsin,⁸ Wyoming.⁹ In Tennessee conditional sales are invalid unless in writing, but record is not required.¹⁰ In Massachusetts a less comprehensive statute exists applying only to household furniture, and aimed primarily at protecting the conditional buyer, which requires the contract to be written and a copy to be delivered to the buyer.¹¹ Statutes relating only to conditional sales of the rolling stock of railroads also have been passed in many States. In England the Factor's Act of 1889¹² has absolutely invalidated all conditional sales where the buyer has possession as against purchasers, whether by absolute sale or by mortgage or pledge,¹³ reaching, as to such parties, the same result that has been reached in a few States in this country,¹⁴ without the aid of statute. The English statute has been

(Tex. Civ. App.), 45 S. W. 729; *Mechanics' Bank v. Gullett Gin Co.* (Tex. Civ. App.), 48 S. W. 627; *Sanger v. Jesse French Piano Co.* (Tex. Civ. App.), 75 S. W. 39; *Hall v. Keating Imp. Co.* (Tex. Civ. App.), 77 S. W. 1054.

⁴ Vt. St. (1894), § 2290. See *Cole v. Howe*, 50 Vt. 35; *Fairbanks v. Davis*, 50 Vt. 251; *Phelps v. Bemis*, 51 Vt. 487; *Clark v. Hayward*, 51 Vt. 14; *Bugbee v. Stevens*, 53 Vt. 389; *Dickerman v. Ray*, 55 Vt. 65; *McPhail v. Gerry*, 55 Vt. 174; *Collender Co. v. Marshall*, 57 Vt. 232; *Church's Admr. v. McLeod*, 58 Vt. 541, 3 Atl. 490.

⁵ Acts 1893-4, c. 362. See *Hash v. Lore*, 88 Va. 716, 14 S. E. 365; *Arbuckle v. Gates*, 95 Va. 802, 30 S. E. 496.

⁶ *Ballinger's Code* (1897), § 4585. See *Peterson v. Woolery*, 9 Wash. 390, 37 Pac. 416; *Johnson v. Wood*, 19 Wash. 441, 53 Pac. 707; *Eisenberg v. Nichols*, 22 Wash. 70, 60 Pac. 124, 79 Am. St. Rep. 917.

⁷ *Code* (1906), § 3101. See *Baldwin v. Van Wagner*, 33 W. Va. 293, 10 S. E. 716; *Hyer v. Smith*, 48 W. Va. 550, 37 S. E. 632; *Hatfield v. Haubert*, 51 W. Va. 190, 41 S. E. 144; *Webster Lumber Co. v. Key-*

stone Lumber Co., 51 W. Va. 545, 42 S. E. 632; *Troy Wagon Works Co. v. Hutton*, 53 W. Va. 154, 44 S. E. 135; *Hubbard v. Akers*, 52 W. Va. 21, 43 S. E. 124.

⁸ *Sanborn & Berry Annot. St.*, §§ 2317, 2319b. See *Williams v. Porter*, 41 Wis. 422; *Kimball v. Post*, 44 Wis. 471; *Rawson Mfg. Co. v. Richards*, 69 Wis. 643, 35 N. W. 40; *Thomas v. Richards*, 69 Wis. 671, 35 N. W. 42; *Mershon v. Moors*, 76 Wis. 502; s. c., *sub nom.* *Mershon v. Wheeler*, 45 N. W. 95; *Bent v. Hoxie*, 90 Wis. 625, 64 N. W. 426; *Mississippi Logging Co. v. Miller*, 109 Wis. 77, 85 N. W. 193.

⁹ *Rev. St.* (1899), § 2837.

¹⁰ *Acts of 1899*, c. 15.

¹¹ *Rev. Laws*, c. 198, § 11. See *Lee v. Gorham*, 165 Mass. 130, 42 N. E. 556.

¹² 52 & 53 Vict., c. 45, § 9.

¹³ On the construction of this statute see *Lee v. Butler*, [1893] 2 Q. B. 318; *Helby v. Matthews*, [1894] 2 Q. B. 262, [1895] A. C. 471; *Payne v. Wilson*, [1895] 1 Q. B. 653, 2 Q. B. 537.

¹⁴ See *supra*, § 325. But as regards creditors a conditional sale if written and recorded as required by the Bills of Sales Acts, or if oral

copied in British Columbia,¹⁵ Manitoba,¹⁶ the Northwest Territories,¹⁷ Nova Scotia.¹⁸ In Ontario,¹⁹ New Brunswick,²⁰ Prince Edward Island,²¹ statutes requiring the record of the contract, in order that it shall be valid against subsequent purchasers or mortgagees, are in force. The further requirement is added in case of manufactured goods, that the name and address of the manufacturer, bailor, or vendor be marked upon the goods.²²

§ 328. **Effect of notice.**—There can be no estoppel if a purchaser or creditor is aware of the true situation. And, therefore, even though a purchaser from the buyer or an attaching creditor of the buyer without notice is in a particular jurisdiction held entitled to hold the property against an original seller, a creditor²³ or buyer²⁴ should be, and generally is, denied the right where he had notice of the seller's claim before his own right accrued. The time when notice should be regarded as important, so far as a purchaser is concerned, is when he has entered into a bargain for the purchase of the goods. But it is probable that if only an executory bargain had been made, the courts would disregard the technical right of the purchaser and treat him as a volunteer.²⁵ So far as the creditor is concerned,

and unrecorded, is valid in England.
See *supra*, § 324, note.

¹⁵ Rev. St. (1897), c. 4, § 10.

¹⁶ St. of 1896, c. 25, § 24.

¹⁷ Consolidated Ordinances of 1899, c. 39.

¹⁸ St. of 1895, c. 11.

¹⁹ Rev. St. (1897), c. 148, § 41.

²⁰ St. 1899, c. 12.

²¹ St. 1896, c. 6.

²² The particulars of the statutes and the Canadian authorities may be found in Tremear on the Canadian Law of Conditional Sales and of Chattel Liens.

²³ A creditor with notice was held not entitled to protection though had it not been for notice protection would have been granted. *Jones v. Clark*, 20 Colo. 353, 38 Pac. 371 (overruling *Weber v. Diebold Safe Co.*, 2 Colo. App. 68, 29 Pac. 747); *Anderson v. Adams*, 117 Ga. 919, 923, 43 S. E. 982; *Dyer v. Thorstad*, 35 Minn. 534,

29 N. W. 345; *Coover v. Johnson*, 86 Mo. 533; *McPhail v. Gerry*, 55 Vt. 174. In Missouri and Vermont the express language of the statute required this result. But see *Murch v. Wright*, 46 Ill. 487, 95 Am. Dec. 455.

²⁴ *Braddock Brewing Co. v. Pfau-ler Vacuum Co.*, 106 Fed. Rep. 604, 45 C. C. A. 491; *Unmack v. Douglass*, 75 Conn. 633, 55 Atl. 12; *Hill v. Ludden*, 113 Ga. 320, 38 S. E. 752; *First Nat. Bank v. Tufts*, 53 Kans. 710, 37 Pac. 127; *Van Buren v. Stubbings*, 149 Mich. 206, 112 N. W. 706; *Barnes v. Rawlings*, 74 Mo. App. 531; *Norton v. Pilger*, 30 Neb. 860, 47 N. W. 471; *Batchelder v. Sanborn*, 66 N. H. 192, 22 Atl. 535; *Kelsey v. Kendall*, 48 Vt. 24; *Singer Mfg. Co. v. Nash*, 70 Vt. 434, 41 Atl. 429; *Perkins v. Best*, 94 Wis. 168, 68 N. W. 762.

²⁵ See Ames, *Cas. Trusts* (2d ed.), 287. If part of the price has been

the time when notice is important, at least where an unrecorded conditional sale is regarded as fraudulent, might well be held not to be when the levy²⁶ is made, but when the debt was created, if its creation was subsequent to the conditional sale; for a creditor whose debt has been created in reliance upon the apparent condition of the debtor's estate should not have his rights diminished by subsequent notice.²⁷ The only qualification that must be observed in regard to the principle stated in this paragraph in regard to notice relates to the statutes referred to in the preceding sections. Some of these statutes enact in such positive terms that an unrecorded conditional sale is invalid or void that it is probably a necessary construction of them that notice can make no difference. Others make express provision for notice.²⁸

§ 329. **Other circumstances of estoppel in conditional sales.**—There may be special circumstances in a conditional sale which will estop the original seller from asserting his right although otherwise he might have done so. Perhaps the commonest of these circumstances is where the conditional sale is made to a buyer who, if not authorized expressly, or by implication, to resell the goods, at least is authorized to put the goods in his stock or otherwise make it seem that the goods are his. Under such circumstances it is clear that the seller cannot reclaim the goods from a *bona fide* purchaser, though the contract expressly provided that title should not pass until the price was paid.²⁹ Such an agree-

paid before the purchaser receives notice, the purchaser is treated either as entitled to keep the goods and bound to pay the balance of the price to person equitably entitled thereto, or as entitled to hold the goods only as security for the portion of the price already paid. *Ibid.* 288. See, however, the definition of value in the Sales Act, § 76; *infra*, §§ 619, 620.

²⁶ The moment of the levy was held the essential time in *Dyer v. Thorstad*, 35 Minn. 534, 29 N. W. 345.

²⁷ See *Vanmeter v. Estill*, 78 Ky. 46; also the Georgia decisions referred to in § 327, note.

²⁸ Compare the decisions holding

that a creditor with notice of an unrecorded deed of real estate by his debtor cannot thereafter levy a valid attachment upon the real estate. 4 Cyc. 640.

²⁹ *Stone v. Waite*, 88 Ala. 599, 7 So. 117; *South Bend Iron Works v. Reedy* (Del. Super.), 60 Atl. 698; *Barbour v. Perry*, 41 Ill. App. 613; *Winchester Wagon Works, etc., Co. v. Carman*, 109 Ind. 31, 9 N. E. 707, 58 Am. Rep. 382; *Re Gilligan* (Ind.), 152 Fed. Rep. 605, 81 C. C. A. 595; *Rogers v. Whitehouse*, 71 Me. 222; *Sargent v. Metcalf*, 5 Gray, 306, 66 Am. Dec. 368; *Burbank v. Crooker*, 7 Gray, 158, 66 Am. Dec. 470; *Spooner v. Cummings*, 151

ment is, however, valid as between the parties.³⁰ Whether a sale of this sort is fraudulent against creditors and, therefore, invalid against a trustee in bankruptcy does not seem clear.³¹ If, however, the resale made by the buyer is of a totally different character from that which the seller authorized or is estopped to deny that he authorized, this principle does not apply.³² The cases are not unanimous as to the rights of the buyer's creditors where the seller authorizes or is estopped to deny the buyer's right to resell the goods. In some jurisdictions creditors, as well as purchasers, may treat the sale as absolute.³³ In other jurisdictions, however, the creditor succeeds merely to the rights of the buyer and is,

Mass. 313, 23 N. E. 839; *Pratt v. Burhans*, 84 Mich. 487, 47 N. W. 1064, 22 Am. St. Rep. 703; *Columbus Buggy Co. v. Turley*, 73 Miss. 529, 19 So. 232, 32 L. R. A. 260, 55 Am. St. Rep. 550; *Lawrence v. Owens*, 39 Mo. App. 318; *Fitzgerald v. Fuller*, 19 Hun, 180; *Carmack v. Gordon*, 2 Cinc. Super. Ct. Rep. 408; *Wilder v. Wilson*, 16 Lea, 548; *Star Clothing Mfg. Co. v. Nordeman* (Tenn.), 100 S. W. 93. See also *New Haven Wire Co. Cases*, 57 Conn. 352, 5 L. R. A. 300; s. c., *sub nom. Baring v. Galpin*, 18 Atl. 266. But the law of Arkansas is otherwise. *Re Newton*, 153 Fed. Rep. 841, 83 C. C. A. 23. In *Sargent v. Metcalf*, 5 Gray, 306, 66 Am. Dec. 368, it was held that the original seller could reclaim the goods from a subpurchaser where the original contract provided that resale should not be made until payment of the price.

³⁰ *Lewis v. McCabe*, 49 Conn. 141, 44 Am. Rep. 217. See also *Arlington v. Houston*, 38 Vt. 448, 91 Am. Dec. 366, where goods were not to be resold but the buyer had a right to consume them.

³¹ *In re Pierce*, 157 Fed. Rep. 755, C. C. A. ; *Mishawaka Mfg. Co. v. Smith*, 158 Fed. Rep. 885. It was held that the seller was entitled

to reclaim his property from the trustee in bankruptcy of the buyer, and in *Rogers v. Whitehouse*, 71 Me. 222, agreement was enforced against an assignee in insolvency, but in *Pontiac Buggy Co. v. Skinner*, 158 Fed. Rep. 858, sale was held fraudulent and the seller's right against the buyer's trustee in bankruptcy denied. See also *Sheldon v. Mayers*, 81 Wis. 627, 51 N. W. 1082.

³² Thus where a shopkeeper had bought on a conditional sale goods for his stock in trade, he was held unable to give a valid title to a purchaser of the entire stock in trade. *Burbank v. Crooker*, 7 Gray, 158, 66 Am. Dec. 470. So where the buyer was expressly authorized to resell the goods "in the due course of trade," a transfer of them in satisfaction of an antecedent debt was held invalid. *Pratt v. Burhans*, 84 Mich. 487, 47 N. W. 1064, 22 Am. St. Rep. 703. Compare with this decision, however, *Poorman v. Witman*, 49 Kans. 697, 31 Pac. 370; *Columbus Buggy Co. v. Turley*, 73 Miss. 529, 19 So. 232, 32 L. R. A. 260, 55 Am. St. Rep. 550.

³³ *Re Howland* (N. Y.), 109 Fed. Rep. 869; *Devlin v. O'Neill*, 6 Daly, 305; *affd.*, 68 N. Y. 622; *Bonesteel v. Flack*, 41 Barb. 435 (compare *Cole*

therefore, bound by the condition.³⁴ Another way in which the seller may be estopped to show that a sale was conditional is by giving a bill of sale absolute in form to the buyer. Though it has been held that such a seller may show the existence of the condition against the buyer,³⁵ yet against purchasers who have bought, relying upon the form of the bill of sale, the original seller is precluded from asserting his title.³⁶ And so against creditors who have extended credit, similarly relying upon the buyer's apparent title, the seller would be estopped.³⁷

§ 330. **Conditions precedent and subsequent in conditional sales.**—

In an ordinary conditional sale the payment of the price is by the express terms of the agreement a condition precedent to the transfer of title. For this reason it has been argued that the term "conditional sale" is a misnomer and that the transaction should properly be called a conditional contract of sale or contract to sell. The name of conditional sale, it is urged, should be reserved for a transaction where title is transferred immediately and a right given in the nature of a condition subsequent to resume the title for breach of condition.³⁸ The distinction between a sale upon condition subsequent and a conditional sale as ordinarily made with a condition precedent is not so extreme, however, as this argument implies. The ordinary conditional sale does not rest wholly in agreement. It is not merely a contract to sell to which is superadded a contract that the buyer shall have possession. If this were all, the seller could at any time break his contract, subjecting himself thereby to liability of damages. In fact the buyer acquires not simply a contract right but a property right. This is due to the fact that the seller does not simply contract that the buyer shall have possession; the seller actually delivers possession, and this possession is delivered not to hold the goods for

v. Mann, 62 N. Y. 1); *Loving Publishing Co. v. Johnson*, 68 Tex. 273, 4 S. W. 532.

³⁴ *Mack v. Story*, 57 Conn. 407, 18 Atl. 707. See also *McGirr v. Sell*, 60 Ind. 249; *Blanchard v. Cooke*, 144 Mass. 207, 11 N. E. 83; *Hirsch v. Steele*, 10 Utah, 18, 36 Pac. 49.

³⁵ *Smith v. Tilton*, 10 Me. 350.

See also *Burditt v. Howe*, 69 Vt. 563, 38 Atl. 240.

³⁶ *Ryder v. Cooley*, 58 Conn. 367, 20 Atl. 470; *Sanborn v. Chittenden*, 27 Vt. 171.

³⁷ *Ryder v. Cooley*, 58 Conn. 367, 20 Atl. 470; *Dixon v. Blondin*, 58 Vt. 689, 5 Atl. 514.

³⁸ *Mechem, Sales*, § 559 *et seq.*

the seller, but to use as the buyer's own. Moreover, the buyer, so long as he is not in default, may maintain his possession and use of the property against the world. The situation is, therefore, identical with the case of the condition subsequent, except that in the case of the condition precedent the seller has a bare legal title for the purpose of security only, while in the case of the condition subsequent the seller has only the right to regain a legal title on the happening of a condition. As the purpose of the seller's right, whether a legal title or whether a right to resume the title on breach of condition, is merely to give security for the payment of the price, the transaction is in its essence a mortgage.³⁹ And the distinction between a case where the condition is precedent and the case where it is subsequent is somewhat analogous to a distinction taken in the law of mortgages. In some States a mortgage is held to transfer a legal title to the property subject to a condition subsequent, by which title is revested in the buyer if the debt is paid. A mortgage upon this theory is analogous to a conditional sale where the seller retains the title. The mortgagor, like the conditional buyer, has not the legal title to the mortgaged estate, but in both cases has nevertheless a property

³⁹ In *Chicago Railway Equipment Co. v. Merchants' Bank*, 136 U. S. 268, 283, 10 S. Ct. 999, 34 L. ed. 349, while referring to notes each of which contained a statement that it was given for personal property the title to which should remain in the payee until the note was paid, Harlan, J., who delivered the opinion of the court, said: "The agreement that the title should remain in the payee until the notes were paid * * * is a short form of chattel mortgage. The transaction is, in legal effect, what it would have been if the maker, who purchased the cars, had given a mortgage back to the payee, securing the notes on the property until they were all fully paid." To the same effect see *New York Security & Trust Co. v. Capital Ry. Co.*, 77 Fed. Rep. 529, 531. The same idea is more briefly expressed: "The reservation of the

title is but as security for the purchase price." *Ross-Meehan Co. v. Pascagoula Ice Co.*, 72 Miss. 608, 615, 18 So. 364. And this language is substantially repeated in *McKean v. John Mathews Co.*, 74 Miss. 119, 121, 20 So. 869, 60 Am. St. Rep. 502. So in *Gaar v. Nichols*, 115 Iowa, 223, 225, 88 N. W. 382: "A conditional sale involves the delivery to the vendee as owner, with reservation to the vendor of title only for the purpose of security." It should be carefully observed that the analogy to a mortgage holds good only in the kind of conditional sales under discussion—where there is an unconditional obligation on the part of the buyer to pay the price though the seller's obligation to transfer title is subject to a condition. If the buyer's obligation is conditional, as where he has an option to buy or not to buy, or where

right protected by the courts.⁴⁰ In other States it is held that title does not pass by a mortgage, but merely a lien enabling the mortgagee on breach of condition to acquire or transfer title by foreclosure.⁴¹ Upon this theory a mortgage resembles a transaction where the seller has not retained title, but only a right to resume title on default by the buyer. Although the desirability of a clear theory upon the subject is not to be denied, nor is it to be denied that differences in result may follow from the difference in theory, it is easy to exaggerate the importance of the distinction between these two views of a mortgage and similarly between the ordinary conditional sale where payment is a condition precedent of the passing of the legal title, and the case where nonpayment is a condition subsequent revesting title in the seller; for though payment be a condition precedent to the vesting of legal title, it is not a condition precedent to the vesting of a right of property in the buyer, called in the cases a "special property." The transaction is, therefore, properly called a conditional sale, not a conditional contract to sell. It is an error with serious practical consequences to suppose that the conditional buyer's rights rest only in contract. Various important results follow from the existence of a property right in the buyer, to which attention may now be called.

§ 331. **Seller cannot effectively refuse to transfer title.**—In the case of a contract to sell, the seller may refuse to carry out his contract and the buyer has no redress except an action for damages. He cannot obtain the goods themselves.⁴² Moreover, even though the seller does not refuse to transfer the property, but is simply passive, it does not pass without an act of appropriation agreed upon by the parties.⁴³ The situation in the case of a conditional sale, however, is thus expressed: "Under it the vendee acquires not only the right of possession and use, but the right to become the absolute owner upon complying with the terms of

the transaction is to be completed only in a certain event, there is no analogy to a mortgage, the essence of which is a debt for which the mortgaged property is security.

⁴⁰ Jones, Mortgages, § 11 *et seq.*

⁴¹ Jones, Mortgages, § 13 *et seq.*

But see Jones, Chattel Mortgages, § 1, which indicates that this view is not prevalent in regard to chattels.

⁴² Kerr v. Henderson, 62 N. J. L. 724, 42 Atl. 1073. See *infra*, § 598.

⁴³ See *supra*, § 274 *et seq.*

the contract. These are rights of which no act of the vendor can divest him, and which, in the absence of any stipulation in the contract restraining him, he can transfer by sale or mortgage. Upon performance of the condition of the sale, the title to the property vests in the vendee, or, in the event that he has sold or mortgaged it, in his vendee or mortgagee, without further bill of sale."⁴⁴ Therefore, a tender of the price in accordance with the condition, though refused, debars the seller from recovering the goods,⁴⁵ and the buyer or his assignee may replevy them from the seller;⁴⁶ but not if tender was made after breach of the contract and rescission by the seller.⁴⁷

§ 332. **Assignability of the rights of buyer and seller.**—Choses in action are not assignable at common law; and though some of the consequences of assignability have been achieved in the law of contracts, it is still true that contract rights are very imperfectly assignable. A contract by the owner of property that A. should have the possession of it could not, it is submitted, ordinarily be assigned by A. to B. The contract involves too great an element of personal trust. But where A. has the right to use the property as his own, it is not essential, unless the bargain makes it so, whether A. disposes of the property to B. or not; and the right of the conditional buyer may be assigned,⁴⁸ though such a disposition cannot diminish A.'s liability to pay the price, nor give B. the legal title to the property if the price is not paid. It may be added in this connection that the seller's interest in the property is also assignable;⁴⁹ and that the assignment of the debt by the seller

⁴⁴ *Carpenter v. Scott*, 13 R. I. 477, 479 (citing *Day v. Basset*, 102 Mass. 445, 447; *Crompton v. Pratt*, 105 Mass. 255, 258; *Currier v. Knapp*, 117 Mass. 324, 325, 326; *Chase v. Ingalls*, 122 Mass. 381, 383).

⁴⁵ *Christenson v. Nelson*, 38 Or. 473, 63 Pac. 648.

⁴⁶ *Tweedie v. Clark*, 114 N. Y. App. Div. 296, 99 N. Y. Suppl. 856.

⁴⁷ *Lippincott v. Rich*, 19 Utah, 140, 56 Pac. 806.

⁴⁸ *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339; *Ames Iron Works v. Richardson*, 55 Ark. 642, 18 S. W.

381; *Beach's Appeal*, 58 Conn. 464, 20 Atl. 475; *United Shoe Machinery Co. v. Holt*, 185 Mass. 97, 102, 69 N. E. 1056; *Powers v. Burdick*, 110 N. Y. Suppl. 883; *Carpenter v. Scott*, 13 R. I. 477.

⁴⁹ *Everett v. Hall*, 67 Me. 497; *Hubbard v. Bliss*, 12 Allen, 590; *McMillan v. Larned*, 41 Mich. 521, 2 N. W. 662; *Ross-Meehan Co. v. Pascagoula Ice Co.*, 72 Miss. 608, 18 So. 364; *Burnell v. Marvin*, 44 Vt. 277; *W. W. Kimball Co. v. Mellon*, 80 Wis. 133, 48 N. W. 1100. In *Everett v. Hall*, the court held that the vendor

operates of itself as an assignment of the seller's interest in the property.⁵⁰ The assignee's right to the property is equitable rather than legal.⁵¹ But most courts would probably allow the assignee to enforce his right to the property by ordinary legal proceedings. The cases most commonly arise where a note has been given for the price and the seller transfers the note. Sometimes, however, the debt for the price is not represented by a note, but by a simple contract obligation. If the seller has a negotiable note, he can vest the legal ownership in the note in an indorsee; but if there is no negotiable paper representing the debt, the seller can only give an assignee the usual rights of one who buys a chose in action. Even though suit may be brought by the assignee in his own name, his legal right in such a case is merely that of one holding an irrevocable power of attorney for the original creditor, coupled with a right to hold the money as his own when collected. Therefore, if one who has sold property conditionally transfers to different persons his claim to the price

could effectively mortgage (and presumably sell) the property at any time before the conditional buyer had paid the full price. Whether a court of equity would give the conditional buyer a lien on the property for so much of the price as he had paid the court suggests but does not answer. It is submitted that his special property, whether called legal or equitable, protects all the rights assured to him by the contract and attaches to the goods from the time of their delivery to him. After breach of the condition the seller may resell the property without first resuming possession himself. *Hubbard v. Bliss*, 12 Allen, 590.

⁵⁰ *Bank of Little Rock v. Collins*, 66 Ark. 240, 50 S. W. 694; *Townsend v. Southern Product Co.*, 127 Ga. 342, 56 S. E. 436; *Laurens Banking Co. v. Bales*, Ga. App., 60 S. E. 1014; *Cutting v. Whittemore*, 72 N. H. 107, 54 Atl. 1098; *Esty v. Graham*, 46 N. H. 169; *Spoon v. Frambach*, 83 Minn. 301, 86 N. W.

106; *W. W. Kimball Co. v. Mellon*, 80 Wis. 133, 48 N. W. 1100. But under the Georgia statute the assignee of the debt does not acquire any right to the goods unless they are expressly transferred. *Burch v. Pedigo*, 113 Ga. 1157, 39 S. E. 493, 54 L. R. A. 808. Compare *McCullough v. Pritchett*, 120 Ga. 585, 48 S. E. 148.

⁵¹ Therefore, in *McPherson v. Acme Lumber Co.*, 70 Miss. 649, 12 So. 857, a seller who had assigned purchase-money notes was allowed to replevy the goods on breach of condition by the buyer, but was held bound to apply the proceeds of the goods to the payment of the debt which had been assigned. See also *Domestic Sewing Machine Co. v. Arthurhultz*, 63 Ind. 322. In the latter case the holder of a promissory note indorsed in blank was not allowed to replevy the property for which the note had originally been given under a bargain of conditional sale.

and the notes given for the price, the indorsee of the notes will be entitled to the property, although the indorsement of the notes was subsequent to the agreement to transfer the claim.⁵²

§ 333. **The seller may recover the price—Tortious interference with the property.**—Where an ordinary contract to sell is broken by the buyer, the seller, in England and in many jurisdictions in this country, is allowed to recover as damages only the difference between the contract price and the market price of the goods, since the seller still is the owner of the goods.⁵³ In the case of a conditional sale, however, the seller would doubtless be universally allowed to recover the full price.⁵⁴ The only justification for such a result can be that the essential incidents of property have already been transferred to the buyer, when possession was delivered to him with the right to use the goods as his own, so that there is an absolute debt from that time. Such a result identifies the transaction with a mortgage, the vital feature of which is the existence of a debt irrespective of the property held for security. If the conditional buyer's right is wrongfully disturbed by third persons, the buyer may bring action against the tort-feasor and recover as damages the full value of the goods.⁵⁵ This does not necessarily involve the conclusion that the buyer is the owner of the property, for any bailee who is answerable to his bailor for the property may recover full damages. For the bailor, and consequently for a conditional seller, the appropriate remedy at common law is an action on the case.⁵⁶ But other circumstances show how far the buyer's property right is recognized. If the seller converts the goods, the buyer may sue him but he can recover only the value

⁵² *W. W. Kimball Co. v. Mellon*, 80 Wis. 133, 48 N. W. 1100.

⁵³ This subject is more fully treated in *infra*, § 562 *et seq.*

⁵⁴ *Morris v. Cohn*, 55 Ark. 401, 18 S. W. 384, 385; *Smith v. Aldrich*, 180 Mass. 367, 62 N. E. 381; *Whitney v. Abbott*, 191 Mass. 59, 77 N. E. 524; *Haynes v. Temple*, 198 Mass. 372, 84 N. E. 467. As Massachusetts does not permit the seller, generally, to recover the full price until the prop-

erty has passed, the decisions have peculiar force. See also *Tufts v. Poness*, 32 Ont. 51. The decisions cited in the following section, holding that the risk of loss is upon the buyer, necessarily involve the same conclusion.

⁵⁵ *Smith v. Gufford*, 36 Fla. 481, 18 So. 717, 51 Am. St. Rep. 37; *Colcord v. McDonald*, 128 Mass. 470.

⁵⁶ *Kent v. Buck*, 45 Vt. 18.

of his interest in the goods, since in this case he can keep all the damages awarded, without liability for the balance of the price.⁵⁷ In some form of action the seller would undoubtedly universally be allowed a remedy against one who had wrongfully interfered with the property.⁵⁸ But since the seller is under no obligation to the buyer to redeliver the goods to the buyer or to pay for them, the seller's measure of damages is only the amount of the price unpaid, not, however, exceeding the value of the goods, whether the converting defendant is a third person,⁵⁹ or the buyer himself.⁶⁰ In any event the tort-feasor should not be obliged to pay as total damages more than the full value of the property, so that if full damages are paid the buyer, the seller should look to him only thereafter.

§ 334. **Risk of loss and gain is upon the buyer.**—Risk of loss should properly fall upon the party who has the beneficial incidents of title rather than upon the party who has the legal title alone. In the case of a mortgage, even though a mortgagee is admitted to have the legal title, the risk of loss is upon the mortgagor. The same result should be reached in the case of a conditional sale, and under the Sales Act it has been expressly so provided.⁶¹ Apart from statutes the weight of authority supports the same result.⁶² Analogous to the risk of loss is the chance of benefit. But one class of goods seems to illustrate this: Where an animal is sold conditionally and during the period when the animal sold is in the buyer's possession, but before the price has been paid and the property passed, the animal has young, it is held that the young are subject to the same condition as the mother. That is, the property is in the seller, but passes to the buyer on the payment of the price originally stipulated for. Thus the buyer secures

⁵⁷ *White v. Allen*, 133 Mass. 423; *Levan v. Wilten*, 135 Pa. St. 61, 19 Atl. 945. In the case last cited the court erroneously held this to be the amount the buyer had paid toward the price, instead of the value of the goods, less what remained unpaid — not necessarily the same thing.

⁵⁸ *Sims v. James*, 62 Ga. 260; *Tower v. Haslam*, 84 Me. 86, 24 Atl. 587.

⁵⁹ *Tower v. Haslam*, 84 Me. 86, 24 Atl. 587.

⁶⁰ *Hall v. Nix*, Ala., 47 So. 335.

⁶¹ Section 22 (a). See *supra*, § 304.

⁶² See *supra*, § 304.

the benefit of the increase without paying anything additional for it.⁶³

§ 335. **Conflicting authority.**—The views which have been expressed in the preceding paragraph, it is believed, are sanctioned by the weight of authority and are supported by reason. Nevertheless, some courts having in mind simply the fact of the legal title of the seller do not accept the explanations that have been given. Those jurisdictions which hold that even in the absence of express provision the risk is upon the buyer necessarily do so upon the theory here advanced. Even jurisdictions which deny that the risk of loss is upon the buyer would not consistently follow out the view that the buyer's right is purely contractual; they halt somewhat illogically between the two positions.⁶⁴

§ 336. **Distinction between conditional sales and leases.**—The distinction between an ordinary lease and a conditional sale is obvious. A lease contemplates only the use of the property for a limited time, and the return of it to the lessor at the expiration of that time. A conditional sale contemplates the ultimate ownership of the property by the buyer, together with the use of it in the meantime. Sometimes, however, leases contain options giving the lessee a right to buy the leased property, and again the amount of rent may be so fixed as to reimburse the lessor not only for the use of the property and its possible deterioration, but also in large part, or wholly, for the total value of the property. Sellers desirous of making conditional sales of their goods, but who do not wish openly to make a bargain in that form, for one reason or another, have frequently resorted to the device of making contracts in the form of leases either with options to the buyer to purchase for a small consideration at the end of the term, provided the so-called rent has been duly paid, or with stipulations that if the rent throughout the term is paid, title shall thereupon vest in the lessee. It is obvious that such transactions are leases only in name. The so-called rent must necessarily be regarded as payment of the price in instalments since the due pay-

⁶³ *Anderson v. Leverette*, 116 Ga. 732, 42 S. E. 1026; *Allen v. Delano*, 55 Me. 113, 92 Am. Dec. 573; *Bunker v. McKenney*, 63 Me. 529; *Buckmaster v. Smith*, 22 Vt. 203; *Kent v.*

Buck, 45 Vt. 18; *Clark v. Hayward*, 51 Vt. 14.

⁶⁴ The cases relating to risk are collected, *supra*, § 304.

ment of the agreed amount results, by the terms of the bargain, in the transfer of title to the lessee. This has been clearly recognized and many of the statutes relating to conditional sales⁶⁵ in express terms include leases within their scope. Apart from statutes courts have disregarded the form of the transaction and held leases where payment of the rent nearly or quite paid the price of the goods conditional sales and subject to the rules governing the latter kind of transaction.⁶⁶ In a few States only, notably Pennsylvania,

⁶⁵ See *supra*, § 327.

⁶⁶ *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. ed. 1003; *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339; *Heryford v. Davis*, 102 U. S. 235, 26 L. ed. 160; *Re Sheets Mfg. Co.*, 136 Fed. Rep. 989; *Re Poore*, 139 Fed. Rep. 862; *Re Tice*, 139 Fed. Rep. 52; *Unitype Co. v. Long*, 143 Fed. Rep. 315, 74 C. C. A. 453; *Manson v. Dayton*, 153 Fed. Rep. 258, 82 C. C. A. 588; *Warren v. Liddell*, 110 Ala. 232, 20 So. 89; *Miller v. Steen*, 30 Cal. 402, 89 Am. Dec. 124; *Kohler v. Hayes*, 41 Cal. 455; *Hegler v. Eddy*, 53 Cal. 597; *Parke, etc., Co. v. White River Lumber Co.*, 101 Cal. 37, 35 Pac. 442; *Lundy Furniture Co. v. White*, 128 Cal. 170, 60 Pac. 759, 79 Am. St. Rep. 41; *Gerow v. Castello*, 11 Colo. 560, 19 Pac. 505, 7 Am. St. Rep. 260; *Hine v. Roberts*, 48 Conn. 267, 40 Am. Rep. 170; *Loomis v. Bragg*, 50 Conn. 228, 47 Am. Rep. 638; *Watertown Steam Engine Co. v. Davis*, 5 Del. 192; *Knowles Loom Works v. Knowles*, Del. , 65 Atl. 26; *Sanders v. Wilson*, 19 D. C. (8 Mackey), 555; *Hays v. Jordan*, 85 Ga. 741, 11 S. E. 833, 9 L. R. A. 373; *Cottrell v. Merchants' Bank*, 89 Ga. 508, 15 S. E. 944; *Ross v. McDuffie*, 91 Ga. 120, 16 S. E. 648; *Lytle v. Scottish American Mtge. Co.*, 122 Ga. 458, 465, 50 S. E. 402; *Lucas v. Campbell*, 88 Ill. 447; *Singer Mfg.*

Co. v. Ellington, 103 Ill. App. 517; *Singer Sewing Mach. Co. v. Holcomb*, 40 Iowa, 33; *Gross v. Jordan*, 83 Me. 380, 22 Atl. 250; *Campbell v. Ather-ton*, 92 Me. 66, 42 Atl. 232; *Chase v. Ingalls*, 122 Mass. 381; *Wickes v. Hill*, 115 Mich. 333, 73 N. W. 375; *Dederick v. Wolfe*, 68 Miss. 500, 9 So. 350; *Ham v. Cerniglia*, 73 Miss. 290, 18 So. 577; *Gerrish v. Clark*, 64 N. H. 492, 13 Atl. 870; *Puffer v. Lucas*, 112 N. C. 377, 17 S. E. 174; *Clark v. Hill*, 117 N. C. 11, 23 S. E. 91, 53 Am. St. Rep. 574; *Singer Mfg. Co. v. Gray*, 121 N. C. 168, 28 S. E. 257; *Wilcox v. Cherry*, 123 N. C. 79, 31 S. E. 369; *Hamilton v. Highlands*, 144 N. C. 279, 56 S. E. 929; *Sage v. Sleutz*, 23 Ohio St. 1; *Singer Mfg. Co. v. Graham*, 8 Or. 17, 34 Am. Rep. 572; *Herring-Marvin Co. v. Smith*, 43 Or. 315; *Farquhar v. McAlevy*, 142 Pa. St. 233, 21 Atl. 811, 24 Am. St. Rep. 497; *Kelly Springfield Roller Co. v. Spyker*, 215 Pa. St. 332, 64 Atl. 546; *Carpenter v. Scott*, 13 R. I. 477; *Pringle v. Canfield*, 19 S. Dak. 506, 104 N. W. 223; *Singer Mfg. Co. v. Cole*, 4 Lea, 439, 40 Am. Rep. 20; *Cowan v. Singer Mfg. Co.*, 92 Tenn. 376, 21 S. W. 663; *Whitcomb v. Woodworth*, 54 Vt. 544; *Collender Co. v. Marshall*, 57 Vt. 232; *Fidelity Ins., etc., Co. v. Shenandoah Valley R. Co.*, 86 Va. 1, 10, 9 S. E. 759, 19 Am. St. Rep. 858; *De St. Germain v. Wind*, 3 Wash. Terr. 189,

does it make any difference in the validity of the transaction whether it takes the form of a conditional sale or a lease which by its operation gives the so-called lessee title at the end of the term.⁶⁷ It is, however, essential in order to make a conditional sale, in the sense in which that term is used ordinarily in statutes or elsewhere, that the buyer should be bound to take title of the property, or at least to pay the price for it. Therefore, a lease which provides for a certain rent in instalments is not a conditional sale if the buyer can terminate the transaction at any time by returning the property, even though the lease also provides that if rent is paid for a certain period, the lessee shall thereupon become the owner of the property.⁶⁸ And though the rent is to be applied at the buyer's option toward the payment

13 Pac. 573; *Quinn v. Parke, etc., Co.*, 5 Wash. 276, 31 Pac. 866; *McGinnis v. Savage*, 29 W. Va. 362, 374, 1 S. E. 746; *Whelan v. Couch*, 26 Grant Ch. 74.

⁶⁷ In Pennsylvania, it is true it is asserted: "The courts in determining whether or not the contract was one of bailment, or one of sale with an attempt to retain a lien for the price, have not considered what name the parties have given to the contract, but what was its essential character." *Ott v. Sweatman*, 166 Pa. St. 217, 221, 31 Atl. 102. And doubtless it is true that in Pennsylvania the name the parties give to the transaction is not material, but in many cases where so-called rent by the terms of the agreement operated as a payment of the price, the transaction has been, nevertheless, regarded as one of bailment or lease rather than as a conditional sale. The earlier cases are cited in *Brown v. Billington*, 163 Pa. St. 76, 99 Atl. 904, 43 Am. St. Rep. 780, and *Ott v. Sweatman*, 166 Pa. St. 217, 31 Atl. 102. See also *Stiles v. Seaton*, 200 Pa. St. 114, 49 Atl. 774; *Re Tice*, 139 Fed. Rep. 52; *Re Angeny*, 151 Fed. Rep. 959; *Re Morris*, 156 Fed. Rep. 597. In Cincinnati

Equipment Co. v. Strang, 215 Pa. St. 475, 64 Atl. 678, the transaction was held a lease though the goods at the end of the lease were to become the buyer's on paying \$10. In view of the fact that the so-called rental was several thousand dollars, it is obvious the final payment was merely a device, and in the face of such a decision it is hard to give much credit to the statement quoted at the beginning of this note that the Pennsylvania court regards "the essential character" of the transaction.

⁶⁸ *Helby v. Matthews*, [1894] 2 Q. B. 262, [1895] A. C. 471; *Payne v. Wilson*, [1895] 1 Q. B. 653, 2 Q. B. 537; *Southern Music House v. Dusenbury*, 27 S. C. 464, 4 S. E. 60; *Ludden & Bates Southern Music House v. Hornsby*, 45 S. C. 111, 22 S. E. 781. See also *McCall v. Powell*, 64 Ala. 254. In *Helby v. Matthews*, a piano was leased at a monthly rental, and it was provided that if this rental was paid for in thirty-six months the piano should thereupon become the property of the lessee, but by the terms of the lease the lessee had the right to return the piano without incurring any other liability than for arrears of

of the price, the transaction is not a conditional sale if the price largely exceeds the rent the lessee is bound to pay.⁶⁹

§ 337. **Distinction between conditional sales and chattel mortgage.**

— Although it has been urged that a conditional sale is, essentially, a chattel mortgage, it does not follow that the name mortgage includes within its meaning a conditional sale. Though the two transactions are in essence the same, they are different in form, and by virtue of this difference have been given different names. Accordingly, statutes providing for the recording of chattel mortgages are not generally held to cover conditional sales.⁷⁰ So other statutory provisions in regard to chattel mort-

rent. The lessee disposed of the leased piano to a *bona fide* purchaser for value. The latter claimed a right to retain the piano under section 8 of the Factors' Act of 1889, which provides that "where a person having bought, or agreed to buy goods, obtains, with the consent of the seller, possession of the goods * * * the delivery or transfer to that person * * * of the goods * * * under any sale, pledge, or other disposition thereof * * * to any person receiving the same in good faith and without notice of any lien or any right of the original seller * * * shall have the same effect as if the person making delivery or transfer were a mercantile agent in possession of the goods * * * with the consent of the owner." The court, however, held that the lessee had not agreed to buy. Although the question raised in the English decisions is strictly whether a certain statute is applicable, it is believed the question involved is, in substance, whether the transaction is a conditional sale. It should be noticed that under many of the American statutes referred to in section 327, leases are expressly included, so that such a bargain as that in *Helby v. Matthews*, though not properly designated a conditional

sale, would come within the terms of the enactment.

⁶⁹ *Lambert Engine Co. v. Carmody*, 79 Conn. 419, 65 Atl. 141.

⁷⁰ *Rogers Locomotive Works v. Lewis*, 4 Dill. 158; *The Marina*, 19 Fed. Rep. 760; *Campbell Print. Press Co. v. Walker*, 22 Fla. 412, 1 So. 59; *Gilbert v. National Cash Register Co.*, 176 Ill. 288, 52 N. E. 22; *Campbell v. Atherton*, 92 Me. 66, 42 Atl. 232; *Bennett Bros. Co. v. Tam*, 24 Mont. 457, 62 Pac. 780; *Maxwell v. Tufts*, 8 N. Mex. 396, 45 Pac. 979, 33 L. R. A. 854; *McComb v. Donald's Admr.*, 82 Va. 903, 5 S. E. 558; *W. W. Kimball Co. v. Mellon*, 80 Wis. 133, 48 N. W. 1100. In a few States, however, it has been held that conditional sales were within statutes requiring the record of chattel mortgages. *Hart v. Barney, etc., Mfg. Co. (Ky.)*, 7 Fed. Rep. 543; *McKnight v. Gordon*, 13 Rich. Eq. 222, 94 Am. Dec. 164; *Talmadge v. Oliver*, 14 S. C. 522; *Herring v. Cannon*, 21 S. C. 212, 53 Am. Rep. 661. See also *Hervey v. Rhode Island Locomotive Works (Ill.)*, 93 U. S. 664, 23 L. ed. 1003; *Hudnall v. Paine*, 39 Fla. 67, 21 So. 791; *Welch v. National Cash Register Co.*, 103 Ky. 30, 44 S. W. 124; *White Sewing Machine Co. v. Conner*, 111 Ky. 827, 64 S. W. 841.

gages would not be held to include within their scope conditional sales.⁷¹ Reference should be made to one matter which sometimes causes confusion. The term "conditional sale" is frequently used in mortgage law, especially in regard to land, in a sense entirely different from that in which the term "conditional sale" is ordinarily used in the law of sales of personal property. Where a sale is made and an option given by the bargain to the seller to repurchase the property on certain terms, it is called a conditional sale and it is obvious that it is very similar to a mortgage, since a mortgage by its terms conveys property to the mortgagee, subject to a condition that the property shall revert to the mortgagor on the happening of a specified condition. But though it is frequently hard to determine whether a transaction is a conditional sale of the character just given, or a mortgage, the two transactions essentially differ. It is fundamental that a mortgage shall secure a debt; there must be an absolute obligation to pay. If, then, the grantor of the property is to receive it back on the condition of paying a debt which he is in any event bound to pay, the transaction, however worded, is a mortgage. But if the grantor has an option, whether he will or will not pay the money and so perform the condition, the transaction is called a conditional sale.⁷² The only reason why such a conditional sale

⁷¹ In *Nichols v. Ashton*, 155 Mass. 205, 29 N. E. 519, the defendant asked a ruling from the court that the plaintiffs, the sellers, were mortgagees, and, therefore, could not defeat an attachment of the goods made by the defendant as creditor of the conditional buyer except by demanding payment in writing as provided by the Massachusetts statutes in regard to mortgages. The court, by Holmes, J., sustained a refusal to give this rule, and in doing so expressed the opposition of the Massachusetts court to the general doctrine that a conditional sale is essentially a mortgage. "It is impossible by construction of such a contract to turn the transaction between the parties into a sale passing the title to plaintiff and a mort-

gage or pledge back by him. Such a result can be reached only by overturning the instrument, which declares that title does not pass, and there is no warrant for overturning it. *Blanchard v. Cooke*, 144 Mass. 207, 221, 11 N. E. 83. If the plain effect of the English language needs confirmation by authority, it may be mentioned that contracts like the present are recognized as being what they purport to be by the statutes. St. 1884, c. 313; Pub. St., c. 192, § 13." It will be remembered that Massachusetts is one of the minority jurisdictions which hold that the risk of loss in case of a conditional sale is upon the seller. See *supra*, § 304.

⁷² See *Jones, Mortgages*, § 258, 6 Am. & Eng. Encyc. of Law, 444.

is referred to here is to make it clear that it has nothing to do with conditional sales such as are treated of in this chapter, which are essentially like mortgages, for the buyer is under an absolute obligation to pay the price. The condition, moreover, relates to the original acquisition of title, not to the revesting of title in one who has parted with it. Possession of the property is transferred to a buyer who corresponds to the mortgagor, since he is an absolute debtor and has the beneficial interest of the property, whereas in the other type of case possession with the title is ordinarily transferred to a buyer who corresponds more nearly to a mortgagee, since he is to retain the property until a repurchase is made.

§ 338. **Distinction between conditional sales and consignments.**—

Reference has already been made to goods consigned to a factor with power of sale, and the question has been considered how far, either at common law or by virtue of statutes, such a consignee or factor has power to give a title other than in accordance with the terms of his agency.⁷³ But consignments may be made the cover for bargains really intended to operate as sales, and the rights of subpurchasers and creditors, where the bargain is of that nature, demand attention. In order that a just understanding of the matter may be had, it is necessary to determine the essential features distinguishing a bailment from a sale, and this is the more important because a distinction has been laid down in works of authority on the subject of bailment which, if not wrong, is at least misleading. Sir William Jones, in his work on Bailments,⁷⁴ says: "It may also be proper to mention the distinction between an obligation to restore the specific things, and a power or necessity of returning others equal in value. In the first case it is a regular bailment; in the second it becomes a debt." This statement, in the same or slightly altered form, has been often quoted as expressing the correct doctrine.⁷⁵ A little consideration will show that the statement cannot be literally accepted. If A. transfers the possession of A.'s horse to B. as A.'s agent, instructing B. to take the horse to town and receive in exchange therefor a horse

⁷³ See *supra*, § 317 *et seq.*

⁷⁴ 2d ed., p. 102.

⁷⁵ Brown, Bailments, 3; Benjamin, Sales; 2 Kent's Comm. 589; South Australian Ins. Co. v. Randell, L. R.

3 P. C. 101; Chickering v. Bastress, 130 Ill. 206, 22 N. E. 542, 17 Am. St. Rep. 309. See the criticism in Norwegian Plow Co. v. Clark, 102 Iowa, 31, 36, 70 N. W. 808.

from C., which is to be brought back to A., it is clear that B. is simply an agent or bailee. It may be urged that while B. has A.'s horse in his possession, A. may at any time revoke B.'s authority and reclaim the horse originally delivered to B. and that, therefore, B. is within the definition of Sir William Jones, since he is under an obligation to restore the specific thing given him. This is true, but the fact that the bargain does not contemplate the return of the specified thing delivered to the agent is likely to lead and has led courts to conceive that under Sir William Jones' definition the transaction is not a bailment. Moreover, it may be a part of the bargain between A. and B. that B. shall derive a profit for making the exchange suggested and B. may have made some advance upon the property, and in that case B.'s agency, if revocable at all, cannot be revoked without repaying him any advance he may have made and profits he would have earned. Yet it is clear that B. would be still a bailee of A.'s goods, not a purchaser of them. Where goods are consigned for sale, it is always the hope, and generally the expectation, that the goods consigned will be sold by the consignee and money instead of the goods be returned to the owner. Nevertheless it is clear that the consignee is properly to be described as a bailee if his holding is for the consignor and the sale is made by him as agent for the consignor. This indeed is the typical case of a factor, and the right of third persons to treat the factor as if he were the owner of the goods either by virtue of common law or because of special statutes has already been considered.⁷⁶ In such a case money received by the consignee or factor for the goods is received under an agency or trust in favor of the consignor,⁷⁷ and the duties of the consignee in regard to keeping his principal's funds separate from his own are governed by the general rules of the law of agencies and trusts which forbid an agent or trustee to mingle his own money with that of his principal or beneficiary, and forbid him to substitute the relation of debtor and creditor for that of principal and agent or of trustee and *cestui que* of trust. Where this course of business is followed the consignor's rights should be upheld, except in so far as Factors' Acts enact otherwise, against those acquiring title from

⁷⁶ *Supra*, § 317 *et seq.*

⁷⁷ *Richardson Mfg. Co. v. Brooks*,
95 Me. 146, 49 Atl. 672.

the factor contrary to the express or implied terms of his authority.⁷⁸ As against the creditors of the consignee the consignor's right should also be protected, for the transaction is certainly no more misleading than a conditional sale, and the right of the consignee in the goods is far less than that of the buyer in a conditional sale.⁷⁹ The question has not infrequently arisen in regard to the rights of the consignee's trustee in bankruptcy to the goods thus consigned, and the consignor has been generally and rightly protected.⁸⁰ Nor does the consignee lose his rights because it was a term of the contract that the consignee should guarantee the payment of the price of any goods sold by him. This is the case of a *del credere* agent.⁸¹ A more difficult case, and one which

⁷⁸ See § 317, and cases cited.

⁷⁹ *Fleet v. Hertz*, 201 Ill. 594, 66 N. E. 858, 94 Am. St. Rep. 192. In this case the consignor's right was upheld against a creditor of the consignee who levied upon the goods although the latter had failed to remit for the goods as soon as the price had been collected, and though the consignor had accepted certain notes of the consignee's customers given in payment of goods other than those furnished by the consignor, the contract expressly required the consignee to "hold the proceeds in trust making settlement within thirty, sixty, or ninety days, as soon as the money is collected." See also *Donnelly v. Mitchell*, 119 Iowa, 432.

⁸⁰ *Re Smith & Nixon Piano Co. (Mo.)*, 149 Fed. Rep. 111, 79 C. C. A. 53; *Re Taft (Ohio)*, 133 Fed. Rep. 511, 66 C. C. A. 385. This is otherwise by statute in Virginia. *Chesapeake Shoe Co. v. Seldner*, 122 Fed. Rep. 593, 58 C. C. A. 26. In this State it is enacted "that if any person transact business as a trader in his own name (excepting auctioneers and commission merchants), 'all the property, stock, and choses in action acquired or used in such business shall, as to the creditors of any such

person, be liable for the debts of such person,' the trustee in bankruptcy of a merchant doing business in his own name takes title to all the stock in his store, including goods held by him on consignment, to which he did not have title as between himself and the consignor."

⁸¹ *Re Taft (Ohio)*, 133 Fed. Rep. 511, 66 C. C. A. 385 (the court said: "The real defense made by the bankrupt's receiver was that the contract under which this carload of stock was shipped to and received by the bankrupt was not the ordinary arrangement between an owner and a commission sales agent. To make out this defense, it was shown that the custom of live stock commission men at Cleveland was to assume all the risks of the payment of the price by the buyer, and account to the owner, whether the price was collected or not. But such a custom would only convert the bankrupt into an agent upon a *del credere* commission. One who sells upon a *del credere* commission is supposed to receive an additional consideration for the risk incurred by guaranteeing the purchaser. He is at last nothing but a guarantor, and his relation as agent is not converted into that of a pur-

doubtless is very common in modern business, arises where the consignee is authorized to make himself a debtor when he sells the goods. That is, instead of requiring him to account for the specific proceeds which he receives, the consignor accepts the consignee's personal indebtedness for the price. Even here there seems no reason why the rights of the consignor should not be upheld. The method is adopted frequently rather on the ground of convenience than for any other reason. It is simpler for the consignee to mingle the funds he receives for the goods with his own and give credit on his books to the consignor. If the consignee is a responsible person the consignor has no objection to this method. There is nothing in the transaction inconsistent with the existence of a bailment or agency while the goods are unsold.⁸² It is possible, however, for the form of a consignment

chaser by the fact that his sales, under local custom, are *del credere* sales. The principal may sue the purchaser for the price, and in his own name. Story, Agency, §§ 33, 112; 2 Benjamin, Sales (Corbin's ed.), § 1099, and notes; Morris v. Cleasby, 4 M. & S. 566"); Audenreid v. Bettley, 8 Allen, 302, 81 Am. Dec. 755.

⁸² In *Ex parte White*, L. R. 6 Ch. 397, the court on construction of the agreement in question held that the bankrupt consignee, as between himself and the consignor of the goods, became the purchaser of them when they were sold, but that up to that time the agency continued. The court said that this method of conducting business was a usual one of great convenience to the parties and they distinguished it from an ordinary sale by an agent even with a *del credere* commission. The case involved only the right of the consignor to the price of goods sold by the consignee, not the right to goods remaining unsold. A somewhat similar case was *Nutter v. Wheeler*, 2 Low. 346 (in this case the

defendants had sent their goods to the bankrupt, and he had sold them at such prices and to such persons, and on such terms as he pleased, not, however, at less than the trade prices fixed by the defendant. Whenever he had sold any goods, and not before, he was to pay the defendants in thirty days the price shown in the list, less an agreed discount. The defendants had the right to sell any goods remaining unsold in the bankrupt's shop and he was permitted to sell any of the goods in the defendant's factory. Instead of paying in thirty days, the bankrupt would sometimes give his note for the balance due. At the time of the bankruptcy the price of some machinery sent by the defendants, on the order of the bankrupt, to a purchaser remained unpaid, and the question involved was whether the consignor or the trustee in bankruptcy was entitled to collect this money. It was held that it belonged to the assignee in bankruptcy, because the bankrupt was authorized to make himself a debtor and, further, because the particular goods in question had never

to be used in order to cover a bargain which is essentially a conditional sale, using that term in the narrow sense of an agreement in which one who agrees to buy is given possession and use of the property immediately, but not the title, until the price is paid. The difference between such a sale and a consignment, even if the consignee is allowed to make himself a debtor for the price, is that in the conditional sale, but not in a bailment, the person to whom the goods are delivered enters into an absolute obligation to buy them and pay the price, and, therefore, acquires an immediate property in them subject to the seller's security title. Difficult questions of fact have arisen in some cases to determine whether the particular transaction fell within one class or the other.⁸³

been consigned to him but were shipped directly to the purchaser from the factory. Judge Lowell seemed to consider the agreement between the parties valid so far as concerned the retention of title by the consignor until the goods were sold by the consignee, but there was no occasion to make a decision on that point); *Re Smith & Nixon Piano Co. (Mo.)*, 149 Fed. Rep. 111, 79 C. C. A. 53 (in this case pianos were shipped to a corporation dealing in musical instruments, which subsequently became a bankrupt, under a written contract stating that they were furnished on memorandum, and also stating the price of each kind, and providing that the bankrupt should "pay for every piano they sell, cash." When pianos were furnished under the contract, invoices were sent containing a recital that the shipper sold the pianos described to the bankrupt, and shortly before bankruptcy proceedings were instituted the shipper wrote the bankrupt, stating that, when the pianos were consigned, it was with the understanding that they should be settled for as sold and paid for in cash when sold, that the shipper

insisted on a settlement, and that, if it was not convenient to send cash, the shipper would accept paper secured by collateral, but "did not care for dead stock." It was held, that the transaction was a bailment, and not a sale; and that the title to the unsold pianos never passed to the bankrupt).

⁸³ In the following cases the transaction was held a sale in *Re Carpenter (N. Y.)*, 125 Fed. Rep. 831. A buggy dealer obtained goods to be resold, under an agreement directing them to be shipped "at prices herein specified, and for which we agree to give our note on receipt of invoice, payable as per terms stated * * * Terms 4 Mos. May 1st. Less 5% for cash in 30 days." The agreement provided that "all goods on hand and the proceeds of sale of all goods received under this contract, whether the goods are in cash, notes or book accounts, we, as agents of the seller, agree to hold the same in trust for the benefit of and subject to the order of" the seller "until we have paid in full, in cash, all our obligations of whatsoever nature now due or yet to become due to" the seller. Also, that "the sale and disposition of all goods

§ 339. **Conflict of laws.**—Questions involving the conflict of laws not infrequently arise where conditional sales are concerned,

received under this contract * * * shall be made and the proceeds held by us as agents of" the seller. It was held not to create an agency, and that the seller could not claim title to the goods as a principal, against the trustee of the bankrupt purchaser. In *Re Miller* (Pa.), 135 Fed. Rep. 868, goods were sold to a firm, which became bankrupt, under a contract that the latter might sell the goods at their discretion and be subject only to the obligation to pay the price on such sales as they made, or return the goods. An invoice was sent with the goods, charging for them at regular prices, and nothing was said about the price at which the bankrupt firm might sell them. It was held this amounted to merely a sale or return, and the seller was not entitled to reclaim such of the goods as remained unsold at the time of the bankruptcy. In *Re Wells* (Pa.), 140 Fed. Rep. 752, it appeared that the bankrupt for a number of years had dealt in silk thread which she purchased from claimants. Having fallen behind in her payments, it was arranged that thereafter the goods should be "consigned" to her, and that the goods on hand should be invoiced and credited on her general indebtedness and charged to her on "consigned account." She was to report monthly the goods on hand and the amount sold, paying for the latter at the regular wholesale prices at which the goods were billed to her. It was further agreed that the goods should remain the property of the claimants and subject to their order. No restriction was made on the manner of selling, or the prices to be charged by her, and she kept no separate ac-

count of receipts from goods sold. It was held, that as to her creditors the transaction was a sale, and that the goods on hand at the time of bankruptcy could not be reclaimed, whether they were on hand when the arrangement was made or received thereafter. In *Re Heckathorn* (Pa.), 144 Fed. Rep. 499, goods were billed by petitioners to a bankrupt at definite prices and on fixed terms of credit and discount; the bankrupt undertaking to settle or pay for them and to be responsible for the freight. He also agreed to give the petitioners his exclusive trade and to render accounts for goods sold every six months. He was also required to hold separate and in trust all "goods unsold and all currency, open accounts, notes, liens, mortgages, or other values received for goods sold," and that, where goods were sold on credit, notes should be taken on blanks furnished by petitioners and made payable to their order, the bankrupt indorsing and guarantying them. It was held, that the trust provision of the contract related merely to the manner of payment for the goods, and that the contract was one of sale, and not of bailment. It may be thought that the court in Pennsylvania, following the same reasoning which has led the court to hold conditional sales invalid against third persons, adopts a severer construction in regard to consignments than the courts of most States would. In *Bradley v. McAfee* (Mo.), 149 Fed. Rep. 254, a contract between claimant and the bankrupt's predecessor in business, which was continued by the bankrupt, provided for the sale of vehicles to be shipped by claimant to the bankrupt who as-

for the property may be moved from the State where the original bargain was made to another State where different rules of law

sumed the risk thereof from the time they were loaded on the cars at the point of shipment. The bankrupt agreed to pay the freight, insurance, and taxes, and house the vehicles when received, and to assume any loss by fire, flood, mobs, or any other cause, with or without his fault. The contract called the consignee the shipper's factor, but contained no provisions for accounting, and, instead of providing for the return of unsold goods, provided that the consignee agreed to purchase and pay for such goods at net cash prices, at the option of the consignor, or, if defendant so elected, the goods might remain in the consignee's possession, under the agreement, subject to future settlements. It was held that the agreement was a contract of conditional sale, and not a contract of agency, and was, therefore, void, as against the bankrupt's trustee and creditors, for failure to record the same, as required by Mo. Rev. St. (1899), § 3412. In *Norwegian Plow Co. v. Clark*, 102 Iowa, 31, 70 N. W. 808, it was held that a contract between a manufacturer of goods and another person, giving the latter the privilege of selling goods in a certain territory and requiring him to obtain settlement for all goods at the time of delivery, either in cash or notes to be made payable to the manufacturer, and requiring him to turn over all cash and notes received by him to such manufacturer, and not permitting him to use any of the proceeds of sale until the manufacturer is paid in full, and authorizing him to sell goods at a reasonable profit and subject to a specified warranty, and in addition, requiring him to guarantee the sales of all goods

shipped to him on his order by a time specified therein, and insure the fulfillment of the contract, and requiring him in order to fulfill the contract to advance, at the time of shipment, one-third of the agreed price thereof in cash, and to execute his notes for the balance, and providing for the giving a credit on his account at the end of the season for goods remaining on hand and accepted by the manufacturer, is a contract of sale, and not of bailment, and notes received by him as payee for goods sold by him are subject to levy for his debts, although the manufacturer has not been paid. In *Arbuckle v. Gates*, 95 Va. 802, 30 S. E. 496, the agreement in question declared that all goods consigned should, until sold in the regular course of business, remain the property of the consignors and be held by the consignees as factors; and that the factors should never purchase goods for their own account. The consignees were to sell and bill the goods in their own name, but only at such prices and on such terms as the consignors directed. The consignees assumed all risk as to the credit of persons to whom goods were sold, and bound themselves to make all collections at their own expense. And they guaranteed the sale of each consignment and the payment therefor within sixty days from date. They agreed to remit the full amount of each consignment less a small sum, called a commission, by the end of sixty days, whether the whole consignment was sold or not, and whether the proceeds of sale had been collected or not. They were further required to insure the consignors against any decline in the price of

prevail. The decisions are not easy to reconcile though the principles on which the courts act do not widely differ. In the first

any unsold goods, and were entitled to the benefit of any advance in price. No provision was made for the return of unsold goods; no account of sales was required to be rendered. On account of these provisions the court held that goods shipped under this agreement were, in reality, sold to the so-called consignee.

In the following cases the transaction was held a bailment. In *Natl. Bank of Augusta v. Goodyear*, 90 Ga. 711, 16 S. E. 962, the court held that a contract by the terms of which one person agrees to receive goods on consignment to be sold by him as the agent of another, monthly reports of sales and goods on hand to be made, the goods to remain on consignment as the property of the consignor until paid for in full by the consignee, and all proceeds of sale to belong to the consignor until he is paid the invoice price in cash, which is to be done for each article as soon as sale of it is made, and with no provision whatever for the acquisition of the property in the goods, by the consignee, is not a contract of sale but of bailment and agency for the sale of goods, notwithstanding the contract provides, that the compensation of such consignee shall be whatever he shall receive, upon sale of such goods, as surplus over the price named in the contract; that if any of such goods be removed from his place of business they shall be paid for immediately: and he shall keep the goods insured for the benefit of the consignor, and shall pay freight, safely store, keep in good condition, and hold them free from all charges and taxes, and assume all risk of loss or damage from any cause what-

soever; a further stipulation being that on failure of the consignee to sell in a reasonable time, or on his failure to comply with any condition of the contract, then the agency shall terminate at the option of the consignor, and goods remaining unsold are to be subject to his order free from all charges. The court further held that the fact that the invoices which accompanied the consigned goods said they were sold, some of the invoices adding "terms contract," others, "terms contract" and "terms spot cash," others, "terms when sold," and one "terms * * *," would not necessarily negative the theory that all the goods were merely consigned, and none of them sold to the consignee. Also that the nature of the contract was not varied or waived as to the goods remaining unsold, by the acceptance of notes instead of cash for some of those which had been sold. After a sale by an agent which entitles his principal to a cash payment, the principal may take the agent's notes in lieu of cash without converting the agent into a purchaser of the goods, if he was in fact an agent to sell at the time the sale was effected. In *Donnelly v. Mitchell*, 119 Iowa, 432, 93 N. W. 369, it was held that an agreement that one shall have the possession and use of personal property on condition that he pay one-half the purchase price, and compensation for the use of the other undivided one-half and a share in the profits of such one-half if the purchase price is not paid and in event same is not paid, then for use of the entire property, constitutes a contract of bailment and not a conditional sale, and in default of payment of the one-half of the purchase price the party thus

place the general rule is universally accepted that if a conditional sale is made in a given jurisdiction, at least if without intent to remove the property to another jurisdiction, the law of the place where the bargain was made covers all questions of the validity, nature, and construction of the bargain. In the application of this doctrine, however, there seems some difference of decision. Conditional sales are almost universally valid between the parties to them, so that little occasion arises for applying this principle of the conflict of laws when the litigation is confined to the original parties.⁸⁴ Differences arise when creditors of the buyer, or purchasers from him, become interested in the goods. It has been held that if in the jurisdiction where the sale was made it was good against purchasers or creditors of the buyer, the seller's title will prevail against such persons also though they acquire their rights in another State where purchasers and creditors of a conditional buyer are protected.⁸⁵ This doctrine has become particularly important as applied to recording acts when a conditional sale is made in a State where record is not required and the property is removed to a State where record is required. The

obtaining the possession acquires no interest therein subject to attachment and sale at the suit of a creditor. See also cases cited in previous notes in this section.

⁸⁴In *Gross v. Jordan*, 83 Me. 380, 22 Atl. 250, the litigation was between the buyer and an assignee of the seller's rights. As such an assignee could get no greater rights than his assignor, the case was legally the same as if between the original parties. The sale had been made in Massachusetts, and by the law of Massachusetts a right to redeem after default is allowed the buyer. No similar right exists in Maine, but the Maine court held that it would apply the Massachusetts law. Compare *Public Parks Amusement Co. v. Embree-McLean Carriage Co.*, 64 Ark. 29, 40 S. W. 582, where it was held that a statute of Missouri providing that one who sells a chattel with reservation of title in the

vendor until payment of the purchase money shall tender part of the purchase money received before bringing suit to recover the property, pertains to the remedy and is inapplicable in a suit brought in Arkansas to recover a chattel so sold in Missouri.

⁸⁵*Harper v. People*, 2 Colo. App. 177, 29 Pac. 1040; *Waters v. Cox*, 2 Bradwell, 129. In both Colorado and Illinois a conditional sale is not valid against subpurchasers and creditors of the buyer. Yet the courts of those States upheld a seller's right which had been acquired in another State. In *Harper v. People* it did not appear whether the removal of the goods to Colorado was with the seller's consent, but the court held whether he consented or not, the law of Kansas should be applied. In *Waters v. Cox* the removal was without the knowledge or consent of the buyer.

courts of the latter State have enforced the rights of the seller although the sale had not been recorded.⁸⁶ Conversely, when the law of the place where the sale was made required recording, a failure to record has been held fatal by the court of another State to which the property had been removed.⁸⁷ But, on the other hand, it has been held that if a buyer purchases goods from a conditional vendee, the buyer's rights must be determined by the law of the place where he contracted, and where the goods were at the time, not by the law of another State where the conditional vendee had originally obtained the goods.⁸⁸ This reasoning seems hard to gainsay. The question involved is not the validity of the original conditional sale; confessedly that is valid between the parties and the seller has the property. The essential question is, Are the circumstances of the case such as to estop the original seller from asserting his title? These circumstances of estoppel exist in the second State and the question whether they are sufficient to make a transaction in that State effectual should, it seems, be determined by its own law.⁸⁹ On this principle if the

⁸⁶ *Baldwin v. Hill*, 4 Kans. App. 168, 46 Pac. 329; *Cleveland Machine Works v. Lang*, 67 N. H. 348, 31 Atl. 20, 68 Am. St. Rep. 675; *Studebaker Brothers Co. v. Mau*, 13 Wyo. 358, 86 Pac. 151, 14 Wyo. 68, 82 Pac. 2, 110 Am. St. Rep. 1001.

⁸⁷ *Davis v. Osgood*, 69 N. H. 427, 44 Atl. 432. But see *Weinstein v. Freyer*, 93 Ala. 257, 9 So. 285, 12 L. R. A. 700.

⁸⁸ *Marvin Safe Co. v. Norton*, 48 N. J. L. 410, 7 Atl. 418, 57 Am. Rep. 566. In this case the goods were bought in Pennsylvania (where conditional sales are invalid against third persons) for use in New Jersey (where their validity is upheld) as the seller knew, but the reasoning of the court is not confined to a case where the seller knew of and assented to the removal of the goods from the State. See also *Weinstein v. Freyer*, 93 Ala. 257, 9 So. 285, 12 L. R. A. 700. In this case an unrecorded sale in Georgia was followed

by a removal (apparently unauthorized) of the property to Alabama. The original seller was held entitled to assert his title against an Alabama subpurchaser, though in Georgia he could not have done so. To the same effect is *Public Parks Amusement Co. v. Embree-McLean Carriage Co.*, 64 Ark. 29, 40 S. W. 582; *The Marina*, 19 Fed. 760.

⁸⁹ See *Cammell v. Sewell*, 5 H. & N. 728, where property of English owners was wrongfully sold by a shipmaster in Norway under circumstances which would give a good title to the buyer by Norwegian law but not by English law. The validity of the Norwegian buyer's title was upheld. Compare *Edgerly v. Bush*, 81 N. Y. 199, where property taken from New York tortiously was sold in Canada in market overt. The New York court refused to apply the Canadian law of market overt, but seemed to suppose that a Canadian court would have done so.

validity of a conditional sale against subpurchasers or creditors of the buyer requires record, an unrecorded sale will be ineffectual against such persons though the sale was made in another State in which record was not essential.⁹⁰ In regard to the necessity of record under such circumstances, however, careful examination of the recording statute in question is necessary. It is of course possible for a statute to require record only of all conditional sales made within the State as a condition of their validity⁹¹ or for a statute to provide that all property within the State to which a conditional seller claims title must be recorded in order that the title may be effectual against third persons. In Alabama the statute expressly provides that conditional sales of property brought from another State must be recorded within three months after the property is brought into Alabama.⁹² Another principle has been adopted by the Federal courts in cases where goods are bought on conditional sale for immediate removal to another State, and the seller either ships the goods himself or is aware of the buyer's purpose. It has been held that the courts of the State to which the property is removed will apply its own rules, though the conditional sale was entered into in another State,⁹³ but there is no general assent to this proposition, for other courts apply the rule prevailing in the jurisdictions where the conditional sale was made, although the goods were to be removed immediately to another jurisdiction.⁹⁴

⁹⁰ *Hart v. Barney, etc., Mfg. Co.*, 7 Fed. 543; *Cunningham v. Cureton*, 96 Ga. 489, 23 S. E. 420. But see *Ensley Lumber Co. v. Lewis*, 121 Ala. 94, 25 So. 729.

⁹¹ See *Hirsch v. Leatherbee Lumber Co.*, 69 N. J. L. 509, 55 Atl. 645.

⁹² See *Brandon Printing Co. v. Bostick*, 126 Ala. 247, 28 So. 705.

⁹³ *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. ed. 1003; *Re Legg*, 98 Fed. 326; *Hart v. Barney, etc., Mfg. Co.*, 7 Fed. Rep. 543. See also *Studebaker Brothers Co. v. Mau*, 13 Wyo. 358, 80 Pac. 151, 14 Wyo. 68, 82 Pac. 2, 110 Am. St. Rep. 1001. Care must be taken to distinguish cases where though the

bargain was made in the State from which the goods were removed, the delivery, and, therefore, the conditional sale was not made until the goods reached their destination in the second State. In such cases the law of the latter would everywhere be held to govern. *Knowles Loom Works v. Vacher*, 57 N. J. L. 490, 31 Atl. 306, 33 L. R. A. 305. Doubtless the same principle would be applied if the goods at the time of the conditional sale were not in the State where the sale was made, but in another.

⁹⁴ *Cleveland Machine Works v. Lang*, 67 N. H. 348, 31 Atl. 20, 68 Am. St. Rep. 675; *Barrett v. Kelley*,

§ 340. **Substitution of a different agreement for a conditional sale.**

— It is of course possible for the parties after a conditional sale has been entered into to alter their original agreement in any way they see fit. The surrender of old rights will be sufficient consideration for the assumption of new. A lease may be changed to a conditional sale or a conditional sale to a lease. A conditional sale may be made absolute or the parties may alter in any way the terms of their original agreement. Thus a conditional sale which applied to specified property may be made to apply to other property by substitution,⁹⁵ and the agreement may be made in advance that the buyer may substitute other property for that originally bargained for.⁹⁶ If the buyer without authority from the seller exchanges the property which was the subject of the sale, for other property, the person who buys the property which was the subject of the conditional sale acquires no title even though a *bona fide* purchaser for value without notice.⁹⁷ And no title to the property received in substitution by the conditional buyer will vest in the conditional seller.⁹⁸ If the conditional buyer wrongfully sold the property which was the subject of the conditional sale, the conditional seller could doubtless recover the money received by the conditional buyer in lieu of bringing an action of trover for conversion on the familiar principle of waiving the tort,⁹⁹ and in some jurisdictions this principle is extended

66 Vt. 515, 29 Atl. 809, 44 Am. St. Rep. 862; *Mershon v. Moors*, 76 Wis. 502; s. c., *sub nom.* *Mershon v. Wheeler*, 45 N. W. 95. See also *G. A. Gray Co. v. Taylor Bros. Co.*, 66 Fed. 686, 23 U. S. App. 671, 14 C. C. A. 56.

⁹⁵ *Cole v. Propst*, 119 Ala. 99, 24 So. 884; *Webber v. Osgood*, 68 N. H. 234, 38 Atl. 730; *Kelsey v. Kendall*, 48 Vt. 24.

⁹⁶ *People v. Gluck*, 188 N. Y. 167; *Perry v. Young*, 105 N. C. 463, 11 S. E. 511.

⁹⁷ See *supra*, § 324, and for the few exceptional jurisdictions where a contrary result is reached, § 325. It is assumed that if the local law re-

quires record of the conditional sale in order that it shall be valid, such record has been made.

⁹⁸ *Dedman v. Earle*, 52 Ark. 164, 12 S. W. 330; *Nattin v. Riley*, 54 Ark. 30, 14 S. W. 1100. See also *Smith v. Gufford*, 36 Fla. 481, 18 So. 717. In this case it was held that the conditional seller could not recover from the conditional buyer a horse which had been purchased by the latter with money received as damages from a third person who had tortiously killed the horse which was the subject of the original bargain.

⁹⁹ See *Keener. Quasi-Contracts*, 170; 15 Am. & Eng. Encyc. 1113. The seller's right should be limited by the

so as to allow a plaintiff, whose goods have been converted, to sue for their value as for goods sold, even though the converter did not receive money for the goods.^{99a} But even this principle falls short of permitting the conditional seller to treat as his own property received by the buyer in exchange for that which was the original subject-matter of the sale.

§ 341. **Cash sales—Meaning of the term.**—The term “cash sale” is used to define a kind of sale where the payment of the price is a condition of the transfer of title to the buyer. Such sales are, therefore, doubtless conditional sales (or contracts to sell), using that term broadly, but they must be distinguished from the transaction ordinarily called by the latter name. Where a seller refuses to sell except for cash, it may mean that he refuses to part with the possession of the goods until the price is paid, but does not decline to transfer title; or, it may mean that he declines to transfer title. Although a transaction of either sort might as an original question be appropriately termed a cash sale, in fact, that name has generally been used for transactions of the latter sort only, and to avoid confusion its use should be so confined. Such a transaction is distinguished from the conditional sale, using that phrase in its customary meaning, in the circumstance that in a cash sale no transfer of possession is contemplated until the price is paid; whereas, in a conditional sale the buyer is expected to have possession as soon as the bargain is made. The cash sale contemplates no credit; the conditional sale contemplates credit as far as the possession and use of the goods by the buyer is concerned, though no credit in regard to the transfer of title. Cash sales are, therefore, not regarded as within the scope of the statutes requiring record of conditional sales, since the separation of title and possession which is characteristic of conditional sales is not contemplated in cash sales.¹

value of his interest in the property, whether the suit is for the conversion or the money received. See *supra*, § 333.

^{99a} See 15 Am. & Eng. Encyc. 1114; Wald's Pollock, Contracts (3d ed.), 707, note.

¹ Johnson-Brinkman Co. v. Central Bank, 116 Mo. 558, 571, 38 Am. St.

Rep. 615; Hart v. Boston & Maine R. R., 72 N. H. 410; Hudson Institution v. Carr-Curran Co., 58 N. J. Eq. 59, 43 Atl. 418; Hirsch v. Leatherbee Lumber Co., 69 N. J. L. 509, 55 Atl. 645. See also Budlong v. Cottrell, 64 Iowa, 234, 20 N. W. 166.

It is in accordance with natural justice that unless the seller so agrees, he should not be obliged to part with the possession of his goods until the price for them is paid; and this has been the general rule of law certainly from a very remote period. The result may be accomplished, however, either by regarding every sale, unless an inconsistent intention appears, as a cash sale, using that term narrowly, as defined above, or as an immediate sale with a lien reserved by the seller. From an early period there seems to have been a difference of opinion as to which of these rules should be adopted, though the prevalent idea in early times seems to have been in favor of a cash sale, and in modern times of an absolute sale with a lien. The authorities may now be examined in detail.

§ 342. **Cash sales — Early law.**— There are several passages in the early books stating the doctrine that unless a term of credit is expressly given, or the price or earnest paid, property in goods in the seller's possession will not pass.² Chief Justice Brian, however, more than once clearly stated the doctrine that in such a case the property passed immediately when the bargain was made, and that the seller retained a lien.³ Subsequent authorities reflect the

² This is clearly expressed in Dyer, *30. a. (28 Henry VIII), "And this diversity was taken, when the day of payment is limited, and when not: in the first case the contract is good immediately, and an action lies upon it without payment; but in the other not so: as if a man buy of a draper twenty yards of cloth, the bargain is void, if he do not pay the money at the price agreed upon immediately; but if the day of payment be appointed by agreement of the parties, in that case, one shall have his action of debt, the other an action of detinue."

³ BRIAN. "If I sell you my horse for £10, it is lawful for me to retain the horse until I am paid, and yet I have no action of debt on the contract until the horse is delivered; and it is clear that by the bargain

the property was in him who bought the horse, but if the buyer offers him the money, and he refuses, then he may seize the horse, or have action of trespass at his pleasure, etc." Y. B. 18 Ed. IV, 21, 1. (1478-9). BRIAN. "And further, I say that the property is in the defendant by the bargain in the case at bar, and in your cases of the horse and the cloth; nevertheless, he may not take them without the leave of the other. And he shall have a writ of detinue, but the defendant shall be excused by saying he was ready to give it up if the other had paid; and if he bring an action of debt he shall have the same plea. The case is much as where the property remains all the time in me, and nevertheless during a certain time I cannot take it; as where I deliver certain sheep to a

same uncertainty or difference of opinion. In Noy's Maxims,⁴ some statements clearly express the view that unless time is expressly given, or some payment made, the property will not pass.⁵ But a paragraph immediately following seems to express Brian's view that the property passes and the seller has a lien.⁶ It seems

man to soil his fields for a certain time; there the property is in me, and still during the time I cannot take them back." Y. B. 17 Ed. IV, 1, 2. (1477). Perhaps a word should be added in regard to Brian's intimation that the buyer might plead nondelivery of the horse if sued for the price. The debt for the price was looked upon, at the time when Brian wrote, as a property right in the creditor rather than a contract right, and Brian's idea evidently was that buyer and seller had reciprocal liens on property in their possession belonging to the other party. There are other passages in the Year Books in which it is stated that by the making of the bargain the property is in the plaintiff. Y. B. 20, Henry VI, 35, 4; Y. B. 21 Henry VI, 55, 12; Y. B. 37 Henry VI, 818; Y. B. 49 Henry VI, 1823. But it cannot be clearly made out from these passages whether the court intended to state a rule for every bargain, or only for a bargain accompanied by the giving of earnest, or an express term of credit.

⁴Chapter 42.

⁵"In all agreements there must be *quid pro quo* presently, except a day be expressly given for the payment, or else it is nothing but communication. If a man do agree for a price of wares he may not carry them away before he hath paid for them. But the merchant shall retain the wares until he be paid for them, and, if the other take them, the merchant may have an action of trespass or an action of debt for the

money at his choice. If the bargain be that you shall give me £10 for my horse and you do give me a penny in earnest which I accept, this is a perfect bargain. You shall have the horse by an action of the case, and I shall have the money by an action of debt. If I say the price of a cow is £4, and you say you will give me £4 and do not pay me presently, you may not have her afterward, except I will, for it is no contract. But if you go presently to telling of your money, if I sell her to another you shall have your action of the case against me. * * *."

⁶"If I sell my horse for money, I may keep him until I am paid, but I cannot have an action of debt until he be delivered, yet the property of the horse is by the bargain in the bargainee or buyer; but if he does presently tender me my money, and I do refuse it, he may take the horse or have an action of detainment. And if the horse die in my stable between the bargain and the delivery, I may have an action of debt for my money, because by the bargain the property was in the buyer." It may indeed be suggested that bargain in this paragraph means such a bargain as is valid; namely, one where earnest is given or an express term of credit. It seems more probable, however, that Noy, like many modern text-writers, reflected a difference of opinion in the authorities on which his statements were based and made inconsistent statements without noting their inconsistency.

probable that the doctrine expressed by the prior statements from Noy represented more nearly the general understanding of lawyers than the subsequent, for there was certainly no general recognition of a seller's lien in the seventeenth century.⁷ The inconsistent views stated by Noy are partially but not fully harmonised by Blackstone, who bases his treatment on that of Noy. In the first part of his discussion, Blackstone apparently regards a cash payment or delivery as essential for the transfer of title, unless the contrary is expressly agreed.⁸ But this statement is followed by other statements indicating that title will pass as soon as a bargain is made, but subject to a lien.⁹ The great

⁷In *Nichols v. Raynbred*, Hob. 88, "Nichols brought an Assumpsit against Raynbred, declaring that in Consideration that Nichols promised to deliver the Defendant to his own Use a Cow, the defendant promised to deliver him 50 Shillings: Adjudged for the Plaintiff in both Courts, that the Plaintiff need not to aver the Delivery of the Cow, because it is Promise for Promise. Note here the Promises must be at one Instant, for else they will be both *nuda pacta*." *Langfort v. Tiler*, [1704] 1 Salk. 113, seems the earliest case on which the modern law of the seller's lien rests, although Brian, as shown in the extracts in a preceding note in this section, expressed the idea of such a lien clearly more than 200 years earlier. The doctrine of the independence of the promises in a bilateral agreement, which became well settled after Brian's time, and was not questioned till Lord Mansfield's time, near the end of the seventeenth century, made it impossible to follow Brian's theory.

⁸"If a man agrees with another for goods at a certain price, he may not carry them away before he hath paid for them; for it is no sale without payment, unless the contrary be expressly agreed. And,

therefore, if the vendor says, the price of a beast is £4, and the vendee says he will give £4, the bargain is struck; and they neither of them are at liberty to be off, provided immediate possession be tendered by the other side. But if neither the money be paid, nor the goods delivered, nor tender made, nor any subsequent agreement be entered into, it is no contract, and the owner may dispose of the goods as he pleases." 2 Comm. 247.

⁹"As soon as the bargain is struck, the property of the goods is transferred to the vendee, and that of the price to the vendor; but the vendee cannot take the goods, until he tenders the price agreed on. (*Noy, ibid.*) But if he tenders the money to the vendor, and he refuses it, the vendee may seize the goods, or have an action against the vendor for detaining them. And by a regular sale, without delivery, the property is so absolutely vested in the vendee, that if A. sells a horse to B. for £10, and B. pays him earnest, or signs a note in writing of the bargain; and afterward, before the delivery of the horse or money paid, the horse dies in the vendor's custody; still he is entitled to the money, because by the contract, the property was in

vogue of Blackstone necessarily led to the repetition of the doctrine he expressed by later authorities, which even repeat the statement that if parties agree on the terms of a bargain without payment, there is no contract — a statement of law formulated in the Year Books at a time when no executory contracts were recognized by the law and when by the use of the word “contract” sale was meant, and repeated by one writer after another though the statement cannot have been accurate for about two centuries before Blackstone wrote.¹⁰

§ 343. **Cash sales — Modern law.**— The general rule of the modern law of sales is almost precisely the opposite of the old rule. The modern rule is merely one of presumption and is expressed in the Sale of Goods Act in these words: “Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the

the vendee (Noy, c. 42). Thus may property in goods be transferred by sale, where the vendor hath such property in himself.” 2 Comm. 448. See also Shepherd’s Touchstone, 224.

¹⁰ Thus in 2 Kent’s Comm., p. 496, the learned author says: “Where no time is agreed on for payment, it is understood to be a cash sale, and the payment and delivery are immediate and concurrent acts, and the vendor may refuse to deliver without payment, *and if the payment be not immediately made, the contract becomes void.*” So in *Copland v. Bosquet*, 4 Wash. C. C. 588, the court says: “If credit be not given, the bargain is considered nothing more than a communication.” So in *Southwestern Freight Co. v. Stanard*, 44 Mo. 71, 83, 100 Am. Dec. 255; *Ferguson v. Clifford*, 37 N. H. 86, 103, this obsolete law is repeated, though it may be doubted if it would have been applied. So in England in *Hanson v. Meyer*, [1805] 6 East, 614, Lord Ellenborough said that it was a condition precedent to the absolute vesting of title in the buyer “according to the

generally received rule of law in contracts of sale” that the buyer should make “payment of the agreed price or consideration of the sale.” And in *Tarling v. Baxter*, [1827] 6 B. & C. 360, Holroyd, J., suggested the counsel, in the course of argument, the older authorities, saying: “In Comyn’s Dig., tit. Agreement (B. 3), it is laid down, ‘that if a sale be of goods for such a price, and a day of payment limited, the contract will be good, and the property altered by the sale, though the money be not paid;’ and R. 10 H. 7, 8a, 14 H. 8, 20a, and Dyer, 30a are cited. And again, ‘If A. sell a horse to B. upon condition that he pay £20 at Christmas, and afterward sell it to D., the sale to D. is void, though B. afterward do not pay;’ and Plowden’s Com. 432b, is cited, and the reason there given is, that A. at the time of the second contract had no interest in, nor property, nor possession of the horse, nor anything but a condition; and, therefore, the second contract was merely void.”

time of delivery, or both, be postponed.”¹¹ The authorities sustaining this rule have been previously considered.¹² It will be seen that where under the old law title could not pass without payment or credit or delivery, it now is presumed to pass, irrespective of any agreement for credit. The seller’s lien protects the seller from giving up his goods before he receives the price, while formerly the retention of title served the same purpose. It is still the presumption, where nothing is said about time of payment, that no credit is intended, but the conclusion is drawn that until payment the seller has a lien only, instead of title.¹³ It

¹¹ Sales Act, § 19, rule 1.

¹² Section 264.

¹³ The modern law was thus expressed by Bayley, J., in *Bloxam v. Sanders*, 4 B. & C. 941, 948: “Where goods are sold, and nothing is said as to the time of delivery or the time of payment * * * the seller is liable to deliver them whenever they are demanded upon payment of the price, but the buyer has no right to have possession of the goods till he pays the price * * *. If goods are sold on credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property at once vests in him. But the right of possession is not absolute; it is liable to be defeated if he becomes insolvent before he obtains possession.” So in *Haskins v. Warren*, 115 Mass. 514, 533, “The promise to deliver, involved in an agreement of sale, and the promise to pay the purchase money, are mutually dependent. Neither party is bound to perform without cotemporaneous performance by the other. Payment of the price is the condition upon which alone the purchaser can require the seller to complete the sale by delivery of the property.” So in *Merrill Furniture Co. v. Hill*, 87 Me. 17, 22, 32

Atl. 712, the court expressed the same doctrine, although in the subsequent course of the opinion the court did not fully keep in mind the distinction between concurrency of delivery and payment, and concurrency of transfer of title and payment. “At the time the goods were ordered, nothing was said about the time of payment and no agreement was made by the plaintiffs to give credit; under these circumstances the law presumes that the parties intended to make the payment of the price and the delivery of the possession concurrent conditions.” The same doctrine is expressed by the Supreme Court of Alabama. “It is a very general rule of the common law, that by the mere contract of sale, the property in the thing sold passes to the vendee, though he is not invested with a right to the possession, if no credit is agreed upon, until he pays or tenders the purchase money.” *Lehman v. Warren*, 53 Ala. 535, 540 (though by statute in Alabama a sale of cotton made by a commission merchant will not pass title until payment of the purchase money. *Ibid.*). See also *Catlin v. Jones*, 48 Or. 158, 85 Pac. 515, Or. , 97 Pac. 546; *Glass v. Blazer*, 91 Mo. App. 564; and cases cited, *supra*, § 264, and *infra*, §§ 447, 507.

must be admitted that the older doctrine still finds expression. It is still said by some courts that the presumption, where parties make an agreement, but nothing is agreed as to time of payment or the time of transfer of the property, is that a cash sale is intended.¹⁴ Doubtless it is legally possible for the parties to make either a cash sale, where the property does not pass until payment is made, or an immediate transfer of the property, subject to a lien for the price; and the important question which has been little discussed either by courts or text-writers is, How is a cash sale to be distinguished from a sale where the property passes, but possession is not to be given until payment of the price? There is, doubtless, much confusion as to this, arising in large measure from the failure of courts to observe the inconsistency of the early doctrine with the modern law. It is submitted, however, that the true test is this: If the parties when they make their bargain contemplate an exchange of the goods for the price immediately on making the bargain, the sale is to be regarded as a cash sale. There is no occasion to invoke the doctrine of a sale subject to a lien. On the other hand, if the parties do not contemplate an immediate exchange of the money for the goods, even though they do contemplate that possession of the goods shall not be delivered until the price is paid, it is presumptively an absolute sale as soon as the parties are agreed on the terms of the bargain and the goods are in a deliverable state in accordance with the rules pre-

¹⁴ "No time being stipulated by the contract for payment of the purchase price, its payment was a condition precedent implied by law, and the property would not vest in the vendee until he performed the condition, or the seller waived it." *Michigan Central R. R. Co. v. Phillips*, 60 Ill. 190. The proof tends to show that the sale was for cash, and not on credit; so the trustee testifies, and this is just what would have been intended had no time of payment been stipulated. 2 Kent Comm. *496, *497; Story, Contracts, § 796; Noy's Maxims, 87; *Ins. Co. v. De Wolf*, 2 Cow. 105; *Paul v. Reed*, 52 N. H.

136. "If the contract was for the sale of the stone, and there was no agreement that time should be given the plaintiff, in which to make payment, it was a cash sale, and no title would vest in the plaintiff until she paid or tendered the money." *Turner v. Moore*, 58 Vt. 455, 456, 3 Atl. 467. See also *Adair v. Stovall*, 148 Ala. 465, 42 So. 596; *Bergen v. Magnus*, 98 Ga. 514, 515; *Scudder v. Bradbury*, 106 Mass. 422, 427 (with which compare the more accurate expressions in *Haskins v. Warren*, 115 Mass. 514, 533); *Hughes v. Knott*, 138 N. C. 105, 50 S. E. 586.

viously given.¹⁵ In case of doubt it seems better to assume that the latter kind of bargain was intended. Transfer of the property subject to a lien gives sufficient protection to the seller and also protects the buyer by giving him the ownership of the goods; whereas, in case of a cash sale he merely has a contract right until the price is paid. In one class of cases, however, it is clear that a cash sale is the true construction of the transaction; that is, sales made by shopkeepers over the counter.¹⁶ In other cases the

¹⁵ Sales Act, § 19; *supra*, § 264 *et seq.*

¹⁶ In *Bussey v. Barnett*, 9 M. & W. 312, debt was brought for goods sold and delivered. The defendant pleaded *numquam indebitatus* and proved payment for the goods within ten months after the delivery of them at his house by the shipper. The court held that this evidence sustained the plea that the defendant had never become indebted to the plaintiff. This involved a decision necessarily that the property did not pass to the buyer prior to the payment. Had the property passed at an earlier moment a debt would have arisen simultaneously. *Leven v. Smith*, 1 Denio, 571. The same principle was applied in *Commonwealth v. Devlin*, 141 Mass. 423, 6 N. E. 64, an indictment for obtaining goods by false pretenses. The defendant agreed to buy certain sheep for cash, which were weighed, and, about an hour after the weighing, the owner of the sheep and the defendant met to close up the transaction. The weights were then reckoned and the seller demanded cash, but was induced to take a check on the representation of the defendant that the check was good. There was some evidence that by custom the weighing of the sheep and the recording of the weights constituted a delivery; but the jury were instructed that such a merely constructive delivery, or even a manual delivery, would not deprive the owner of

his property. The court said: "*In Haskins v. Warren*, 115 Mass. 514, the delivery took place several days before payment was demanded. The principle of that case does not apply to a delivery intended to be substantially simultaneous with payment, but which happens to precede it by a few minutes. For instance, if, upon a cash sale, goods should be handed across a counter before the money was put down, that would not be a waiver of the condition or a giving of credit. *Bussey v. Barnett*, 9 M. & W. 312. If the buyer ran off with the goods without paying for them, he would not have a voidable title; and if, by a false representation made the moment after putting his hands upon the goods, he induced the seller to take a check instead of cash, he could be convicted for obtaining the goods upon false pretenses. The case at bar is governed by the same principle as the one we have supposed. The delivery of the sheep was a more cumbersome operation than handling goods over a counter; but, even if it was completed before the representations were made, we think that, on all the evidence, fairly construed, it must be taken to have been made on the understanding that the payment was to be substantially simultaneous." See also *Hirsch v. Leatherbee Lumber Co.*, 69 N. J. L. 509, 55 Atl. 645. Another case where the same principle was applied and where the goods sold

same principle has been applied and in some instances, it is submitted, has been extended unwarrantably.¹⁷ Confusion especially may be caused by use of the words "cash sale" or "terms cash" by business men. In business dealings these words are frequently used when in reality a short period of credit is contemplated. In

could not, from their nature, be delivered in an instant, is *Palmer v. Hand*, 13 Johns. 434. A raft of lumber coming down the North river was sold to be delivered at a dock in Albany. The lumber composing the raft was taken out of the water and nearly all piled on the dock, when the seller forbade any more to be piled because the buyer had absconded. The defendant had advanced the buyer money on the same day on the security of the lumber while it was being piled. The court held that the property had not passed. The contract was for the whole raft delivered on the dock. The seller had no right to payment for any part until the whole was delivered; and while the lumber was still in the course of delivery he refused to go on with the bargain. The defendant's advances were made while the lumber was still in course of delivery.

¹⁷See *Bergan v. Magnus*, 98 Ga. 514, 25 S. E. 570; *Wilson v. Comer*, 125 Ga. 500, 54 S. E. 355, 114 Am. St. Rep. 245; *Susong v. McKenna*, 126 Ga. 433, 55 S. E. 236; *Starnes v. Roberts*, 128 Ga. 718, 58 S. E. 348; *Hall v. Frick Co.*, 32 Ky. L. Rep. 768, 106 S. W. 1186; *Sharp v. Hawkins*, 129 Mo. App. 80, 107 S. W. 1087; *Morris v. Rexford*, 18 N. Y. 552; *Wabash Elevated Co. v. First National Bank*, 23 Ohio St. 311; *Goldsmith v. Bryant*, 26 Wis. 34. And see the cases cited in the following notes. The most extreme case in the books perhaps is *Strother v. McMullen Lumber Co.*, 200 Mo. 647. In this

case the plaintiff contracted for the sale and delivery to the defendant of the output of the plaintiff's saw mills during the year 1902, the delivery to be at a lumber yard adjoining the mill leased by the plaintiff to the defendant. The contract provided that "immediately on the delivery of any lumber upon said lumber yard the title to said lumber shall at once vest in" defendant, and that "all lumber as it is sawed and before piling and stacking shall be graded and measured" by the defendant's inspector, and "all lumber shall be paid for in full every thirty days." It was held, that the contract was an executory sale of all lumber sawed by plaintiff during the year 1902, to be delivered in instalments, measured by the quantity manufactured during each thirty days, and the price to be paid at the end of each instalment delivered, and that title to the month's delivery did not pass until payment, so that the plaintiff having delivered the lumber sawed during August, and having on September 1st demanded payment and failed to obtain it, was held entitled by replevin to recover the lumber. It is impossible to speak respectfully of such a decision. The court disregards the express provision of the contract as to the time title should pass to reach a result which would not have been permissible even in the absence of the express provision. The lumber was delivered to the buyer and there was nothing in the contract to indicate that he might not rightly use it or resell it immediately.

such a case it is clear that there is no cash sale in the legal sense; for, under the circumstances suggested, it is not contemplated that the buyer shall refrain from dealing with the goods or even from reselling them, and if such is the contemplation of the parties, it is impossible to say that the property was not to pass until the price was paid. Clear as this is on principle, there are cases which disregard it.¹⁸

§ 344. **Sales conditional on the signing of negotiable paper.**—A very common kind of transaction where the transfer of the property in goods is conditional on the buyer's performance of his promise is where the buyer is, by the terms of the bargain, to give negotiable paper. In such a case there is less reason to construe the bargain as a transfer of the property with a lien in favor of the seller for the promised security than where the bargain calls for the payment of the price in cash, since negotiable paper may be executed at any time when the parties have made up their minds that the property shall pass; whereas the actual payment of the price may be inconvenient at the time when the bargain is agreed upon.¹⁹ The typical illustration of this kind of case is

¹⁸ In *Stone v. Perry*, 60 Me. 48, the plaintiffs sold some flour for cash, as it was stated; the flour was shipped to the buyer and duly arrived. On the next day the plaintiffs sent a bill for the flour on which the words "terms cash" were printed on the margin. By the usage of trade in Boston, it appeared that when flour is sold for cash, it means that the seller has the right to call for the payment at any time he pleases, but the custom is not to call for ten days: the ten days is a courtesy and not a right. The buyer not being paid was allowed to replevy the goods from an attaching creditor of the buyer. It is submitted the case is wrong. Doubtless the seller might have called for the price at any time but he shipped the flour and the buyer would not have done anything wrong if he had immediately resold it. The words "cash sale," as ex-

plained by the evidence of usage in the Boston market, in fact meant a very short period of credit, not exceeding ten days. See also *Strother v. McMullen Lumber Co.*, 200 Mo. 647, stated in the preceding note.

¹⁹ Cases where such a condition existed are: *Godts v. Rose*, 25 L. J. C. P. 61; *Merchants' Exchange Bank v. McGraw*, 59 Fed. Rep. 972, 15 U. S. App. 332, 8 C. C. A. 420, 76 Fed. Rep. 930, 48 U. S. App. 55, 22 C. C. A. 622; *Mathewson v. Belmont Mill Co.*, 76 Ga. 357; *Wilson v. Comer*, 125 Ga. 500, 54 S. E. 355, 114 Am. St. Rep. 245; *Budlong v. Cottrell*, 64 Iowa. 234; *Seed v. Lord*, 66 Me. 580; *Whitney v. Eaton*, 15 Gray, 225; *Armour v. Pecker*, 123 Mass. 143; *Silshy v. Boston & Albany R. R. Co.*, 176 Mass. 158, 57 N. E. 376; *Adams v. Roscoe Lumber Co.*, 159 N. Y. 176, 53 N. E. 805.

where a bill of lading for the goods is sent forward by the seller with a draft for the price attached. Payment of or acceptance of the draft is, under these circumstances, a condition precedent to the buyer's right to the possession of the bill of lading, and unless the buyer is named as the consignee of the goods, is a condition precedent to the transfer of the property in the goods.²⁰

§ 345. **Sales — C. O. D.** — A closely related question concerns sales "C. O. D." As has already been seen²¹ in such sales, according to the weight of authority, the property is not prevented from passing, when the goods are shipped, by the requirement of payment on delivery. These decisions support the view here advocated, that except where the parties contemplate an exchange of the goods for the money immediately upon making the bargain, the transfer of the property is not deferred until payment of the price, even though the parties may have expressly or impliedly agreed that the goods shall not be delivered until the price is paid.

§ 346. **Waiver of the condition of payment.** — Whether a sale is complete with a lien retained by the seller, or whether the property has not passed, and will not pass until the buyer pays the price, is a question that has some importance when merely the rights of the buyer and the seller are concerned; for if the property has passed, the risk has been transferred, the seller may sue for the price,²² and, on the other hand, the buyer may bring trover or replevin for the goods if the seller wrongfully refuses to carry out the bargain. The greatest importance of the question arises, however, when the rights of third persons are concerned. If the property does not pass till payment, a purchaser from the buyer gets no title. Even though the buyer has the goods in his possession and delivers them to the subpurchaser, this result is necessarily reached unless, as in England, a statute otherwise provides.²³ If the condition protecting the seller has been waived by

²⁰ See *supra*, § 290.

²¹ *Supra*, § 279.

²² It will be seen hereafter (*infra*, § 562), that even though the property has not passed, in some instances, the seller may sue for the price and is not limited to a recovery of the difference between the value of the goods and the agreed price.

²³ In England, by statute, the Factors' Act of 1889 enables a buyer in possession to give a good title to a purchaser from him. See *supra*, § 319. In *Starnes v. Roberts*, 128 Ga. 718, 720, 58 S. E. 348, the court upheld the seller's right to regain the goods from the buyer, but said had the action been against a subpur-

him, as of course it may be, the buyer's title becomes absolute and may be transferred to a subpurchaser. The majority of the litigated cases in regard to cash sales involve the question how far the delivery of the goods by the buyer to the seller is a waiver of the condition requiring payment of the price before title is transferred. There can be no waiver except by the seller's assent. The mere acquisition of possession by the buyer, therefore, irrespective of the seller's assent, is not a waiver. Nor is manual possession by the buyer, even with the seller's assent, in itself a waiver. As a shopkeeper may allow a prospective purchaser to take goods into his hands and examine them before payment, though he does not assent to the removal of them, it is evident that a delivery to the buyer may be itself conditional; that is, merely for a special temporary purpose, such as examination, testing, weighing, or the like. No assent in such a case to the transfer of the property by the seller can be found when the original bargain required payment of the price as a condition precedent to such transfer.²⁴ The cases which present difficulty are where the seller has voluntarily parted with possession and for a purpose other than the temporary one of examination or the like. It is universally admitted in the decisions that delivery is at least evidence of a waiver, but it is also generally said that it is only evidence and that the seller's intent not to waive the benefit of his condition may be shown.²⁵ An

chaser "a very different case would have been presented." But except where conditional sales are invalid at common law or for lack of record a cash sale must also be valid against third persons.

²⁴ In *Whitney v. Eaton*, 15 Gray, 225, goods were delivered to the buyer for the purpose of computing tare. In *Osborn v. Gantz*, 60 N. Y. 540, and *Hart v. Boston & Maine R. R.*, 72 N. H. 410, 56 Atl. 920, to test the accuracy of weighing. In *Silsby v. Boston & Albany R. R. Co.*, 176 Mass. 158, 57 N. E. 376, to verify the quality and count of the merchandise. In *Wabash Elevator Co. v. First National Bank*, 23 Ohio St. 311, delivery of warehouse receipts for

grain was made in exception of immediate payment, to which the seller was entitled by the bargain, but the buyer, having a claim on another account against the seller, retained the receipts and told the seller that he would credit him on account with the price. In *Harris v. Smith*, 3 S. & R. 20, delivery was secured by a trick. See also *Susong v. McKenna*, 126 Ga. 433, 55 S. E. 236; *Evansville, etc., Ry. Co. v. Erwin*, 84 Ind. 457. In all these cases it was held that title did not pass. See also *Bainbridge v. Caldwell*, 4 Dana, 211.

²⁵ *Cheatle v. MacVeagh*, 83 Ill. App. 336; *Gibson v. Chicago Packing Co.*, 108 Ill. App. 100; *Daugherty v. Fowler*, 44 Kans. 628, 25 Pac. 40,

analysis of the situation upon principle makes it evident that the real question is, Does the seller assent to the transfer of the prop-

10 L. R. A. 314; *Seed v. Lord*, 66 Me. 580; *Peabody v. Maguire*, 79 Me. 572, 12 Atl. 630; *Merrill Furniture Co. v. Hill*, 87 Me. 17, 32 Atl. 712; *Scudder v. Bradbury*, 106 Mass. 422; *Upton v. Sturbridge Cotton Mills*, 111 Mass. 446; *Haskins v. Warren*, 115 Mass. 514; *Globe Milling Co. v. Minneapolis Elevator Co.*, 44 Minn. 153, 46 N. W. 306; *Carter, Rice & Co. v. Cream of Wheat Co.*, 73 Minn. 315, 76 N. W. 55; *Johnson-Brinkman v. Central Bank*, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615; *Ferguson v. Clifford*, 37 N. H. 86, 103; *Leatherbury v. Connor*, 54 N. J. L. 172, 23 Atl. 684, 33 Am. St. Rep. 672; *Morris v. Rexford*, 18 N. Y. 552; *Hammett v. Linneman*, 48 N. Y. 399; *Adams v. Roscoe Lumber Co.*, 159 N. Y. 176, 53 N. E. 805; *Hodgson v. Barrett*, 33 Ohio St. 63, 31 Am. Rep. 527; *Frech v. Lewis*, 32 Pa. St. 279, 67 Atl. 45; *Victor Safe Co. v. Texas Trust Co. (Tex.)*, 104 S. W. 1040; *Paulson v. Lyon*, 26 Utah, 438, 73 Pac. 510. In *Merrill Furniture Co. v. Hill*, 87 Me. 17, 32 Atl. 712, the seller brought replevin for two settees, manufactured for one Coburn, and delivered to him something more than a year before. The defendant had bought the settees from Coburn some months after they had been delivered to the latter. A witness for the plaintiff testified that the settees were made and delivered and "considered cash payment." A week or ten days afterward the bill was sent. About three weeks afterward the money had not come in and a boy was sent over once or twice to collect the bill. A month after the delivery the witness saw the buyer who said he could not pay the bill that day and to come in again in about a week. The witness re-

plied, "all right," and went in about a week but could not get pay then. The witness then said he thought the best way was to give a lease and the buyer to pay \$10 down and \$10 every month thereafter; to which Coburn assented, and \$20 was paid on account during the next few months. Subsequently the defendant purchased the settees. The court instructed the jury that before the sale to the defendant a valid conditional sale had been substituted for the original bargain, and a verdict was returned for the plaintiff. The court in banc held that if the property passed by delivery, the unrecorded conditional sale substituted for the original bargain was ineffectual to give the plaintiffs a claim against the defendant; but that if the property did not pass originally the parties merely substituted one conditional contract for another, as they might with propriety have done. The court, therefore, sustained the exceptions and directed that the case should be submitted to the jury. The principle on which the jury should be instructed was thus stated: "The mere fact of delivery without a performance of the condition of payment is some evidence of a waiver of the condition. The rule that prevails in this State is thus stated in *Peabody v. McGuire*, 79 Me. 572, 12 Atl. 630: 'But the doctrine which has the support of our own court upon this question, and which seems to be the correct and rational one, is, that even in a conditional sale the mere fact of delivery, without a performance by the purchaser of the terms and conditions of sale, and without anything being said about the condition, although it may afford presumptive evidence of an absolute delivery and of a waiver of the con-

erty? — and in order to answer this question the original bargain and what is subsequently done must both be considered. If the

dition, yet it may be controlled and explained, and is not necessarily an absolute delivery or waiver of the condition; but whether so or not is a question of fact to be ascertained from the testimony.'” It seems perfectly clear, however, that the property had passed to the defendant. The sale was made on credit at the outset, and further credit allowed. From the moment of delivery the buyer used the settees as his own, and was permitted to do so. This permission was inconsistent with a conditional delivery. It was not inconsistent with a conditional sale, but such a bargain should never be implied. Moreover, if such was the nature of the transaction, the lack of record made it invalid against the defendant. In *Brownville Slate Co. v. Hill*, 175 Mass. 532, 56 N. E. 706, slate was ordered of the plaintiff by one Williams, to be shipped to the defendants. The order was accepted on condition that Williams should give an order on the defendants for the price and procure an acceptance of the order. This order was to be procured before the slate was shipped. Subsequently upon the promise of Williams to secure the acceptance of the order, the slate was shipped to the defendants. It arrived about the middle of July and remained near the church, upon which it was to be used, until the latter part of September, when a large part of it was put upon the roof of the church. After the arrival of the slate the plaintiff's agent called upon Williams several times during July and August to obtain the acceptance of the order but was put off and, in September, the plaintiff in terms asserted title to the slate. The court held that the trial judge properly refused to order a

verdict for the defendant, and said there was evidence which warranted the jury in holding that the delivery of the slate was conditional, that the condition had not been waived, and that the title in the slate had not passed to Williams. It seems somewhat hard to see why the shipment of the goods ordered was not an absolute delivery. If the slate had been used immediately upon its arrival, it would not have been inconsistent with any condition imposed by the seller. The seller, though originally demanding an order before he would deliver, seems subsequently to have been satisfied with a promise to give the order in the immediate future. In *Hammett v. Linneman*, 48 N. Y. 399, the plaintiff sold coal to the defendant, and allowed the defendant to take the coal from the boat to his yard and mix it with other coal; but the court found that the sale was for cash, and the seller demanded payment in a short time, and the court, therefore, held, Earle, J., dissenting, that the evidence supported a verdict for the plaintiff. In *Adams v. Roscoe Lumber Co.*, 159 N. Y. 176, 53 N. E. 805, lumber was delivered under a contract to one Mackintosh, who agreed to buy the lumber and pay for it by note at sixty days. The lumber was delivered, and as soon as delivered the bill was sent with a written statement that the terms of payment was a note payable in sixty days, together with a letter requesting that the note be sent in accordance with these terms, but the note was never delivered and the plaintiff's agent, on calling for it, failed to get it. It was held that a verdict for the plaintiff based on the theory that title had never passed should be sustained.

original bargain was for a cash sale, that must mean that the buyer was to have neither the title nor the use and enjoyment of the goods until the price was paid. If the buyer was to have the use and enjoyment of the property, though not the title, before payment of the price, the transaction is a conditional sale, not a cash sale. Accordingly, if after bargaining for a cash sale the seller subsequently, voluntarily, delivers to the buyer the goods with the intent that the buyer may immediately use them as his own, and without insisting upon contemporaneous payment, this action is absolutely inconsistent with the original bargain. Such a delivery is not only evidence of the waiver of the condition of cash payment, it should be conclusive evidence. Even though the case warrants the conclusion that the buyer and seller agreed or understood that the seller should not part with his title until the price was paid, it is still true that the delivery and permission to the buyer to use the goods as his own are inconsistent with the theory of a cash sale. Instead, a conditional sale has been substituted and the transaction should be dealt with according to the rules governing conditional sales. Record should be required where the local statutes require record of conditional sales. Moreover, since a conditional sale where the buyer is given power to resell the goods is held invalid,²⁶ in no case where a ~~buyer~~ delivers goods under such circumstances that it is not a violation of duty to the seller for the buyer immediately to resell the goods can the seller's title be upheld, either on the theory of a cash sale or a conditional sale, at least as against subpurchasers or creditors of the buyer.²⁷ Sometimes after a bargain for a cash sale the

²⁶ See *supra*, § 329.

²⁷ The doctrine contended for in the text is well expressed by Judge Wells in *Upton v. Sturbridge Cotton Mills*, 111 Mass. 446, 453: "A waiver is the result of a voluntary unequivocal act of delivery. To say that a party does not thereby intend a waiver is to say that he does not intend the legal effect of his voluntary act * * *. 'Delivery,' as applied to a change of possession in pursuance of a sale, ordinarily in-

cludes both the act of the vendor in transferring the property and that of the vendee in receiving it. If unaccompanied by any word or act or circumstance to indicate that it is qualified or made subject to a condition, the vendee has a right to understand it to be absolute. To hold him accountable, as the custodian of property belonging to another, requires his assent to the obligation, either express or by implication. If there has been a completed delivery,

buyer gives in payment of the price a worthless check, and it has been held that such a false check is no payment; and that not

the denial of a waiver involves necessarily the affirmative proposition that the other party to the delivery has accepted the possession subject to the condition * * *. It is true that it is entirely at the option of the vendor whether he will waive the condition or not. It requires his voluntary act. But when he voluntarily does the act, which, unexplained, constitutes a waiver, he not only may be presumed to intend it, but he changes the relations between himself and the purchaser in respect to the property and the contract of sale. If he would impose any condition upon the purchaser, affecting those new relations, or any obligation not implied from the transaction itself, he should manifest his purpose in some mode, so that the other party may assent or dissent. The purchaser may be presumed to assent to a waiver; but he cannot be presumed, by accepting a delivery apparently unrestricted, to assent to a condition which lies in the undisclosed intent of the other party." So in *Blackshear v. Burke*, 74 Ala. 239, 242: "The title vested in the purchaser, and from the moment of delivery of possession the relation of buyer and seller was changed into that of debtor and creditor. This is true, even where there is a sale of goods for cash; if the seller, without demanding the purchase money, not being induced by the fraud of the buyer, delivers the goods to him unconditionally, the title vests in the buyer, and he becomes the absolute owner." In *Frech v. Lewis*, 218 Pa. St. 141, 67 Atl. 45, 11 L. R. A. (N. S.) 948, 120 Am. St. Rep. 864, the plaintiff furnished the defendant with carriages which were to be paid

for on delivery. The carriages were used, however, and two and one-half months elapsed, during which time frequent demands for payment were made; then the plaintiff began an action for replevin for the carriages. The lower court permitted the case to go to the jury, who found in favor of the plaintiff. This decision was affirmed by a divided bench in the Superior Court, but was reversed by the Supreme Court, which held that there was no evidence which could justify a verdict for the plaintiff. The court said: "Our cases proceed on the theory that until payment has been made, or waived, the contract remains executory, and that delivery in such case is not a completion of the contract, except as an intention to so regard it is expressly declared or can fairly be inferred from the circumstances attending. Possession, however, having passed, and the buyer, by the act of the seller, having been invested with the indicia of ownership, the policy of our law requires that this situation—the possession in one and the right of property in another—shall continue no longer than is necessary to enable the seller to recover the goods with which he has parted. The law gives the seller the right in such case to reclaim his goods, but he must do so promptly, otherwise he will be held to have waived his right, and he can only thereafter look to the buyer for the price. The question the present case suggests is: When does this inference of waiver arise? Our authorities admit of but one answer: Except when delayed by trick or artifice, the assertion of the right to reclaim the property must follow immediately upon the buyer's default

only does no title pass to the fraudulent buyer, but that the seller may assert his title against an innocent purchaser from the buyer.²⁸ It is submitted that such decisions are unsound. The reasoning upon which they rest is that a worthless check is no payment of the price, and the condition has not happened upon which the property was to pass. But the real question is, Did the seller assent to transfer the ownership in the goods; and it can hardly be doubted that he did. If a seller should say "you must not deal with these goods, though I have put them in your hands, until I collect the check," that would show an intent not to transfer the property to the buyer. But where the goods are put into the buyer's hands without more, it can hardly be doubted that the seller means to allow him to deal with them as his own; to resell them immediately if he feels inclined. It is true that this assent to the transfer of the property to the buyer has been

This does not mean that the seller must *eo instanti* begin legal proceedings to recover the goods; but it does mean that the seller, when he discovers that his delivery is not followed by payment as he had the right to expect, is at once put to his election whether he will waive the condition as to payment and allow the delivery to become absolute, or retake property, and that he is to allow no unnecessary delay in making his choice. The object of the law is not to multiply his remedies because of his disappointment. He may not continue to hold his right to the goods and at the same time hold the buyer as his creditor; one or the other he must relinquish, and do it promptly, or the law will forfeit his right to elect. Continued acquiescence in the buyer's possession of the goods will be taken as a choice on his part to regard the delivery as absolute, notwithstanding the buyer's default." This decision was followed and the above extract quoted with approval in *E. I. Dupont Co. v. John Shields Const. Co.*, 162 Fed.

Rep. 198. See also *Northwestern State Bank v. Silberman*, 154 Fed. Rep. 809, 83 C. C. A. 525; *Peabody v. Maguire*, 79 Me. 572, 12 Atl. 630.

²⁸ *National Bank of Commerce v. Chicago, etc., Ry. Co.*, 44 Minn. 224, 46 N. W. 342, 9 L. R. A. 263, 20 Am. St. Rep. 566; *Johnson-Brinkman Commission Co. v. Central Bank*, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615. In these cases it was held that the seller might maintain an action for conversion against a *bona fide* purchaser of the goods from the original fraudulent buyer. In *Hodgson v. Barrett*, 33 Ohio St. 63, the seller, under similar circumstances, was allowed to reclaim the goods from a voluntary assignee in insolvency, and it is not improbable that the court would have reached the same result as against an innocent purchaser from the buyer. In *Mathews v. Cowan*, 59 Ill. 341, the seller was allowed to recover from the original buyer; and whatever may be said of the other cases, the Illinois decision seems sound.

procured by fraud; therefore, the seller may reclaim the goods from the fraudulent buyer. But, as in other cases where the seller is induced to part with his property by fraud, the voidable title of the fraudulent buyer becomes an indefeasible title upon a *bona fide* purchaser from the fraudulent buyer. The matter may be thus summarized: If the goods are delivered without any permission, express or implied, to the buyer to deal with them as his own until the price is paid, the condition that payment shall be simultaneous with the transfer of title is not waived; but if the seller on delivering the goods does so without restriction, so that the buyer is violating the terms of no bargain if he uses the goods as his own, it is a conclusion of law that the transaction is not properly a cash sale. At most, it is what has been commonly called a conditional sale; and the natural inference is that the transaction is not even a conditional sale. A delivery to the buyer with authority to use the goods immediately should be a conclusive evidence of transfer of the property in the absence of pretty clear evidence showing an intention to reserve the title. Even though a delivery to the buyer is not a waiver of a cash sale, because the delivery was for some purpose other than to transfer the property, the seller may lose his right to insist on the condition by a failure to reclaim the goods for an unusual time. Such failure shows an assent to the permanent retention by the buyer of goods which were delivered to him for a temporary purpose only.²⁹ Evidence of usage is, of course, admissible to

²⁹ *Carter, Rice & Co. v. Cream of Wheat Co.*, 73 Minn. 315, 318, 76 N. W. 55 ("Where payment of the purchase price, or giving security for its payment, and the delivery of goods, are expressly or impliedly agreed to be simultaneous, and, upon getting possession, the payment or giving security is omitted, evaded, or refused by the purchaser, the seller may immediately reclaim the goods"); *Leatherbury v. Connor*, 54 N. J. L. 172, 174, 23 Atl. 684, 33 Am. St. Rep. 672. ("The agreement did not contemplate an absolute sale without condition; it considered

that the vendee would act honestly and presently furnish the mortgage, which was the condition of the sale. The delivery did not make the sale absolute [2 Kent Comm. 497; *Smith v. Dennie*, 6 Pick. 262, 17 Am. Dec. 368; *Smith v. Lynes*, 5 N. Y. 41; *Farlow v. Ellis*, 15 Gray, 229; *Parker v. Baxter*, 86 N. Y. 586], but as the indicia of title raised a presumption that it was absolute [Schouler, *Per. Prop.*, § 304; *Smith v. Lynes*, *supra*; *Parker v. Baxter*, *supra*; *Farlow v. Ellis*, *supra*; *Whitney v. Eaton*, 15 Gray, 225; *Scudder v. Bradbury*, 106 Mass. 422], and

explain the nature of a delivery and, therefore, whether it was absolute or conditional.³⁰

§ 347. **Market overt.**—By the English law, goods sold in market overt cannot be reclaimed from the buyer even though the seller had no title, provided the buyer acts in good faith and without notice of any defect in the title. This doctrine is based on early customs and has been perpetuated in England by the Sale of Goods Act.³¹ Market overt outside of London is based on special charter, or prescription for special days.³² In the city of London every shop where goods are exposed for sale is market overt for goods of the kind which the shopkeeper professes to sell. It is not necessary to examine in detail the particulars of the doctrine; it is enough briefly to refer to the decisions.³³ It is well settled

when the mortgage was not forthcoming, it became the duty of the vendors to pursue their right to recover possession of the chattels with all the reasonable diligence that the circumstances surrounding them would permit, following the buyer at once and without suffering their vigilance to abate. Failure to thus pursue their right, while others bought their chattels as the property of the corporation which they had clothed with apparent title, constituted a waiver of the concurrent condition that they should have the mortgage and of any right they had to retake the property in the hands of an innocent third person. It was their duty at the trial, situated as they were, not only to show that the condition entered into the contract, but also that they pursued their right to retake the property with all possible vigilance.") See also *Goldsmith v. Bryant*, 26 Wis. 34; *Ewing v. Sylvester*, Tex. Civ. App., 94 S. W. 405; *Victor Safe Co. v. Texas State Trust Co.*, Tex. Civ. App., 99 S. W. 1049.

³⁰ *Scudder v. Bradbury*, 106 Mass. 422.

³¹ See § 22. The provisions of the section, however, do not apply to Scotland, § 23 (3).

³² Bl. Comm. 449.

³³ Case of Market Overt, 5 Co. 83b; *Hill v. Smith*, 4 Taunt. 520; *Lyons v. De Pass*, 11 A. & E. 326; *Lee v. Bayes*, 18 C. B. 599; *Benjamin v. Andrews*, 5 C. B. (N. S.) 299; *Crane v. London Dock Co.*, 5 B. & S. 313; *Marnier v. Banks*, 17 L. T. (N. S.) 147; *Hargreave v. Spink*, [1892] 1 Q. B. 25. See further an article by J. G. Pease, Esq., in 8 Col. L. Rev. 375. As to the doctrine in Ireland, see *Ganly v. Ledwidge*, Ir. R. 10 C. L. 33; *Delaney v. Wallis*, L. R. 14 Ir. 31; and in Victoria, *Ward v. Stephens*, 12 Vict. L. R. 378. The Sale of Goods Act has been adopted in all the Australian colonies except New South Wales. In Queensland, however, section 22 of the act is omitted, and in New Zealand that section is qualified. The act has also been adopted in Canada by the Northwest territories, by Manitoba, and by British Columbia, but with the omission of section 22.

that the law of market overt has no application in the United States.³⁴

§ 348. Sale by one having voidable title — Provisions of the Sales Act.—

Sec. 24. SALE BY ONE HAVING A VOIDABLE TITLE.— Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title.

This is copied without change from section 23 of the English act and states a well-recognized principle of law, so far as titles voidable on equitable grounds are concerned. No title, not even a voidable one, can pass (except by virtue of the principles of estoppel discussed under the previous sections of the act, and except in case of negotiable paper) unless there is an intent on the part of the seller to transfer the property. But for a variety of reasons, when such an intent exists the seller may be permitted by law to regain the title with which he has parted. Under what circumstances the seller has this right is considered in other places.³⁵ In most cases the right to avoid the transfer of title is essentially equitable. If the property concerned were land, a bill in equity for a reconveyance would be the appropriate remedy. It is natural that the same doctrine which equity applies in regard to purchasers for value without notice should be applied by courts of law in analogous circumstances. In a few classes of cases, however, the law as distinguished from equity gives a special right of avoiding a transfer of title; a right which has been held to exist not simply against the first taker of title, but against any subsequent transferee irrespective of *bona fides* for value.

³⁴ *Ventress v. Smith*, 10 Pet. 161; *Browning v. Magill*, 2 H. & J. 308; *Dame v. Baldwin*, 8 Mass. 518; *Towne v. Collins*, 14 Mass. 500; *Bryant v. Whitcher*, 52 N. H. 158; *Wheelwright v. Depeyster*, 1 Johns. 471, 3 Am. Dec. 345; *Hoffman v. Carow*, 22 Wend. 285; *Easton v. Worthing-*

ton, 5 S. & R. 130; *Hosack v. Weaver*, 1 Yeates, 478.

³⁵ See *supra*, § 73, *infra*, § 623 *et seq.*; also *supra*, in regard to infants, § 10 *et seq.*; lunatics, § 28 *et seq.*; drunkards, § 40; contracts in which a right to avoid the title is expressly reserved, § 273.

This has been the privilege of the infant³⁶ and in jurisdictions where the contract of a lunatic is regarded as analogous to that of an infant, the same principle has been applied.³⁷ In regard to such cases this section of the Sales Act works a change in the law. It is desirable that at some time the title to goods bought from an infant or lunatic should be perfected, and the advantage to trade and the stability of titles justifies the diminution in the privilege of infants and lunatics.

³⁶ See *supra*, § 10 *et seq.*

³⁷ See *supra*, § 28 *et seq.*

CHAPTER XI.

DELIVERY TO THE BUYER AND RETENTION OF POSSESSION BY THE SELLER.

Section 349. Purchase of goods by second buyer — Provisions of the Sales Act.

350. Necessity of delivery by the seller.

351. Fraudulent retention of possession — Provisions of the Sales Act.

352. Retention of possession — English law.

353. Retention of possession — American law.

354. Alabama.

355. Alaska.

356. Arizona.

357. Arkansas.

358. California.

359. Colorado.

360. Connecticut.

361. Delaware.

362. District of Columbia.

363. Florida.

364. Georgia.

365. Idaho.

366. Illinois.

367. Indiana.

368. Iowa.

369. Kansas.

370. Kentucky.

371. Louisiana.

372. Maine.

373. Maryland.

374. Massachusetts.

375. Michigan.

376. Minnesota.

377. Mississippi.

378. Missouri.

379. Montana.

380. Nebraska.

381. Nevada.

382. New Hampshire.

383. New Jersey.

384. New Mexico.

385. New York.

386. North Carolina.

387. North Dakota.

388. Ohio.

Section 389. Oklahoma.

390. Oregon.

391. Pennsylvania.

392. Rhode Island.

393. South Carolina.

394. South Dakota.

395. Tennessee.

396. Texas.

397. United States.

398. Utah.

399. Vermont.

400. Virginia.

401. Washington.

402. West Virginia.

403. Wisconsin.

404. Wyoming.

§ 349. Purchase of goods by second buyer — Provisions of the Sales Act.—

Sec. 25. SALE BY SELLER IN POSSESSION OF GOODS ALREADY SOLD.—Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

This section is copied from Sale of Goods Act¹ with some changes.² The English section was originally passed in the

¹ Section 25 (1).

² The word "negotiable" is inserted before "documents of title," in order to carry out the general plan of the Sales Act to make documents of title effectual representatives of the goods only when negotiable in form. The adjective "mercantile" precedes the word "agent"

in the English statute. A "mercantile" agent is a term used in England by the Factors' Act of 1889, and subsequently; but the term has no definite meaning in American law, and there seemed no reason for using a narrower term than "agent." The words, "and paying value for," have been inserted in the Sales Act. So

Factors' Act of 1889,³ and was copied in the Sale of Goods Act. The section has been construed but once in England.⁴

§ 350. **Necessity of delivery by the seller.**—In very early times delivery seems to have been necessary to transfer property even as between buyer and seller,⁵ but this ceased to be true centuries ago, and both in England and in this country it has long been clear that, as between the parties, no delivery is necessary. In England, apart from the statutory provision referred to in the preceding section, the same rule has been adopted even where the rights of third persons are concerned, that is, a buyer who has not obtained delivery has been preferred to a subsequent buyer of the same goods, from the same seller, who has obtained delivery.⁶ But in this country, although the decisions are not uniform, and although the doctrine has been much confused with the allied doctrine of retention of possession in fraud of creditors, it has been generally held that delivery is necessary to perfect a buyer's rights either against subpurchasers or the seller's attaching creditors. In view of the many differences on matters of detail in the law on this subject of the several States, and in view of the consolidation or confusion of the doctrine in regard to delivery with that of fraudulent retention of possession, it has been thought best to treat separately the law of each State in regard to these matters.⁷

far as the words of the English statute are concerned, it would seem that in England a donee of the goods from a seller in possession would be preferred to the buyer — a result that can hardly have been intended.

³ 52 & 53 Vict., c. 45, § 8.

⁴ In *Nicholson v. Harper*, [1895] 2 Ch. 415, the seller had a quantity of wine stored with a warehouseman. No documents of title seem to have been issued by the warehouseman. He sold the wine to the plaintiff, but no delivery was made and no notice of the sale given to the warehouseman. Subsequently the seller signed a memorandum of charge by which he purported to pledge the wine to the warehouseman, in order to secure advances made by the latter without

notice of the plaintiff's claim. North, J., held that the plaintiff was entitled to recover on the ground that the goods had been continuously in the pledgee's possession, and had not been delivered to him by the seller. The decision seems a narrow one, and to show a disposition to limit the effect of the statute as closely as possible. In this country where, even aside from statute, delivery is generally held requisite in order to perfect a buyer's right as regards third persons, a more liberal construction will probably be adopted.

⁵ See *supra*, § 260.

⁶ *Meyerstein v. Barber*, L. R. 2 C. P. 38, 51.

⁷ See *infra*, § 354 *et seq.*

§ 351. Fraudulent retention of possession — Provisions of the Sales Act.—

Sec. 26. CREDITORS' RIGHTS AGAINST SOLD GOODS IN SELLER'S POSSESSION.—Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, and such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void.

This provision is not found in the English statute, nor is there anything analogous in that statute, although the principle is well recognized in English law, being based on the familiar statute of 13 Eliz., c. 5. In many of the States in this country there are statutory provisions covering the matter, and in all the older States the law is well settled, and it would be hard to bring about a change. For this reason it seemed best to the Commissioners for Uniform State Laws in considering this subject not to attempt to make a uniform rule as to what constitutes fraud, but to leave that matter to the law of each State. When the existing local law determines what constitutes fraud this section of the Sales Act provides the consequences which follow.

§ 352. **Retention of possession—English law.**—It was at one time decided in England that retention of possession of goods by a seller under a bill of sale or document which made no provision for such retention of possession was constructively fraudulent as to creditors, and that irrespective of any actual intent it could be avoided.⁸ This decision has had a wide influence in the United States, where it has been followed in many jurisdictions with the omission of the qualification laid down by the English court, that if the retention of possession is in accordance with an express provision in a bill of sale, the doctrine of constructive fraud is inapplicable; but in England the decision was soon overruled.⁹ And it is now well settled in England that retention of possession by the seller is, at most, evidence tending to show fraud.¹⁰ The

⁸ Edwards v. Harben, 2 T. R. 537.

⁹ See Martindale v. Booth, 3 B. & Ad. 498.

¹⁰ V. C. Kindersley, in Hale v. Metropolitan, etc., Co., 28 L. J. Ch.

(N. S.) 777, 779, laid down the rule as follows: "With respect to the question whether the sale was *bona fide*, it was at one time attempted to lay down rules that particular things

question is now of much less importance in England than formerly because of the Bills of Sales Acts.¹¹ These acts require that bills of sale, whether given by way of absolute sale or as security (that is, as chattel mortgages), shall be registered as a condition of their validity against third persons, if possession is not transferred. The English law seems to an American lawyer very defective, however, in that oral transactions are not affected by the acts, and there is nothing to prevent a valid oral sale or mortgage with retention of possession other than the Statute of Frauds, and the principle that if the retention is in fact intended as a fraud, the transaction may be attacked on that ground.

§ 353. **Retention of possession — American law.**— Though the doctrine in regard to fraudulent retention of possession was originally based on a statute,¹² which had reference only to creditors, the statutes of many States, and the decisions of others, have treated retention as fraudulent against subsequent purchasers from the seller, as well as against creditors. The doctrine of fraud has been considered with, and, to some extent, consolidated with the common-law requirement of delivery referred to above.¹³ In view of the variety of rules both of statute and of decisions, and in view of the importance of the question, a separate examination seemed desirable of the laws of each State in regard to all questions of delivery and retention of possession, and to this examination the following sections are devoted.

§ 354. **Alabama.**— The rule was established at an early date in Alabama, that the retention of possession by the seller was not

were indelible badges of fraud, but, in truth, every case must stand on its own footing; and the court or the jury must consider whether, having regard to all the circumstances, the transaction was a fair one and intended to pass the property for a good and valuable consideration." See also *Lindon v. Sharp*, 6 M. & G. 895; *Pennell v. Dawson*, 18 C. B. 355; *Alton v. Harrison*, L. R. 4 Ch. App. 622; *Macdona v. Swiney*, 8 Ir. C. L. R. 73.

¹¹ Those now in force are: 41 & 42 Vict., c. 31; 45 & 46 Vict., c. 43; 53 & 54 Vict., c. 53; 54 & 55 Vict., c. 35.

¹² 13 Eliz., c. 5.

¹³ Section 350.

¹⁴ *Hobbs v. Bibb*, 2 Stew. 54; *Martin v. White*, 2 Stew. 162; *Ayres v. Moore*, 2 Stew. 336; *Blocker v. Burness*, 2 Ala. 354; *Cummings v. McCullough*, 5 Ala. 324; *Terrell v. Green*, 11 Ala. 207; *Henderson v. Mabry*, 13 Ala. 713; *Millard's Admsr.*

per se fraud against creditors, but merely *prima facie* evidence of fraud which might be rebutted.¹⁴ In a recent case,¹⁵ where it was shown that the seller of a stock of merchandise had, after the sale, been in charge of selling the goods in the same place of business, the court treated such exercise of control as raising the same presumption that would be raised by a continuous retention of possession. * * * The court said: "The continued possession indicates a continuance of interest in the goods sold in the vendor, so also does his presence, and handling the goods sold, in a place occupied by those who exercise the rights of ownership over them, indicate a continuance of interest in them. The difference between such case and an actual retention of possession is not in principle, but only in degree." If any reasonable explanation be given of the continued exercise of control or retention of possession by the vendor, the presumption of fraud is rebutted.¹⁶ It is sufficient to show that the seller retains possession as the buyer's agent.¹⁷ A distinction is taken between public and private sales. If the sale is public, no presumption of fraud

v. Hall, 24 Ala. 209; *Upton v. Rairford*, 29 Ala. 188; *Mayer v. Clark*, 40 Ala. 259; *Moog v. Benedicks & Co.*, 49 Ala. 512; *Crawford v. Kirksey*, 55 Ala. 282, 28 Am. Rep. 704; *Teague v. Bass*, 131 Ala. 422, 31 So. 4.

¹⁵ *Teague v. Bass*, 131 Ala. 422, 31 So. 4.

¹⁶ *Planters' & Merchants Bank v. Borland*, 5 Ala. 531; *Mauldin v. Mitchell*, 14 Ala. 814. In the former case the court discussed the question as to what is sufficient to rebut the presumption of fraud, and said: "We answer, let it be shown, as in the case of *Hobbs v. Bibb*, that the property had been purchased for a fair and full consideration, truly paid; that the negroes remained with the vendor on hire, which was actually paid, and that the transaction was known publicly. Or, let it be shown that it was impracticable, or extremely inconvenient, at the time of

sale, to change the possession, some reasonable excuse, or satisfactory explanation at least, should be shown, to rebut the legal presumption, that the right of property is with the possession of a personal chattel."

¹⁷ *Borland v. Walker*, 7 Ala. 269; *Ullman v. Myrick*, 93 Ala. 532, 8 So. 410; *Troy Fertilizer Co. v. Norman*, 107 Ala. 667, 18 So. 201. In *Ullman v. Myrick* (p. 537), *McClellan, J.*, said: "This burden is discharged, when it is shown that the vendor holds the property for and only as the agent of the vendee, either for the latter's mere convenience, as, for instance, to afford him a better opportunity to remove it, or for the purpose of sale by the agent on account of the principal. A possession so explained affords no evidence or presumption of fraud, *prima facie*, or otherwise."

arises, but of course the attacking creditor may show from other circumstances that the sale was in fact fraudulent.¹⁸

§ 355. **Alaska.**—A statute states the general doctrine,¹⁹ but this statute has not been construed.

§ 356. **Arizona.**—The matter has been regulated by statute.²⁰ In its early form the statute provided that if there was not an

¹⁸ In *Bank v. McDade*, 4 Port. 252, the court said: "Without pretending to determine, whether, where there is an absolute sale of slaves, unaccompanied by possession, the transaction may be freed from the imputation of fraud, by showing that they were left with the vendor, to enable him to gather a growing crop, we are of opinion that the publicity of the sale dispensed with the immediate delivery of possession, and operated as a notice to the world of a change of property. *Kidd v. Rawlinson*, 2 B. & P. 59. If, however, the slaves were suffered to remain without a change of possession, to effect some-sinister end, as to defraud third persons, by giving to their possessor a false credit, the publicity of the sale would avail nothing. Or, if personal property is suffered to remain with the vendor, for an unreasonable length of time after a public sale, so as to warrant the inference that the transaction is merely colorable, the sale, though public, will not pass a title to the vendee, against the creditors of the vendor. Here the negroes were levied on within the same year, and but two months after the sale, and it was proved that they remained with Alexander McDade [the vendor], to aid in gathering a crop, to the cultivation of which they had contributed. Under these circumstances, the court might, with propriety, have instructed the jury, that if the possession was *bona fide*, such possession did not, *per se*, avoid the sale." See also *Simerson v. Branch*

Bank, 12 Ala. 205; *Creagh v. Savage*, 14 Ala. 454; *Montgomery v. Kirksey*, 26 Ala. 172; *Wyatt v. Stewart*, 34 Ala. 716.

¹⁹ *Carter's Annot. Alaska Codes*, Pt. IV, § 1043. "*Sale or transfer of personal property.* Every sale or assignment of personal property, unless accompanied by the immediate delivery and the actual and continued change of possession of the thing sold or assigned, shall be presumed *prima facie* to be a fraud against the creditors of the vendor or assignor, and subsequent purchasers in good faith and for a valuable consideration, during the time such property remains in the possession of said vendor or assignor."

²⁰ *Rev. St. (1901)*, § 2700 (5). "Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of things sold or assigned, shall be *prima facie* evidence of fraud as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith." Section 2701 (6). "The term 'creditors,' as used in the last section, shall be construed to include all persons who shall be creditors of the vendor or assignor at any time while such goods and chattels shall remain in his possession or under his control."

immediate delivery followed by continued change of possession, the presumption of fraud was conclusive.²¹ Since 1887, however, there have been some slight changes in the statute, and the law has allowed the presumption of fraud to be rebutted.²²

§ 357. **Arkansas.**—Retention of possession by the seller is treated in Arkansas as raising a presumption of fraud which may be rebutted.²³ The general rule that possession attends title is held to explain cases where persons living in the same family negotiate a sale and no visible change of possession follows. In such a case there is no presumption of fraud, although the vendor at times exercises control over the chattels.²⁴ When the chattels cannot be immediately delivered, if the buyer is guilty of no laches and takes possession within a reasonable time, no presumption of fraud arises.²⁵ To rebut the presumption of fraud

²¹ *Gant v. Broadway*, 2 Ariz. 315, 15 Pac. 862.

²² *Leibes v. Steffy*, 4 Ariz. 11, 32 Pac. 261.

²³ *Cocke v. Chapman*, 7 Ark. 197, 44 Am. Dec. 536 (here a fugitive slave, sold by his owner, was attached by the owner's creditors before either he or the vendee got possession. The buyer's title was upheld); *Field v. Simco*, 7 Ark. 269 (this case has been considered as settling the law of the State, although there was strictly no retention of possession since the vendor's bailee attorned). The case of *Stone v. Waggoner*, 8 Ark. 204, where the sale was public, was dealt with as if the sale had been private, the court suggesting no distinction. In *Little Rock & F. S. Railway Co. v. Page*, 35 Ark. 304, 316, the court explained the rule as follows: "It is a different question whether such leaving in possession would be a fraud upon subsequent purchasers or incumbancers, whereby Page might have lost the benefit of his trade. * * * [The jury] were properly advised that this is only a badge of fraud, but not conclusive

evidence; that they should consider all the circumstances of the case, and that the true test was whether the purchase was made in good faith, or as a pretense. * * * It would be in the highest degree embarrassing if failure to remove property at once should be held conclusive evidence of fraud or secret trust." *George v. Norris*, 23 Ark. 121; *Shaul v. Harrington*, 54 Ark. 305, 15 S. W. 835; *Valley Distilling Co. v. Atkins*, 50 Ark. 289, 7 S. W. 137; *Smith v. Jones*, 63 Ark. 232, 37 S. W. 1052.

²⁴ *Humphries v. McGraw*, 9 Ark. 91; *Rector v. Danley*, 14 Ark. 304.

²⁵ In delivering the opinion of the court in *Trieber v. Andrews*, 31 Ark. 163, 168, English, C. J., said: "Here the staves in question were not in the actual possession of Knight when he sold them to appellee, but were, it seems, along the line of the Arkansas Central railroad, and only constructively in his possession. The bill of sale was executed about the 13th of May, and before the 8th of June, when the staves were attached, then had been conveyed to Helena, and put into a barge belonging to appellee.

after it has arisen, proof of the *bona fides* of the sale must be perfectly clear.²⁶ If it be shown that the seller holds as bailee for the buyer, the presumption of fraud is rebutted.²⁷

§ 358. **California.**—The law was settled at an early date in California by a statute, to which several additions have been made in recent years.²⁸ The tendency in early decisions was toward an

There were no such laches on the part of appellee in taking possession of these staves, under the circumstances, as to indicate fraud."

²⁶In *Valley Distilling Co. v. Atkins*, 50 Ark. 289, 291, 292, 7 S. W. 137, it was said: "The courts are at variance with each other and sometimes with themselves, as to how far a vendee must go in such a case in his explanation of the transaction and possession, to exonerate himself. But that the burden of proof is shifted to him to show, at least the *bona fides* of the sale, is well settled; and to establish *bona fides*, a sufficient consideration for the purchase must be shown. * * * The surrender by the vendee of a note or an account which the instrument recites is due from the vendor to him is not sufficient. It must be proved that the supposed debt is an honest one. It must not be left to inference."

²⁷*Smith v. Jones*, 63 Ark. 232, 37 S. W. 1052. In *Shaul v. Harrington*, 54 Ark. 305, 310, 15 S. W. 835, the court explained the rule as follows: "Constructive delivery being enough to satisfy the law, it is an easy transition to constitute the vendor a bailee for the vendee, and so work out a delivery. And it is held that such a delivery is sufficient against creditors. Whenever there is a completed contract of sale and an agreement by the vendor to hold as bailee for the vendee in lieu of an actual delivery, the sale is complete against creditors, if it is not otherwise

fraudulent." In referring to the broad language used in *Davis v. Meyer & Co.*, 47 Ark. 210, 214, 1 S. W. 95, which would make a visible and substantial change of possession essential to the protection of a vendee against attaching creditors as well as against subsequent purchasers, the court said: "But to hold that actual and visible possession by the vendee is essential to his title in every case where the articles sold are capable of manual delivery, would be in effect to make the continuance of possession by the vendor fraud *per se*, and so allow no exculpatory explanation by the vendee." This seems to misinterpret the earlier decision, for what the court's language there requires is merely delivery and not a continued change of possession.

²⁸Civil Code, § 3440. *Certain transfers presumed fraudulent.* Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry and respondentia, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and

extremely strict construction to the statute. It was said that if at any later time the seller was given possession his creditors might attach the property.²⁹ This unreasonable view was soon overthrown by a decision³⁰ in which the court said: "The delivery must be made of the property; the vendee must take the actual possession; that possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the

the successors in interest of such creditors, and against any person on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or incumbrancers in good faith subsequent to the transfer; provided, however, that the provisions of this section shall not apply to the transfers of wines in the wineries or wine cellars of the makers or owners thereof, or other persons having possession, care, and control of the same, and the pipes, casks, and tanks in which the said wines are contained, which transfers shall be made in writing, and certified and verified in the same form as provided for chattel mortgages and which shall be recorded in the book of miscellaneous records in the office of the county recorder of the county in which the same are situated; provided, also, that the sale, transfer, or assignment of a stock in trade (or of such a quantity of a stock in trade, as to be substantially a whole) in bulk, or in any manner otherwise than in the ordinary course of trade and in the regular and usual practice and method of business of the vendor, transferrer, or assignor, will be conclusively presumed to be fraudulent and void as against the existing creditors of the vendor, transferrer, or assignor, or the intended vendee, transferee, or assignee shall record in the office of the county recorder in the county or counties in which the said stock in trade is situated, a notice of said

intended sale, transfer, or assignment, stating the name and address of the intended vendee, transferrer, or assignor, and the name and address of the intended vendee, transferee, or assignee, and a general statement of the character of the property or merchandise intended to be sold, assigned, or transferred, and the date when, and the place where, the purchase price, if any there be, is to be paid; provided, nevertheless, that if such intended sale is to be at public auction the notice above required to be recorded shall state that fact, the time, terms, and place of said sale, the names and addresses of the vendor and auctioneer, and a general statement of the character of the property or merchandise intended to be sold; but such sale shall in no event occur within five days of the date of recordation of said notice; provided further, that the provisions of this section shall not apply or extend to any sale, transfer or assignment made under the direction or order of a court of competent jurisdiction, or by any executor, administration, guardian, receiver, or other officer or person acting in the regular and proper discharge of official duty, or in the discharge of any trust imposed upon him by law, nor to any transfer or assignment made for the benefit of creditors generally, nor to any sale, transfer or assignment of any property exempt from execution.

²⁹ Bacon v. Scannell, 9 Cal. 271.

³⁰ Stevens v. Irwin, 15 Cal. 503.

vendee. It must be such as to give evidence to the world of the claims of the new owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession must be continuous — not taken to be surrendered back again — not formal, but substantial. But it need not necessarily continue indefinitely, when it is *bona fide* and openly taken, and is kept for such a length of time as to give general advertisement to the status of the property and the claim to it by the vendee." Although until recently it was doubtful from the cases just what would constitute an "actual change of possession," the doctrine seems finally to have been established that a change is sufficient which will give notice to the world of the claims of the new owner. Accordingly the law is incorrectly stated in many cases in which the general language used necessarily implies that more than a constructive change in the possession is required where both seller and buyer have some control over the property. In a recent case where both parties were in control of a stock of merchandise, it was held that a change of several signs on the shop windows gave sufficient notice to the world of the change of title, although one sign remained unchanged.³¹ So

³¹ Hunt v. Hammel, 142 Cal. 456, 76 Pac. 378. In a dissenting opinion Beatty, C. J., said: "I know that there has been a remarkable fluctuation of opinion in this court — as differently constituted at different times — as to what is necessary to constitute a delivery and change of possession on a sale of personalty. Down to and including the decision in Engles v. Marshall, 19 Cal. 320, the court held very strictly against the vendee in all cases where he omitted to do everything possible to make the change of ownership manifest to the world. From that time forward, however, the rule was gradually relaxed in a long series of decisions which reduced the law on this point almost to the condition of a dead letter, though there were occasional revivals of the

older, and, as I think, the better, doctrine. This condition of fluctuation continued until the decision in George v. Pierce, 123 Cal. 172, 55 Pac. 775, in which the judgment and order of the Superior Court upholding a transfer as against creditors was reversed on the evidence by a strict application of the old rule of Engles v. Marshall, Stevens v. Irwin, and other like cases. Since then until now that old and strict doctrine has been uniformly enforced in all cases coming to this court, and in at least three other appeals (McKee, etc., Co. v. Martin, 126 Cal. 557, 58 Pac. 1044; Lilienthal v. Ballou, 125 Cal. 183, 57 Pac. 897, and O'Kane v. Whelan, 124 Cal. 200, 56 Pac. 880) the finding of the trial court in favor of the vendee has been set aside on a review of the evidence, the

although the seller becomes agent for the buyer in managing the property sold and the position of the property remains unchanged, that is merely some evidence tending to show that there was no change of possession.³² But if that evidence is unexplained, it is sufficient to brand the sale as fraudulent against

principle of all the decisions being, that there must be an open and visible change of the status of the property sufficient to make manifest to the world the change of ownership. I think it most unfortunate that there should be any relaxation of this wholesome doctrine. It is always in the power of a vendee to comply with its requirements; and to dispense with its requirements is simply opening the door to innumerable unnecessary controversies and to possible frauds * * *." In *McKee v. Martin*, 126 Cal. 557, 559, 58 Pac. 1044, the court said: 'Prior to the sale there was a sign on the building, where the property was located and the business carried on, in the following language: 'John McKee, Stair Builder.' After the transfer John McKee removed his name from the sign, leaving it simply 'Stair Builder.' It would seem from this evidence that there was no delivery of the property to the vendee, and that the possession of the personal property here in controversy, leaving out of consideration the business of the concern, remained after the sale in the same persons that it had previously rested in. A person familiar with the business and the use of the premises and personal property thereon, prior to the sale, on visiting it subsequently could have seen nothing evidencing a change of ownership or a change of possession; even the change in the sign, unexplained, would have been meaningless to him.' In the case of *George v. Pierce*, 123 Cal. 172, 55 Pac.

775, where the transfer was in the form of a pledge, in reviewing the authorities, the court approved *Stevens v. Irwin*, 15 Cal. 503, 76 Am. Dec. 500, and cited as continuously upholding the doctrine of that case *Engles v. Marshall*, 19 Cal. 320, 329; *Cahoon v. Marshall*, 25 Cal. 197, 201; *Godchaux v. Mulford*, 26 Cal. 316, 323, 85 Am. Dec. 178; *Woods v. Bugbey*, 29 Cal. 466, 472; *Hesthal v. Myles*, 53 Cal. 623, 625, 626; *Bell v. McClellan*, 67 Cal. 283, 7 Pac. 699; *Kelly v. Murphy*, 70 Cal. 563, 12 Pac. 467; *Bunting v. Saltz*, 84 Cal. 168, 172, 24 Pac. 167; *Etchepare v. Aguirre*, 91 Cal. 288, 295, 27 Pac. 668, 25 Am. St. Rep. 180; *Murphy v. Mulgrew*, 102 Cal. 547, 36 Pac. 857, 41 Am. St. Rep. 200; *Byxbee v. Dewey* (Cal. 1897), 47 Pac. 52; *Levy v. Scott*, 115 Cal. 39, 46 Pac. 892; *Rothschild v. Swope*, 116 Cal. 670, 48 Pac. 911. Upon examination of the aforesaid authorities it will be found that the law of *Stevens v. Irwin*, *supra*, stands impregnable and unassailable. In some exceptional cases presenting hard law the court, in its construction and interpretation of the facts, may have leaned a little too far toward the administration of substantial justice. But beyond this it has never gone, and the law of this question stands to-day exactly as it did thirty-eight years ago."

³² *Adams v. Weaver*, 117 Cal. 42, 48 Pac. 972. Here there was no overt act affecting the property, indicating a change of possession, but public notice was given of the change of ownership.

creditors.³³ Where a sale is made for good consideration and with no intent to defraud, it has been held that a creditor is estopped from relying on the statute in case he assented to the sale and recognized its validity, and the buyer was induced to spend money on the faith of his statements.³⁴ The statute does not apply to a sale by a sheriff under an execution, at least where the purchaser is not in any way a party to the proceedings.³⁵ Growing crops also, since not susceptible of delivery, are held not to be in the possession or under the control of the seller within

³³ *O'Kane v. Whelan*, 124 Cal. 200, 56 Pac. 880, 71 Am. St. Rep. 42; *Murphy v. Mulgrew*, 102 Cal. 547, 36 Pac. 857, 41 Am. St. Rep. 200. In each of these cases the sale was made by a husband to his wife. Sections 165 and 166 of the Civil Code allow the filing of an inventory of the separate personal property of the wife and provide that this shall constitute notice and *prima facie* evidence of the wife's title. But in *Murphy v. Mulgrew* the court held that this statute could not be construed as nullifying the provisions of section 3440 as to fraudulent conveyances and doing away with the necessity for immediate delivery and actual and continued change of possession. In *Brown v. O'Neal*, 95 Cal. 262, 30 Pac. 538, 29 Am. St. Rep. 111, the owner of an undivided interest in a stallion, who had actual possession, sold his interest but retained possession as his vendee's agent. The court, in dealing with the question of cotenancy, said: "The law on this subject is stated in *Freeman on Cotenancy*, § 167, as follows: 'If A. and B. together own personal property of which A. is in actual possession, and B. sell his moiety to C., the possession of A. immediately becomes the possession of C. also. Therefore, being at once, by presumption and construction of law, put in possession as tenant in com-

mon with A., it is not necessary that C. should take actual possession with A. to make his purchase good under the Statute of Frauds, as against the creditors of B. If A., the cotenant in possession, had sold his interest, then the sale should have been followed by an actual change of possession, because there was no cotenant whose actual possession could have operated for the benefit of A.'s vendee.'"

³⁴ *Escolle v. Franks*, 67 Cal. 137, 7 Pac. 425; *Sullivan v. Johnson*, 127 Cal. 230, 59 Pac. 583.

³⁵ In the case of *Matteucci v. Whelan*, 123 Cal. 312, 316, 55 Pac. 990, 69 Am. St. Rep. 60, the court, quoting from another case, gave the reason for the rule as follows: "Retention of possession by the former owner of a chattel sold at sheriff's sale is not an index of fraud, because the sale is not the act of the person retaining, but of the law; and because a judicial sale, being conducted by the sworn officer of the court, shall be deemed fair till it is proved otherwise. It may, like a judgment, be shown to be collusive and fraudulent in fact, but the presumption of the law is favorable to it in the first instance. A chattel thus purchased, then, may safely be left in the possession of the former owner on any contract of bailment that the law allows in any other case."

the meaning of the statute.³⁶ When a third person has actual possession of the property at the time of the sale the case is nevertheless within the terms of the statute if such third person is merely a servant of the seller,³⁷ who must in such a case be deemed to have such "control" of the property as the statute contemplates.

§ 359. **Colorado.**— In Colorado the law has always been embodied in statutes.³⁸ In construing the present statute, which makes retention of possession conclusive evidence of fraud, the court has laid down the following rules:³⁹ "(1) When the sub-

³⁶ *Rosenberg v. Ross* (Cal. App.), 93 Pac. 284.

³⁷ *Hurlburt v. Bogardus*, 10 Cal. 518. The servant in actual possession was in this case discharged from the vendor's service and employed by the vendee.

³⁸ *Mills' Annot. St.*, Vol. 1, § 2027. "Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor or the creditors of the person making such assignment, or subsequent purchasers in good faith, and this presumption shall be conclusive." § 2028. "The term 'creditors,' as used in the last section, shall be construed to include all persons who shall be creditors of the vendor or assignor, at any time whilst such goods and chattels shall remain in his possession or control." In *Bassinger v. Spangler*, 9 Colo. 175, 187, 10 Pac. 809, the court refers to the change made by the present statute in the original act of 1861, as follows: "Our statute has not always been in its present peremptory form. Sec-

tion 14, however, is literally identical with section 14 of the original act of October 31, 1861 (*Laws 1861*, p. 244), down to the closing words of the present section—'and this presumption shall be conclusive.' This clause in the original act was in the following form: 'And shall be conclusive evidence of fraud.' But the legal effect of the original section was so qualified by an additional provision as to practically alter the remedy and change the legal effect of the section. This provision was: 'Unless it shall be made to appear on the part of the person claiming under said sale or assignment that the same was made in good faith and without any intent to defraud such creditors or purchasers.' If the latter provision still existed, the plaintiff's arguments, authorities, and evidence would be in point; for it is plain that in such case the validity of plaintiff's purchase might have been determined in his favor upon proof that the same was made in good faith and without any intent to defraud creditors or purchasers. The elimination of this qualifying provision is a strong indication that it rendered the original section inefficient to prevent fraudulent transfers of personal property."

³⁹ *Cook v. Mann*, 6 Colo. 21, 22. In this case the vendor of a stock of

ject of the sale does not reasonably admit of an actual delivery, it is sufficient if the vendor assume the control and dominion of the property, so as reasonably to indicate to all concerned, the change of ownership. The case of goods in a warehouse, brick in a kiln, and lumber in a raft, are familiar illustrations where removal is not impossible, but unusual, and out of the regular course of trade. In such cases, if there is a full surrender upon the part of the vendor, and a full assumption upon the part of the vendee, of the control and dominion of the subject of the sale, the delivery is sufficient. (2) The vendee must take the actual possession, and the possession must be open, notorious and unequivocal, such as to apprise the community, or those who are accustomed to deal with the party, that the goods have changed hands, and that the title has passed out of the seller and into the purchaser. This must be determined by the vendee using the usual marks or indicia of ownership and occupying that relation to the things sold which owners of property generally sustain to their own property. (3) The possession must be exclusive of the vendor. A concurrent or joint possession is not admissible." These rules have been applied in numerous decisions.⁴⁰ The fact that the attaching creditors had actual knowledge of the sale and practically conceded that it was made in good faith does not deprive them of their right to treat it as void.⁴¹ In the cases so holding it does not appear that the creditors knew of the sale when they gave credit, but only when they levied on the goods. When the possession at the time of the sale is not in the seller,

merchandise was retained in charge as clerk, but sufficient public notice of the change of ownership was given and the sale was held valid against creditors.

⁴⁰ *Sweeney v. Coe*, 12 Colo. 485, 21 Pac. 705; *Baur v. Beall*, 14 Colo. 383, 23 Pac. 345; *Butler v. Howell*, 15 Colo. 249, 25 Pac. 313; *Allen v. Steiger*, 17 Colo. 552, 31 Pac. 226; *Crymble v. Mulvaney*, 21 Colo. 203, 40 Pac. 499; *Stanley v. Citizens' Coal Co.*, 24 Colo. 103, 49 Pac. 35. In the case last cited, where the issue was

between two mortgagees, the first was held to have lost his priority of right since he made no effort to take possession until after possession had been taken by the holder of the later mortgage. In *Israel v. Day*, 41 Colo. 52, 92 Pac. 698, the court held there was no delivery of cattle left on the seller's ranch, though the buyer visited the ranch daily and gave directions as to the care of the cattle.

⁴¹ *Bassinger v. Spangler*, 9 Colo. 175, 10 Pac. 809; *Helgert v. Stewart*, 20 Colo. App. 202.

but in a bailee who agrees to become bailee for the buyer, it is held that the statute does not apply and that no actual change of possession is necessary.⁴²

§ 360. **Connecticut.**—The various views expressed in the early Connecticut cases can hardly be reconciled. Whether or not the presumption of fraud arising from retention of possession by the seller had been rebutted, was treated in several cases as a question for the jury only. The law was finally settled, however, that the legal effect of the facts urged in explanation of such retention of possession should be determined by the court, and that to show that such retention was provided for by the terms of the sale and intended in good faith would not rebut the presumption of fraud.⁴³ When the seller, after the sale, holds as agent for the

⁴² *Hendrie & Bolthoff Co. v. Collins*, 29 Colo. 102, 67 Pac. 164; *Jones v. Mackenzie*, 19 Colo. App. 121.

⁴³ In *Osborne v. Tuller*, 14 Conn. 529, 539–541, the court, in reviewing the early cases, said: “In the case of *Woodbridge v. Perkins*, 3 Day, 364, the court say, that ‘it is a rule of law, that where there is a sale of personal property, the possession of such property must be changed from the vendor to the vendee, or it will be liable to the creditors of the vendor.’” And referring to *Burrows v. Stoddard*, 3 Conn. 431, the court continued: “The doubt and confusion on this subject have arisen from the language of the courts, when speaking of the manner in which this legal presumption can be repelled. And this doubt arises from what the court said in the case of *Burrows v. Stoddard*, as it does from the same language used by other courts in other cases. ‘It seems to me,’ says the judge, ‘that whether a conveyance or attachment is fraudulent or not, is, necessarily, a question of fact, to be submitted to the jury.’ And this position is unquestionably true, if understood as explained by the same

court in *Toby v. Reed*, 9 Conn. 216, the jury acting under the direction of the court.” After referring to *Patten v. Smith*, 4 Conn. 450, 10 Am. Dec. 166, and *Sturtevant v. Ballard*, 9 Johns. 337, the court continued: “Then came the case of *Swift v. Thompson*, 9 Conn. 63, by which it was supposed the law of Connecticut on this subject was settled, and discussion put at rest. The court there say: ‘This has been the law of Connecticut, for the last forty years, if not from the beginning. It is not according to the course of the court to call this a fraud *per se*, and to direct the jury to find the sale void, but the question is submitted to the jury with instructions,’ etc. The same explanation is given in *Toby v. Reed*, 9 Conn. 216. The rule established in these cases was followed, by the judge at the circuit in the case of *Mills v. Camp*, 14 Conn. 219, 36 Am. Dec. 488. He submitted the question of fact to the jury, and instructed them as to what the law demanded, as a sufficient excuse for not removing the property attached. * * * In the case of *Carter v. Watkins*, 14 Conn. 240, decided by

buyer, there must be circumstances indicating to the world that there has been a change of title, or there is no sufficient change of possession.⁴⁴ After delivery has been finally secured by the

this court only one week after the decision of *Mills v. Camp*, it cannot be supposed the court intended to impugn any of the doctrines of the former case; indeed, we know they did not. The only question presented or discussed in the case was whether the reasons urged in explanation and excuse of the neglect of accompanying possession were legally sufficient to repel the legal presumption of fraud. And the court held expressly that although an adequate price was paid, and although the property was left, by the vendor, for the purpose of being manufactured, these circumstances did not furnish such an explanation as the law would pronounce satisfactory; thereby clearly recognizing the principle of former cases, that although the facts urged in explanation are to be submitted to, and ascertained by the jury, their legal effect is to be determined by the court."

*In *Talcott v. Wilcox*, 9 Conn. 134, the court refused to find as a matter of law that there was no change of possession, although the vendor retained control of the property as agent for the vendee on the latter's farm. This case was commented on in *Kirtland v. Snow*, 20 Conn. 23, 29, 30, as follows: "It is claimed, however, that the facts in this case are so nearly identical with the facts in the case of *Talcott v. Wilcox et al.*, 9 Conn. 134, that it is impossible to hold this conveyance fraudulent, without expressly overruling that decision. That the two cases are, in many respects, very similar is not to be denied; still, we think they may be distinguished, and we are not

disposed to extend, at all, the doctrine of that case, so far as it is supposed to form an exception to the general rule requiring a change of possession of personal property, in order to render a sale valid as against the creditors of the vendor. * * * In the former case, there was conflicting evidence, on the point of a change of possession. The plaintiff's witness testified that the control of the farm, after the sale, was given up to the vendee; and, although the original owner remained there, yet, that the vendee had upon the farm another man, hired and paid by her to take care of it, and of the property upon it; and that he did so, and the original owner took nothing from it, but by permission. In the case under consideration, no such fact existed, or was claimed; and this fact, of itself, if true, would justify the verdict in that case." In *Crouch v. Carrier*, 16 Conn. 505, 41 Am. Dec. 156, the vendor's agent who made the sale attorned to the vendee, but, according to the terms of the agreement, the property was allowed to remain on the vendor's farm for the agent's convenience. The court held the sale to be fraudulent. In *Potter v. Payne*, 21 Conn. 361, the conveyance of a stock of merchandise was in the form of a mortgage and the only thing indicating a change of possession was a change of the sign in front of the shop. The court held that this was insufficient. In *Potter v. Mather*, 24 Conn. 551, the jury was allowed to find a change of possession of a wagon, although it remained after the sale in a yard occupied by the buyer and the seller in common. In

buyer, the seller's creditors cannot attack the sale, although the seller remained in possession for some time before the delivery.⁴⁵ As a matter of policy certain explanations of the seller's retention of possession are held to be sufficient. The sale is held not to be fraudulent if the buyer exercised due diligence, but did not have sufficient time in which to take possession.⁴⁶ But "reasonable time" must be construed not with refer-

the case of *Colt v. Ives*, 31 Conn. 25, 81 Am. Dec. 161, the court adopted the rules applied to chattels in the case of a transfer of shares of stock. The secretary of the corporation had refused on the application of the seller to allow a transfer on the books of the company, and the seller had thereupon made a written assignment by a separate instrument and deposited it with the secretary. The court held the effort by the seller to do everything possible exempted this retention of possession from the condemnation of the law. In *Elmer v. Welch*, 47 Conn. 56, 58, the buyer at the time he purchased personalty secured a transfer of the realty where it was situated, and went into possession, retaining the seller as his agent on the premises. The court held the recorded transfer of the real estate, with immediate and exclusive possession and occupation thereof by the purchaser, gave such public notice to all the world of a change of ownership as to satisfy the requirements of the law. In *Gilligan v. Lord*, 51 Conn. 562, the recording of the deed was held to have the same effect. In *Dann v. Luke*, 74 Conn. 146, the contents of a livery stable was sold. The seller's name remained on the sign and he was employed as the buyer's agent, but the transfer of title was publicly advertised and the bill of sale was recorded, all to the knowledge of the buyer's creditor who later attached. The court held

that there had been a sufficient change of possession. In *Spencer v. Broughton*, 77 Conn. 38, however, it was held that although the sale of a stock of merchandise was recorded as required by section 4868 of the General Statutes, that did not dispense with the necessity of delivery to make the sale valid against the seller's creditors. See also *Bird v. Andrews*, 40 Conn. 542; *Hatstat v. Blakeslee*, 41 Conn. 301; *Hull v. Sigsworth*, 48 Conn. 258, 40 Am. Rep. 167; *Shaw v. Smith*, 48 Conn. 306, 40 Am. Rep. 170; *Hallock v. Alvord*, 61 Conn. 194, 23 Atl. 131.

⁴⁵ *Calkins v. Lockwood*, 16 Conn. 276, 41 Am. Dec. 143 (see also the same case on second appeal, 17 Conn. 154, 42 Am. Dec. 729); *Hall v. Gaylor*, 37 Conn. 550. In *Gilbert v. Decker*, 53 Conn. 401, 4 Atl. 685, five years elapsed before the buyer took possession. At p. 406, Loomis, J., said: "The inquiry is not whether the creditor was in fact misled, or when and under what circumstances his debt was contracted, or whether the debt is old or new, but simply whether he attached the property while possession was retained by the vendor. A tardy creditor cannot object to a tardy change of possession, for until possession taken he might have secured his debt, but afterward it is too late."

⁴⁶ In *Ingraham v. Wheeler*, 6 Conn. 277, before the assignees in insolvency could take possession, a later

ence to the mere convenience of the party, but only with reference to the time fairly required to perform the act of taking possession.⁴⁷ Where a stranger buys at an execution sale and all legal requirements are complied with, there is no presumption of fraud. If the execution creditor becomes the purchaser, however, a presumption arises which may be rebutted by showing the *bona fides* of the sale.⁴⁸ The rule of constructive fraud does not apply if the property sold is by law exempt from attachment.⁴⁹ It is also a sufficient explanation to show that the transfer was an assignment for creditors and conformed to the statute governing such assignments, which requires record of the assignment in the Probate Court, and the filing of an inventory.⁵⁰ Although possession may have been temporarily changed, that will not excuse a redelivery to the seller when the later possession is identical with that exercised by him before the sale.⁵¹ If after delivery the posses-

bona fide purchaser seized the property. The court said: "The case of Waln's assignment in *Lanfear v. Sumner*, 17 Mass. 110, 9 Am. Dec. 119, seems opposed to these principles. That was a case of the assignment of property then at sea; and it was holden, that an attaching creditor should hold, in preference to the assignee, although no negligence was imputed to him in taking possession of it, after its arrival in port. But in this State, I believe, that doctrine, to that extent, has never obtained. To cases of this class we have applied the well-known principles applicable to ships at sea, and other property afloat. An indorsement and delivery of the bill of sale, and other documents evidential of right and ownership, in the one case, and of the bill of lading, in the other, has been deemed sufficient, provided the purchaser or assignee takes possession of the property within a reasonable time after its arrival, or as soon as reasonably practicable. The assignees in this case, as *bona fide* purchasers, were entitled to a reasonable time

to take possession." In *Meade v. Smith*, 16 Conn. 346, the buyer was at a distant point at the time of the sale and before he could take possession of the property the seller's creditors had attached it, but the vendee's title was upheld.

⁴⁷ *Seymour v. O'Keefe*, 44 Conn. 128, 131.

⁴⁸ *Huebler v. Smith*, 62 Conn. 186, 192, 25 Atl. 658, 36 Am. St. Rep. 337.

⁴⁹ *Patten v. Smith*, 4 Conn. 450, 10 Am. Dec. 166.

⁵⁰ *Osborne v. Tuller*, 14 Conn. 529. In the case of *Peck v. Whiting*, 21 Conn. 206, the assignment did not conform to the statute and was accordingly held to be fraudulent.

⁵¹ In *Webster v. Peck*, 31 Conn. 495, the buyer of a horse, after having been in possession a week, hired it to the seller who used it as before the sale. The point was not necessarily involved in the decision, but the court dealt with it as follows: "But we cannot readily conceive of any ordinary emergency in the business of a vendee that should justify

sion of the property is secured by the seller wrongfully, and without the buyer's consent, the rights of the latter are not prejudiced although creditors attach before he regains possession.⁵²

§ 361. **Delaware.**—An early statute states the general doctrine.⁵³ Any retention of possession of the seller is held to raise a presumption of fraud, but such presumption will be rebutted if it be shown that the sale was *bona fide* and that more than a reasonable time for delivery had not elapsed.⁵⁴ Whether or not the requirement of the statute that delivery be made "as soon as conveniently may be" has been complied with is, of course, usually

the restoration of the possession of property to a vendor by hiring, within about a week of the sale, to be publicly used by him as before the sale; or how a sale so characterized could be sustained against an attaching creditor consistently with an inflexible adherence to the law as heretofore settled in this court." In *Norton v. Doolittle*, 32 Conn. 405, the buyer had possession only two days. In *White v. O'Brien*, 61 Conn. 34, 23 Atl. 751, the purchaser of machinery kept possession four or five months after the sale before redelivering to the seller for the purpose of having it painted and oiled. The seller's creditors attached while it was in his possession. The court held that the seller's possession could not be said, as a matter of law, to invalidate the sale.

⁵² *Hall v. Gaylor*, 37 Conn. 550.

⁵³ Code, c. 63, § 4. "No sale, whether with or without bill of sale, or of any goods or chattels, within this State, shall be good in law (except as against the vendor), or shall change, or alter, the property in such goods or chattels, unless a valuable consideration for the same shall be paid, and unless the goods and chattels sold shall be actually delivered into the possession of the vendee, as soon as conveniently may

be after the making of such sale. And if such goods and chattels, so sold, shall afterward come into and continue in the possession of the vendor, the same shall be liable to the demands of all his creditors."

⁵⁴ In *Cleaver v. Ogle*, 1 Houst. 453, the court said: "If delivery is shown to have been impracticable, the sale will not be held fraudulent if it was made in good faith." In *Hagany v. Herbert*, 3 Houst. 628, 631, Gilpin, C. J., charged the jury, "That the retaining of the possession of goods by the seller after the execution and delivery of a bill of sale for them is *prima facie* fraudulent in contemplation of law, and of our statute against clandestine bills of sale, and raises, *prima facie*, a presumption that the sale and transfer of them, are but a mere pretense or pretext to cover the goods and prevent his creditors from reaching them. It is, however, but a presumption, and may be explained or rebutted. * * * There doubtless may be a good and lawful sale and delivery of household goods by one person to another, though living in the same house at the time and afterward together, and if sold by one who contemplates giving up housekeeping in a few weeks, and bought by the other in contemplation

a question for the jury.⁵⁵ Where actual delivery is impossible or impracticable, the buyer should be given the most complete control over the goods possible — as by delivery to him of the key to the warehouse where the goods are stored, or by the assignment to him of the bill of lading if the goods have been shipped.⁵⁶ In one case it was held that for the seller after delivery to be put into possession as the buyer's agent, although the change was not publicly known, would not make the sale void within the meaning of the last sentence of the statute.⁵⁷ In the most recent case interpreting the statute, however, this distinction is not suggested.⁵⁸ Shares of stock seem to fall within the meaning of the words

of going to housekeeping in another house in a few weeks, it would not be unreasonable for the latter to retain them there until he could conveniently remove them to the house he was about to move into with his family. But in such a case, the jury should be satisfied from the evidence that the transaction was a fair and honest one, and that there was an actual sale and delivery of the property in good faith and for a valuable consideration by the one to the other, and that it was not concocted between them and pretended only, for the purpose of defrauding or defeating the creditors of the vendor and preventing them from seizing the same in execution and satisfaction of the debts due from him to them."

⁵⁵ In *Brown v. Dickerson*, 2 Marv. 119, 121, the court said: "Delivery of possession of goods and chattels may be either actual or constructive; but both contemplate the absolute giving up of the control and custody thereof on the part of the vendor and the assumption of the same by the vendee."

⁵⁶ *Groff v. Cooper*, 6 Houst. 36, 44; *Miller v. Lacey*, 7 Houst. 8, 10.

⁵⁷ *Groff v. Cooper*, 6 Houst. 36, 45. *Comegys*, C. J., said: "The evidence relied upon by the defendant to show

that the goods after their delivery to the plaintiff came into and continued in the possession of Hickman is that of the witness who saw him on the occasion mentioned by them after the sale and delivery to the plaintiff, in the store behind the counter selling the goods to customers, which is met by testimony on the other side that Hickman was at first so employed for the plaintiff in the store for a few days, until the clerk he had engaged should arrive and take charge of it, and that after he arrived and took charge of the store, it was by his request that Hickman assisted him in waiting on customers when in the store and the occasion required it, but that he had no property or interest in the goods, and sold them as the goods only of the plaintiff. Such was substantially the evidence not only of Hickman, but of Mutchler and Wooders, the clerk of the plaintiff. If such was the case, then, certainly, the goods could not be said to have come into the possession of Hickman as his goods after the sale or continued in his possession as his goods after it, contrary to the meaning and intention of the statute."

⁵⁸ *Taylor v. Plunkett*, 4 Pennewill, 467.

"goods or chattels" as used in the statute.⁵⁹ No presumption of fraud arises from the seller's retention of possession if the buyer purchases at a public execution sale.⁶⁰

§ 362. **District of Columbia.**—A statute enacted in the colony of Maryland in the first half of the eighteenth century was held to be in force before the present Code was adopted.⁶¹ It is not clear whether the law has been changed by the Code, for the question has not arisen and the words of the general repealing provision are not perfectly clear.⁶² The decisions rendered by the Circuit Court during the first half of the last century were all in the form of instructions to juries, and it was not always clear what general rule the court had in mind. The prevailing view seemed to be that retention of possession by the seller rendered the sale absolutely fraudulent as to his creditors, and decisions of the Supreme Court of the United States adopting the rule of constructive fraud were cited with approval.⁶³ Only once during

⁵⁹ *Colbert v. Sutton*, 5 Del. Ch. 294, 301. In *Bowman v. Herring*, 4 Harr. 458, the court applied the provision of the statute to the case of a pledge.

⁶⁰ *Perry v. Foster*, 3 Harr. 293. It does not appear in the case whether or not the execution creditor was the purchaser.

⁶¹ Maryland Act of 1729, c. 8. "§ 5. And whereas it has often happened that several persons have heretofore secretly made over unto their creditors, or pretended creditors, or given their own children or others, sundry goods and chattels, and yet kept the same in their own possession, whereby they have been believed to be the proprietors of such goods and chattels and thereby procure to themselves credit for considerable sums of money and quantities of tobacco, to the great prejudice of several inhabitants of this province, and others, be it therefore enacted, etc. That from and after the end of this session of assembly, no goods or chattels whereof the vendor, mort-

gagor, or donor, shall remain in possession, shall pass, alter or change, or any property thereof be transferred to any purchaser, mortgagee, or donee, unless the same be by writing and acknowledged before one provincial justice, or one justice of the county where such seller, mortgagor, or donor shall reside, and be within twenty days recorded in the records of the same county. § 6. Provided always, That nothing in this act shall extend, or be construed to extend, to make void any such sale, mortgage, or gift, against such seller, mortgagor, or donor, his executors, administrators, or assigns only, or any claiming under him, her, or them."

⁶² Code (1902), §§ 1636, 1640.

⁶³ *Gilman v. Herbert*, 2 D. C. 58; *Moore v. Ringgold*, 3 D. C. 434; *Williamson v. Ringgold*, 4 D. C. 39. In *Travers v. Ramsey*, 3 D. C. 354, both the buyer and seller lived in the house where the goods were situated. The court instructed the jury that the presumption must prevail that the

this period was the old Maryland statute mentioned and it was held in that case⁶⁴ that it merely affirmed the common-law rule of constructive fraud. The Supreme Court of the District later rejected the rule of constructive fraud without referring to the older cases or to the statute.⁶⁵ The general question has arisen only once since the establishment of the Court of Appeals. The statute was applied in that case. Morris, J., used the following language: "As already stated, the bill of sale upon which the appellees rely was neither acknowledged nor recorded; and it was undoubtedly void as against *bona fide* purchasers for a valuable consideration. It may, also, with equal confidence, be regarded as void against creditors who may have dealt with Lewis & Co. (vendors), if any there were, on the faith of their ownership of the property mentioned in it. But by the express proviso of the statute it was good and valid against the appellants, who are specifically assignees, unless it can be shown that they are, in contemplation of law, purchasers for a valuable consideration or have the rights of creditors who have dealt with the assignors on the faith of the presumption that they were the real as well as apparent owners of the property covered by the bill of sale, and received credit on that account."^{65a}

§ 363. **Florida.** — In Florida, retention of possession by the seller amounts to evidence of fraud, which in the absence of perfectly satisfactory explanation is held to make the sale fraudulent against creditors. The rule was clearly stated by the Supreme Court in an early case⁶⁶ as follows: "The retention of

possession of the goods remained in the seller unless the contrary were shown, and if there was no change of possession the sale was fraudulent. In *Reed v. Minor*, 3 D. C. 82, the court instructed that although one of the grantors kept possession as the grantee's agent, if the change of title was generally known, such retention of possession would not make the sale fraudulent.

⁶⁴ *Hamilton v. Franklin*, 4 D. C. 729.

⁶⁵ In *Justh v. Wilson*, 19 D. C. 529, 531, *Montgomery, J.*, said that re-

tention of possession by the seller was "*prima facie* of fraud, open to explanation, and a question for the jury." See also *Danby v. Sharp*, 9 D. C. 435.

^{65a} *Colbert v. Baetjer*, 4 App. D. C. 416, 424. The court held that the assignees did not stand as purchasers for value, and since, as far as it appeared, the creditors whom they were assumed to represent had not become such on the faith of the seller's possession, the buyers were protected.

⁶⁶ *Gibson v. Love*, 4 Fla. 217, 241. The court in adopting the rule quoted

personal chattels, after a sale, is *prima facie* evidence of fraud, and the appropriate evidence to rebut the presumption is not the proof of the general good faith of the grantor, but an explanation of the retention, to show either that it is consistent with the deed or is unavoidable, as in the case of a ship at sea, or is temporary, for the reasonable convenience of the grantee.⁶⁷

§ 364. **Georgia.**—Retention of possession is held not to be fraud in itself, but only to raise a presumption of fraud which may be rebutted.⁶⁸ The buyer may overcome the presumption of fraud

claimed to follow the cases of *Edwards v. Harben*, 2 T. R. 587, and *Hamilton v. Russell*, 1 Cranch, 309.

⁶⁷The following cases are to the same effect: *Sanders v. Pepoon*, 4 Fla. 465; *Holliday v. McKinne*, 22 Fla. 153; *Briggs v. Weston*, 36 Fla. 629, 18 So. 852; *Spencer v. Mugge*, 45 Fla. 585; *Volusia County Bank v. Bertola*, 44 Fla. 734, 738. In the last case cited, the court said: "The rule stated in *Gibson v. Love*, 4 Fla. 217, is that where the vendor of personal property retains possession after the sale, fraud is to be inferred, unless there is evidence not of a general character negating a fraudulent intent, but of a character to explain possession; that the presumption of fraud in a case where the vendor remains in possession is so strong as to outweigh positive testimony of an entire absence of all fraudulent intent, or even to establish a fraud, where the jury are satisfied that there was none actually intended. The subsequent decisions in *Holliday v. McKinne*, 22 Fla. 153, and *Briggs v. Weston*, 36 Fla. 629, 18 So. 852, were not intended to lay down any different rule. and in the latter it is stated that where the vendor of personal property continues in the possession of same. the burden rests upon the vendee to show that such possession is either consistent with the deed, is unavoidable, temporary, or for the

reasonable convenience of the vendee, and that in the absence of evidence explaining the possession, a verdict sustaining the sale would be contrary to the evidence. A more accurate way of expressing the rule is that it devolves upon the vendee to show that the possession of the vendor is either consistent with the deed, is unavoidable, or temporary for the reasonable convenience of the vendee, and in the absence of such showing the sale will be regarded, so far as third parties are concerned, as fraudulent in law."

⁶⁸The law was settled by the case of *Peck v. Land*, 2 Ga. 1, 12, 46 Am. Dec. 368. The judge charged the jury as follows: "The possession of the vendor, after an absolute sale, of personal property, is now only *prima facie* evidence of fraud, and is open to explanation." In affirming the decision, the court said: "As it respects the sale of personal property, we cheerfully concur in the opinion of the court below. The science of jurisprudence, like all others, is progressive; and notwithstanding it was settled, and repeatedly held at home and abroad, that an absolute bill of sale of chattels, unaccompanied with possession, was fraudulent in law, and void as against creditors, yet the courts everywhere are adopting the less rigid rule, that the vendor's retaining possession after

by showing to the satisfaction of the jury that he was guilty of no bad faith in permitting the seller to retain possession.⁶⁹ If the retention by the seller is consistent with the purpose of the transfer, it is held not to be fraudulent.⁷⁰

an unconditional sale was not conclusive, but only *prima facie* evidence of fraud and susceptible of explanation; that, strictly speaking, there is no such thing as fraud in law, and that fraud or no fraud is, and ever must be, a question of fact to be found by the jury." The law thus established has been consistently applied. *Armistead v. Barker*, 4 Ga. 170; *Carter v. Stanfield*, 8 Ga. 49; *Beers v. Dawson*, 8 Ga. 556; *Collins v. Taggart*, 57 Ga. 355.

⁶⁹ *Scott v. Winship*, 20 Ga. 429. Nisbet, J., in delivering the opinion of the court in the case of *Fleming v. Townsend*, 6 Ga. 103, 105, 50 Am. Dec. 318, said: "Few, if any courts, have ventured to question that the retaining of possession was a badge of fraud. The question has been, whether it was not, *per se*, a fraud, not susceptible of explanation, and which, of itself, would annul the sale. It has also been a question, as to what amount of explanation would remove the presumption of fraud from possession; and whether the courts should not lay their hand upon the matter, and adjudge, as a question of law, when the presumption was rebutted, rather than that the whole question of explanation should be left in the hands of the jury. That possession is a mark of fraud has not been doubted — certainly, not since *Twynce's Case*, in which it was resolved to be one. This court has adopted the rule, equally applicable to real and personal estate, to sales for valuable consideration, and to voluntary deeds, that possession in the vendor, in case of an absolute sale, is *prima facie* evidence of fraud;

that it may be explained; that the onus of explanation, after possession is proven, is upon the grantee, and that the question of fraud or not is submitted to the jury."

⁷⁰ *Clayton v. Brown*, 17 Ga. 217, 219. Lumpkin, J., said: "No such presumption does or can legitimately arise, where the continued possession is reconcilable with the transfer. So, where personal property, as in this case, is conveyed by a husband and father, to a trustee, for the benefit of his wife and children, the subsequent possession of the husband and father is consistent with the object of the deed, and is no evidence, whatever, of fraud in behalf of a subsequent purchaser. The possession of the vendor is, in fact and in judgment of law, the possession of his family. And for myself, I am strongly inclined to think that such would be the construction which the law would put upon the transaction, unless the husband and father were living separate and apart from the *cestui que trust*." *Goodwyn v. Goodwyn*, 20 Ga. 600. The court disposed of a similar question in few words, saying: "The first error in the charge of the court is, that the possession of Burwell Goodwyn might be explained by his holding the property for Napoleon, his minor son." This can hardly be regarded as stating the law of the State, however, in view of more recent decisions. In *Hargrove v. Turner*, 112 Ga. 134, 136, 37 S. E. 89, 81 Am. St. Rep. 24, a father gave his minor son, who lived with him, a horse as payment for services rendered under a contract. The court did not rely on the fact that the

§ 365. **Idaho.**—To satisfy the statute⁷¹ the buyer's acts should be such as fairly to apprise the community of the change of ownership. What will be sufficient will vary with different cases, and is ordinarily a question for the jury.⁷² It has been held that although the buyer's creditors continue to give credit after knowledge of the sale, this will not prevent them from treating

attaching creditor knew of the sale when he gave credit, but held that *bona fide* retention of possession by the father did not render the sale fraudulent, since it was virtually possession by the son. Simmons, C. J., in delivering the opinion of the court, said: "In cases where title to personal property is in a minor, the law places the possession of it in the parent or guardian, and the possession of the parent is virtually the possession of the minor. Where the father and minor son resided upon the same place and dwelt in the same house and the father was in actual possession of the horse which belonged to the son, the possession of the father was that of the son and for the son's benefit." The case of *Ross v. Cooley*, 113 Ga. 1047, 1049, 39 S. E. 471, was a case of a gift where the donor kept possession as agent for the donee, and the fact of the change of ownership was not known to any one else. The following instruction was held correct: "On the other hand, if you should find that the possession of Martin Cooley, Senior, was genuine and *bona fide*, that there was no intent on his part to take advantage of any purchaser or creditor existing, or that might subsequently become a creditor, that would remove the badge of fraud, and you would be justified in finding for the defendant."

"Civil Code (1901), § 2467. "Every transfer of personal property other than a thing in action, and every lien thereon, other than a mort-

gage, when allowed by law, is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or incumbrances in good faith subsequent to the transfer."

⁷²In the case of *Hazard v. Cole*, 1 Idaho, 276, 283, Bowers, C. J., said: "It is urged * * * that the goods, in view of the provisions of law, could only be permitted to remain in the same place such reasonable time as was necessary to remove them * * * We are, however, fully satisfied that the real question to be determined in the consideration of this and every similar case is, 'Who has the possession and control of the goods, he who purchased under the sale, or he who was the owner before such sale?' If it be found that the goods are under the supervision and dominion of the party claiming to have made the sale, it (the sale) is absolutely void as to creditors, etc., though the goods have been moved a thousand miles. If, on the contrary, it is found that the goods are under the supervision, dominion,

the sale as fraudulent.⁷³ The statute does not apply where the goods are in the possession of a bailee of the seller. In such a case attornment by the bailee seems to be sufficient without any public notice of the change of title.⁷⁴ Where the seller after delivery wrongfully and without the buyer's consent regains possession of the property, the buyer's attaching creditors are not allowed to prevail over the seller.⁷⁵

§ 366. **Illinois.**—Retention of possession by the seller is held to be conclusive proof of fraud,⁷⁶ but if such retention is according to the terms of the deed of transfer or bill of sale, the rule is not

and control of the purchaser, the sale is good, though no removal follow such sale." The court did not suggest that the fact that the buyer purchased at a public execution sale might render the statute inapplicable. In *Harkness v. Smith*, 3 Idaho, 221, 28 Pac. 423, it was held that the jury was not justified in finding a sufficient change of possession of a stock of merchandise, although the name on the business letter-heads had been changed and the vendor after the sale had signed all letters and checks as "manager." In *Simons v. Daly*, 9 Idaho, 87, 72 Pac. 507, it was a close question of fact whether the term of the statute had been satisfied. The vendor after selling his stock of goods had remained in the store, and it was in dispute whether the sale was known to even one of the clerks, but there had been some change in the shop sign and in the stationery. The court refused to disturb the finding that there had been a sufficient delivery and continued change of possession, saying: "It must be conceded, we think, that these are purely questions of fact to be determined by the jury from the evidence in each particular case * * *. In the case under consideration, the evidence verges so nearly upon the border line that if we were called upon to decide

the issue in the first instance, upon the evidence as it comes before us in the record, we should hesitate before either saying there was or was not a sale, as contended for by respondent." In *Rapple v. Hughes*, 10 Idaho, 338, 77 Pac. 722, the court held that a purchaser who worked for the seller and lived in a room in the latter's house took and retained sufficient possession when he removed the goods purchased to his room and kept them there. The statute was also applied in the cases of *Hallett v. Parrish*, 5 Idaho, 496, 51 Pac. 109; *Coombs v. Collins*, 6 Idaho, 536, 57 Pac. 310, and cases cited in the notes which follow in this section.

⁷³ *Harkness v. Smith*, 2 Idaho, 952, 28 Pac. 423.

⁷⁴ *Murphy v. Braase*, 3 Idaho, 544, 32 Pac. 208; *Cornwall v. Mix*, 3 Idaho, 687, 34 Pac. 893.

⁷⁵ *Couch v. Montgomery*, 6 Idaho, 669, 59 Pac. 16.

⁷⁶ *Dexter v. Parkins*, 22 Ill. 143; *Bay v. Cook*, 31 Ill. 336; *Corgan v. Frew*, 39 Ill. 31, 89 Am. Dec. 286; *Lewis v. Swift*, 54 Ill. 436; *Johnson v. Holloway*, 82 Ill. 334; *Allen v. Carr*, 85 Ill. 388; *Rozier v. Williams*, 92 Ill. 187; *Lovejoy v. Raymond*, 127 Ill. App. 519; and cases cited in the notes which follow in this section.

applied.⁷⁷ It is not essential that the buyer take possession at once. He is protected in case he secures possession before a lien attaches.⁷⁸ Possession by the seller as agent for the buyer will not be sufficient unless the public is notified of the transfer.⁷⁹

⁷⁷ *Thornton v. Davenport*, 2 Ill. 296, 298, 29 Am. Dec. 358, was a case of a mortgage where the retention was consistent with the deed of transfer. In stating the general rule, the court said: "But while the decisions of the courts of several of the States have been vacillating and discordant, those of England, as well as those of a large majority of the States, have been uniform and consistent; and the principle well established by those decisions is that all conveyances of goods and chattels, where the possession is permitted to remain with the alienor or vendor, are fraudulent *per se*, and void as to creditors and purchasers, unless the retaining of possession be consistent with the deed, as in case of an absolute unconditional sale, where the possession does not 'accompany and follow the deed.' Here the vendor's possession is not merely evidence of fraud, but, by legal inference, is a fraud *per se*, and cannot be rebutted by testimony of fair intention; because the possession not remaining with the person shown by the deed to be entitled to it works deception and injury. But where, from the nature and provisions of the conveyance, the possession is to remain with the vendor, and the transaction is *bona fide*, its so remaining is consistent with the deed, and does not avoid it." The rule in *Thornton v. Davenport* was incorrectly interpreted a few years later in the case of *Rhines v. Phelps*, 8 Ill. 455. In *Lowe v. Matson*, 140 Ill. 108, 114, 29 N. E. 1036, there had been an assignment for the benefit of creditors; the court

referred to the rule of constructive fraud and said: "But the rule contended for by appellees does not apply even to the ordinary purchase and sale of chattel property when the possession of the vendor is consistent with the deed of sale, or when the sale is of such a public character as to give notoriety thereto, and for these reasons it has been often held that it has no application to assignments for the benefit of creditors." The same rule was laid down in the recent case of *Bass v. Pease*, 79 Ill. App. 308.

⁷⁸ *Cruikshank v. Cogswell*, 26 Ill. 366; *Frost v. Woodruff*, 54 Ill. 155.

⁷⁹ *Powers v. Green*, 14 Ill. 386; *Warner v. Carlton*, 22 Ill. 415; *Milling v. Hillenbrand*, 156 Ill. 310, 40 N. E. 941; *Rapp v. Rush*, 96 Ill. App. 356; *Morris v. Coombs*, 109 Ill. App. 176. In *Rothgerber v. Gough*, 52 Ill. 436, 438, the court said: "While it is not a fraud *per se* for the vendor to be employed by the vendee as a clerk to carry on the business, it is a circumstance creating a strong presumption of fraud, and especially so when he uses and controls the property as he did before the sale. In such a case, it requires clear and satisfactory proof to rebut the presumption. The circumstances surrounding the transaction in such a case should clearly indicate honesty and good faith to change the presumption. The circumstances and proof in this case we think are not of that character." In *Bass v. Pease*, 79 Ill. App. 308, the vendor's manager was retained by the vendee. The same sign remained on the store

Where the property is in the possession of a third person, as the buyer's agent, attornment by him to the buyer accomplishes a sufficient change of possession, and it does not appear that publicity of any sort is required.⁸⁰ In the case of a *bona fide* public sale, the fact that the seller remains in possession of the property does not render the sale fraudulent.⁸¹ And notice to the seller's creditors, at least if it is given before they become creditors, has been held to have the same effect as notice to the public generally. The cases are in confusion on this latter point, however.⁸² Where goods are represented by warehouse receipts and

and the same business card was used, but it was held that the sale was not fraudulent. In the case of *Best v. Fuller*, 185 Ill. 43, 51, there had been a sale of a stock of merchandise. The court in reviewing the facts said: "Counsel for appellees relies on the signs as indicating a change of ownership. It may be true that the card sign over the cash register, the one in the perfumery case, and the small one on the front door with the words 'Henry Best, Successor to' on it, placed over the former sign of Adolph Gaul, might indicate to one observing them that there had been a change in the business, but we think the effect of such signs more than counterbalanced by the manner in which the business was conducted." In the case of a conveyance of personalty between husband and wife living together, no change of possession is necessary, since by statute record notice of the change of ownership is substituted. *Larsen v. Ditto*, 90 Ill. App. 384, 392.

⁸⁰ *Christy v. Ashlock*, 93 Ill. App. 651.

⁸¹ *Hanford v. Obrecht*, 49 Ill. 146; *Love v. Matson*, 140 Ill. 108, 29 N. E. 1036.

⁸² *Sechler Carriage Co. v. Dryden*, 71 Ill. App. 583, 587. In its opinion

the court said: "As to *Kingman & Co.*, the sale was open and notorious. Indeed, for all we know from this record, it may be that the indebtedness to *Kingman & Co.*, upon which they obtained their execution, was not created till after notice of this transfer, or the execution may have been for a tort and not for the collection of a debt. If *Kingman & Co.* were not creditors as to the sum for which the execution was issued till after notice to their agent that appellant owned these goods, we are unable to see how the sale could have been fraudulent either in law or fact as to them. *Kingman & Co.* were not misled nor in any way injured by the detention of the goods in the possession of *Tornquist* for sale on commission. We are of opinion that under the circumstances of this case, so far as they appeared from appellant's evidence, actual notice to the creditors was as effectual to apprise them of appellant's rights as a change of possession would have been." In the case of *O'Leary v. Bradford*, 39 Ill. App. 182, the court treated notice to the officer holding the writs of the attachment as sufficient. The opposite conclusion was reached in the cases of *Hewitt v. Griswold*, 43 Ill. App. 43, 47, and *Schultz v. Reader*, 69 Ill. App. 295. In the former case

the receipts are transferred, no dealing with the goods themselves nor any public notice of the transfer is needed.⁸³ An exception has also been made in the case of standing crops. There nothing more than a symbolical delivery is necessary.⁸⁴

It is not perfectly clear from the cases what constitutes retention of possession within the meaning of the general rule in cases where there has been a delivery to the purchaser at the time of

it was said: "If there was no delivery, the sale, as we have seen, is presumed by the rules of law to be fraudulent. That being so, it is immaterial whether the judgment creditor or the sheriff had actual notice of the sale. If they knew of the sale they also knew that the possession remained with the vendor and that, therefore, the sale was void. There is no difference in effect between a sale made with actual intent to defraud creditors, and one fraudulent in law. Notice of either is only notice of a fraudulent transaction not binding upon a creditor." In the case of *Howell v. Fisk & Co.*, 52 Ill. App. 310, 315, the court, after citing *Hewett v. Griswold* with approval, said: "Cases supposed to declare that notice is effectual to aid a sale not accompanied by delivery, or where the property remains in the possession of the vendor, will, it is believed, upon careful examination be found only to declare that such notice is effectual as against a subsequent purchaser. If one purchases after notice he is but a mere volunteer, but an antecedent creditor is in an entirely different situation." In *Hiser v. Walbaum*, 129 Ill. App. 82, the court held that in an action by the buyer of goods against an officer who seized them on behalf of certain creditors of the seller the question should have been left to the jury whether the creditors had notice of the sale and whether the

transaction was so notorious and public in its character as to be equivalent to a surrender of possession.

⁸³ *Broadwell v. Howard*, 77 Ill. 305. Here the rule was held to apply where the warehouseman sold his own goods and kept possession as agent for the purchaser.

⁸⁴ In the case of *Ticknor v. McClelland*, 84 Ill. 471, 473, *Sheldon, C. J.*, said: "As regards the standing corn and stacks of hay, we consider the delivery of possession sufficient. In case of the sale of standing crops, the possession is in the vendee until it is time to harvest them, and until then he is not required to take manual possession of them. *Bull v. Griswold*, 19 Ill. 631; *Graff v. Fitch*, 58 Ill. 373, 11 Am. Rep. 85; *Thompson v. Wilhite*, 81 Ill. 356." In *Lefever v. Mires*, 81 Ill. 456, the court said: "The rule undoubtedly is, as contended by appellant, where the goods are ponderous or bulky, or cannot be conveniently delivered manually, there may be a symbolical delivery; but we are unable to see why there could not have been an actual delivery of, at least, the cow, here, even if it shall be conceded the shocks of corn and hay were too ponderous for manual delivery." In *Thompson v. Wilhite*, 81 Ill. 356, the seller's creditors attached the crops after they had been cut, but before a reasonable time for taking possession had elapsed. It was held that the buyer should be protected.

the sale and later a redelivery to the seller as his agent. In some cases it has been held that no presumption of fraud arises from the later possession of the seller.⁸⁵ But it seems from the language of the court in other cases, that this is not true unless the temporary possession of the purchaser was such as to give notice to the community of the transfer.⁸⁶

§ 367. **Indiana.**—The general rule is embodied in a statute,⁸⁷

⁸⁵ *Neece v. Haley*, 23 Ill. 416; *Wright v. Grover*, 27 Ill. 426. In *Brown v. Riley*, 22 Ill. 45, 52, the buyer had possession twelve days before putting the dealer in possession as his agent. The court said: "Whilst a sale of personal property, without a delivery and change of possession, is fraudulent as to subsequent purchasers and creditors, if the sale is made in good faith, for a sufficient consideration, and possession is taken by the purchaser, it is valid to pass the title against all creditors not having a lien upon it. And a loan of the property by the purchaser to the seller, for a temporary purpose, or the employment of the seller to use the property in the pursuit of the business of the purchaser, will not avoid the sale, and render it liable to sale on execution issued after the purchase. It may be a circumstance to be taken into consideration by the jury that the seller is subsequently found with its possession, and it is for them to determine whether such possession is *bona fide*, or is only colorable." The Appellate Court in one case distinguished *Brown v. Riley* on the ground that the buyer had there loaned the property to the seller for a temporary purpose only, and held that where the later possession of the seller was intended to continue for a substantial length of time, that the case should be treated as if there had been no delivery. *Wood v. Loomis*, 21 Ill. App. 604. See also

Eberhart v. Greenberg, 133 Ill. App. 501; *affd.*, 231 Ill. 79, 83 N. E. 101.

⁸⁶ *Cunningham v. Hamilton*, 25 Ill. 228, 231. Here the transfer was in the form of a mortgage. Breese, J., said: "On the delivery, the horse became for every purpose the property of the mortgagee, who could loan him, mortgage him, sell him, or do as he pleased with him. It was his property. But it is said, the loaning him to the mortgagor, after he had been in the possession of the mortgagee two or three days, was fraudulent *per se*. We think not. The title to the horse was perfect in the mortgagee, and he had a right to loan or hire him to the mortgagor or to any one else. He had been in the possession of the mortgagee long enough to apprise all parties of the change of ownership. The whole transaction bears none of the indicia of a fraud in law or in fact. We cannot distinguish the case from that of *Brown v. Riley*, 22 Ill. 45. In principle it is the same, and must be decided in the same way." In the case of *Pickard v. Hopkins*, 17 Ill. App. 570, where the possession of the buyer lasted only a few minutes, it was held that the rule of constructive fraud applied. The court said: "The delivery may be actual or constructive, but it must be substantial and not a mere formal and temporary change of possession."

⁸⁷ Burns' Annot. Ind. St. (1901), Vol. 3, §§ 6636, 6637. "Every sale made by a vendor, of goods in his

and permits the presumption of fraud arising from retention of possession by the seller to be rebutted by proof of the good faith of the transaction. This rule was established by the decisions of the Supreme Court before the enactment of the statute.⁸⁸ The rule seems to prevail that no presumption of fraud arises unless it is shown not only that there was no change of possession, but that the seller had no other property subject to execution at the time of the sale.⁸⁹ For the seller to continue in possession as

possession or under his control, unless the same be accompanied by immediate delivery, and be followed by an actual change of the possession of the things sold, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or subsequent purchasers in good faith, unless it shall be made to appear that the same was made in good faith and without any intent to defraud such creditors or purchasers." "The term 'creditors,' as used in the last section, shall be construed to include all persons who shall be creditors of the vendor or assignor, at any time while such goods were in his possession or under his control."

⁸⁸ The earliest cases were cases of chattel mortgages arising before a chattel mortgage recording act had been passed. *Jordan v. Turner*, 3 Blackf. 309; *Hankins v. Ingols*, 4 Blackf. 35; *Sloane v. Kingore*, 3 Ind. 549. In *Watson v. Williams*, 4 Blackf. 26, 33, *Stevens, J.*, said: "In the case of *Jordan v. Turner*, 3 Blackf. 309, the court gave a rule on that subject. The court in that case said that the 'presumption of fraud arising from subsequent possession might, in certain cases, be rebutted and explained by legal evidence; as in cases of conditional sales or mortgages; or in cases where it is a part of the original contract, where the vendor should retain possession until after default be made

in the condition of the sale; or in cases where the situation of the parties or the goods is such that immediate possession cannot be taken. In all such cases, the possession by the vendor or mortgagor, after he has parted with his property in the goods, is consistent with the contract and may be explained by parol evidence. * * * If then the after possession of the mortgagor does not contradict the terms of the deed, evidence may be received to explain that possession, and show that it was fair and consistent with the contract." No case decided since the enactment of the statute has suggested that the fact that retention of possession by the seller contradicted the terms of the instrument of transfer would prevent the buyer from showing that such retention was *bona fide*, and the sale, therefore, valid. The terms of the statute seem to be broad enough to cover such a case, so it is doubtful whether the exception sanctioned by the court in *Watson v. Williams* can be considered law to-day.

⁸⁹ *Rose v. Colter*, 76 Ind. 590, 592, *Elliott, C. J.*, said: "The rule applicable to conveyances of real estate is, that the sale cannot be impeached upon the ground of fraud unless it be shown that the debtor had no other property subject to execution at the time the conveyance was made. *Hardy v. Mitchell*, 67 Ind. 485; *Noble v. Hines*, 72 Ind. 12; *Spaulding v.*

the buyer's agent will not alone accomplish a "change of possession" within the meaning of the statute.⁹⁰

§ 368. **Iowa.**—Under the statute,⁹¹ which has been in force since the origin of the State, unless an instrument of transfer is recorded, a sale of personalty, where the seller retains actual possession, is void as against creditors and later purchasers without notice.⁹² Where the sale is recorded, retention of possession by the seller unless for an improper purpose raises no presumption of fraud.⁹³ But it seems that if it be made a part of the

Blythe, 72 Ind. 93. We can see no reason why the rule does not apply to sales of personal chattels, as well as to sales of real property. If it be shown that a valuable consideration was paid for the property, and that when the sale was made the seller was possessed of property far more than sufficient to pay all his debts, the presumption arising from the retention of possession is plainly overcome." In *Powell v. Stickney*, 88 Ind. 310, 311, the same judge in delivering the opinion said: "Under our statute fraud is a question of fact for the jury, and a case of fraud is not made out by merely showing a sale of goods without a change of possession. It is necessary for the party alleging fraud to show, at least, that the vendor had no other property subject to execution. *Rose v. Colter*, 76 Ind. 590." This rule was referred to with approval by the court in the case of *Rinn v. Rhodes*, 93 Ind. 389, 391.

⁹⁰ *Geisendorff v. Eagles*, 70 Ind. 418; *Rinn v. Rhodes*, 93 Ind. 389; *Seavey v. Walker*, 108 Ind. 78, 9 N. E. 347. In the following cases also, the rule announced by the statute was applied: *Nutter v. Harris*, 9 Ind. 88; *Jones v. Gott*, 10 Ind. 240; *Kane v. Drake*, 27 Ind. 29; *Higgins v. Spahr*, 145 Ind. 167, 43 N. E. 11.

⁹¹ Code (1897), §§ 2906, 2908. "No sale or mortgage of personal prop-

erty, where the vendor or mortgagor retains actual possession thereof, is valid against existing creditors or subsequent purchasers, without notice unless a written instrument conveying the same is executed, acknowledged like conveyances of real estate, and filed for record with the recorder of the county where the holder of the property resides." "Whenever any written instrument of the character above contemplated is filed for record, the recorder shall note thereon the day and hour of filing the same, and forthwith enter in his index book all the particulars required in the preceding section, except the sixth; and from the time of said entry the sale or mortgage shall be deemed complete as to third persons, and have the same effect as though it had been accompanied by the actual delivery of the property sold or mortgaged."

⁹² *Hesser v. Wilson*, 36 Iowa, 152; *Hickok v. Buell*, 51 Iowa, 655, 2 N. W. 512; *Clark v. Shannon & Mott Co.*, 117 Iowa, 645, 91 N. W. 923; *Martin Bros. & Co. v. Lesan*, 129 Iowa, 573; and cases cited in the notes which follow in this section.

⁹³ *Smith & Co. v. McLean*, 24 Iowa, 322 (a mortgage case). In delivering the opinion of the court in the case of *Torbert v. Hayden*, 11 Iowa, 435, 440, *Lowe, C. J.*, said: "Under such a statute, making the possession of the mortgagor equivalent to that of

consideration of the sale that the seller retain the possession and use of the property sold, the sale will be held fraudulent, since this might enable the seller to defraud his creditors by placing part of the consideration beyond their reach.⁹⁴ The Supreme Court has interpreted the words "actual possession" as they are used in the statute, as follows: "In view of the language and purpose of section 1923, we are of the opinion that actual possession, as therein contemplated, means a true, real, genuine, positive, and certain possession, and not a virtual or theoretical possession. The mortgagor is in actual possession when he retains the property under his immediate personal supervision and control, though he employ others to aid in that control; but when the property is intrusted to the custody and control of another,

actual delivery to the mortgagee, it is most difficult to conceive how the retention of possession by the mortgagor can ever, under any circumstances, be regarded a fraud in law; for the plain reason that such possession is not only authorized, but explained by the statute itself, and, therefore, cannot be inconsistent with the rights of the parties or the nature and purposes of the transaction. On the other hand it is easy for us to conceive how such a mortgage may be fraudulent in fact whether the possession of the property be in one party or the other, and notwithstanding it may be regularly executed, duly recorded, and all fair upon the face; yet such fact or fraudulent intent must be shown by extrinsic evidence and pronounced by the jury. But in doing so the jury could infer nothing from the possession of the property by the mortgagor, for this would be entirely consistent with the authority of the statute, if the parties had duly complied with the terms thereof. The manner, however, of the possession would be a proper subject of inquiry. If it was accompanied with the power of disposition, or used in any way inconsistent with the object of the

security of the rights of the mortgagee, these would be badges of fraud, not absolute, but *prima facie*, requiring explanation. The fact that the bill of sale does not provide for the property to remain in the seller's possession makes no difference. *Kuhn v. Graves*, 9 Iowa, 303."

⁹⁴ In *Jordan v. Lendrum*, 55 Iowa, 478, 483, 8 N. W. 311, the court said: "If the vendor has received an actual consideration for the property sold, it can be no disadvantage to creditors that he is allowed to remain in the possession of the property, exercise acts of ownership and control over it, and to use and dispose of it, or to convert it to his own use. Such control and use only better the financial condition of the vendor, render him more able to pay his debts, and thus benefit rather than injure his creditors. If it should be made part of the consideration of the sale that the vendor should retain the possession and use of the property sold, this might enable the vendor to place part of the consideration received beyond the reach of his creditors, and thus perpetrate a fraud upon them, if the transaction should be sustained. This is the doctrine of *Macomber v. Peck*, 39 Iowa, 351."

without the immediate personal supervision of the mortgagor, then the actual possession is in that other, and not in the mortgagor."⁹⁵ Clearly then if the seller's bailee in possession has attorned to the buyer, that is sufficient.⁹⁶ But attornment is not essential, and the purchaser is protected even though the bailee received no notice of the transfer until after creditors attached.⁹⁷ In order to have a sufficient change of possession to take a case out of the statute the change must be of such a character as to suggest to strangers that there has been a transfer of title.⁹⁸ A symbolical change of possession will be sufficient in the case of property not reasonably capable of actual delivery.⁹⁹ Actual delivery to the buyer is insufficient where the seller im-

⁹⁵ *King v. Wallace Bros.*, 78 Iowa, 221, 226, 42 N. W. 776.

⁹⁶ *Barrows v. Harrison*, 12 Iowa, 588, 592; *Frank v. Levi*, 110 Iowa, 267, 81 N. W. 459; *Young v. Evans*, 118 Iowa, 144, 92 N. W. 111. In *Thomas v. Hillhouse*, 17 Iowa, 67, 70, the court said: "The vendor, in this case, did not 'retain the actual possession' of the safe; it had been leased to and was in the actual possession of Lauman, Hedge & Co. who were entitled to and did retain such actual possession for the term of three years. This case is not, therefore, within the letter of the law. * * * *Green, Thomas & Co.* (the vendors) were not in the actual possession of the safe, and, therefore, could not thereon acquire or retain credit, or make sale and delivery to a purchaser on the faith of such possession, and this case is not, therefore, within the spirit of the statute."

⁹⁷ *Sansee v. Wilson*, 17 Iowa, 582; *Campbell v. Hamilton*, 63 Iowa, 293, 19 N. W. 220. In the latter case it was held that the fact that the buyer had the right to immediate possession at the time of the sale made no difference.

⁹⁸ *Boothby v. Brown*, 40 Iowa, 104; *McKay v. Clapp*, 47 Iowa, 418; *McAfee v. Busby*, 69 Iowa, 328, 28 N.

W. 623 (case of a gift); *Horsley v. Hairsine*, 77 Iowa, 141, 41 N. W. 597; *McIntosh v. Wilson*, 81 Iowa, 339, 46 N. W. 1003; *Wessels v. McCann*, 85 Iowa, 424, 52 N. W. 346; *Harris v. Pence*, 93 Iowa, 481, 61 N. W. 927. In *Smith v. Champney*, 50 Iowa, 174, 176, there was a sale of standing corn. The court said: "In our opinion, when a person sells a field of corn standing upon his farm, and the vendee does not commence to harvest it, nor otherwise visibly take charge of the corn or control of the field in which it stands, the actual possession is not changed within the meaning of the statute." The facts in the case of *Nuckolls v. Pence*, 52 Iowa, 581, 582, 3 N. W. 631, were identical with those in *Smith v. Champney*, save that the vendee had cut part of the corn and fed it to his stock. Beck, C. J., in delivering the opinion of the court said: "In the case at bar there was no change in the possession; it remained in Moorehouse's field subject to his control, as it had been before the sale. The feeding of a part of it by plaintiff did not affect the actual possession of what remained, which was still in Moorehouse."

⁹⁹ *Peycke Bros. v. Hazen*, 119 Iowa, 641, 644, 93 N. W. 568.

mediately afterward is allowed to take and keep possession under circumstances which suggest no change of ownership.¹ A sale will be valid where there has been a redelivery by the buyer to the seller only in case the buyer's possession was of such character as to give notice of the transfer to persons dealing with reference to the property.² For a creditor to be able to attack a sale because of lack of change of possession, he must not only have been a creditor at the time the transfer was made, but he

¹ In *Sutton v. Ballou*, 46 Iowa, 517, 520, the court, referring to the instructions given at the trial, said: "The only complaint made of these instructions is, that they direct the jury that plaintiff must have continued in the possession of the property from the time of the purchase up to the date of defendant's mortgage. Appellant argues that if the cattle were sold and delivered to plaintiff, he would have the right to leave them in the possession of any one. But, as applied to the facts of this case, we think this portion of the instructions is not erroneous. At the time of the contract of sale, the plaintiff, at the most, as shown by the testimony, had possession of the property but a few minutes. He then left it on the range under such circumstances that O'Hara, to all appearances, had the same actual possession of it as before. As contradistinguished from this act, plaintiff ought, in the language of the instruction, to have continued his possession."

² This question was squarely raised by the instructions given at the trial in the case of *Deere & Co. v. Needles*, 65 Iowa, 101, 105, 21 N. W. 203. In delivering the opinion of the court, Rothrock, C. J., said: "It cannot be claimed that where one in good faith purchases property and takes possession thereof, he may not afterward loan it or hire it to the seller. The objection to the instruction is that the jury are therein di-

rected that, in order to find the sale a valid one, it must be found that Fisher retained the full and complete actual possession of the property for such length of time as that the public became generally apprised of Fisher's purchase, and that his possession became generally known in the community. This, we think, was erroneous. A sale of personal property, accompanied by delivery and possession, may be valid, without the public having any knowledge upon the subject. Such a rule is not susceptible of proof as a fact, and, indeed, the public never generally becomes advised of so trivial a transaction as the sale of a horse, buggy, and harness. The purpose of the statute is that there shall be such a change of possession as will give to parties dealing with the seller or buyer notice of the transaction. It is such transfer of dominion over the property as to impart notice to persons dealing with reference to the property that the title has been transferred, or such possession as will put such persons in possession of such facts as will lead to inquiry as to the ownership. It is sometimes said that the possession must be such as to be notice to the world. This does not mean notice to the public generally, but to those who propose to purchase the property or deal with reference to it." See also *Preston v. Peterson*, 107 Iowa, 244, 77 N. W. 864.

must have acquired a lien by attachment or otherwise before receiving either actual or constructive notice.³

§ 369. **Kansas.**—A statute⁴ allows the purchaser to overcome the presumption of fraud arising from proof of retention of possession by the seller by showing that the sale was made in good faith and for a sufficient consideration.⁵

§ 370. **Kentucky.**—A statute⁶ renders any transfer of personal property, where there has been no change of possession, fraudulent against creditors unless an instrument of transfer is recorded. The rule that retention of possession by a seller renders a sale constructively fraudulent was adopted by the Court of Appeals at an early date before the enactment of the stat-

³ *Murphy v. Murphy & Co.*, 126 Iowa, 57. This was a mortgage case, but the rule should be the same as in cases of sales since the statute regulates mortgages and sales in precisely the same manner. The words "without notice" in the statute apply to creditors as well as to later purchasers. In the case of *Allen v. McCalla*, 25 Iowa, 464, 477, 96 Am. Dec. 56, this was so held, the court citing *Miller v. Bryan*, 3 Iowa, 58, and *Crawford v. Burton*, 6 Iowa, 476.

⁴ Gen. St. (1897), c. 112, § 3. "Every sale or conveyance of personal property unaccompanied by an actual and continued change of possession shall be deemed to be void as against purchasers without notice and existing or subsequent creditors, until it is shown that such sale was made in good faith and upon sufficient consideration. This section shall not interfere with the provisions of law relating to chattel mortgages."

⁵ *Wolfley v. Rising & Son*, 8 Kans. 297; *Phillips v. Reitz*, 16 Kans. 396; *Kansas Pacific Ry. Co. v. Couse*, 17 Kans. 571; *Locke v. Hedrick*, 24 Kans. 763; *Tullis v. McCall*, 2 Kans. App. 545. *Brewer, J.*, in delivering

the opinion in the case of *Kansas Pacific Ry. Co. v. Couse*, said: "We do not understand the law to imply that one purchasing property without taking actual possession is, if there be creditors of the vendor, presumptively engaged in a fraudulent transaction, and his conduct scrutinized accordingly, but simply that one claiming under such a purchase takes nothing until he shows that he made such purchase in good faith, and for sufficient consideration. In other words, the mere production of a bill of sale, which would be sufficient as against the vendor, is not sufficient as against the creditor, and he must supplement that bill of sale with proof of good faith, and payment of value."

⁶ St. (1903), § 1908. "Every voluntary alienation of or charge upon personal property, unless the actual possession, in good faith, accompanies the same, shall be void as to a purchaser without notice, or any creditor, prior to the lodging for record of such transfer or charge in the office of the county court for the county where the alienor or person creating the charge resides."

ute.⁷ Although the statute has been in force for more than half a century there seems to have been no decision to the effect that the recording of a bill of sale will dispense with the necessity of a change of possession.⁸ The statute has been regarded as declaratory of the common law of the State and the exceptions to the general rules of constructive fraud which were established before its enactment have been held to prevail under it. The rule that retention of possession by the seller after the sale is of itself fraudulent, although always recognized by the court has been frequently criticized, and several important modifications have been established. Where the property sold is already in the possession of a bailee of the seller, it is held that no change of possession is necessary.⁹ If an immediate change of the possession of the property is impracticable or very inconvenient, as in the case of growing crops or bulky articles, retention of possession by the seller for a reasonable time is permissible.¹⁰ In an

⁷ *Dale v. Arnold*, 2 Bibb, 605, settled the law. *Grimes v. Davis*, 1 Litt. 241; *Hundley v. Webb*, 3 J. J. Marsh. 613, 20 Am. Dec. 189; *Stephens' Admrs. v. Barnett*, 7 Dana, 257; *Woodrow v. Davis*, 2 B. Mon. 298; *Mason v. Baker*, 1 A. K. Marsh. 208, 10 Am. Dec. 724. In the case of *Brummel v. Stockton*, 3 Dana, 134, the general rule was stated as follows: "It is the settled doctrine of this court, that, whenever the title absolutely passes, by a contract between the owner and the purchaser, the possession of the thing sold, if it be movable property, and then susceptible of delivery, must go with the title, or that, otherwise, the sale will, for the benefit of a creditor of the seller, or a subsequent *bona fide* purchaser from him, be deemed fraudulent in law."

⁸ In *Foster v. Grigsby*, 1 Bush, 86, the question was expressly left open. In the case of *Short v. Tinsley*, 1 Met. 397, 71 Am. Dec. 482, the court mentioned the fact that the bill of sale had been recorded immediately after

the transfer, but the decision was not rested on that ground.

⁹ *Butt v. Caldwell*, 4 Bibb, 458. In delivering the opinion in the case of *Thierman v. Laupheimer*, 21 Ky. L. Rep. 1631, 1633, Hobson, J., said: "Section 1908, Kentucky Statutes, has no application, for the reason that the property was not in Laupheimer's actual possession, but stored in the warehouse of the two distillery companies. The whiskey could not be removed from the warehouse until the tax on it was paid, and there could not, therefore, be a manual delivery of it to the purchasers."

¹⁰ *Morton v. Ragan*, 5 Bush, 334; *Robbins v. Oldham*, 1 Duv. 28; *Cummings v. Griggs*, 2 Duv. 87, 87 Am. Dec. 482; *Kenton v. Ratcliffe*, 105 Ky. 376, 49 S. W. 14. In the first three cases cited, growing crops were sold. In the case of *Bourbon Bank v. Porter's Exr.*, 22 Ky. L. Rep. 429, 57 S. W. 609, a sale of horses in the possession of a third party was held to be within the exception. In

early case¹¹ where the buyer and seller lived in the same family and there had been no visible change in the possession of the property after the sale, the court left the question of fraud to the jury. Later cases have refused to adopt this view, however, and have required a change of possession in such a case, which will be sufficient to give notice to the community of the transfer.¹² But where the transfer is made by a parent to a minor child living in the same house, the possession of the parent is allowed to raise no presumption of fraud. The point has arisen in cases of gifts.¹³ In the case of a sale by a transfer of a bill of lading,¹⁴

the case of *Taylor v. Smith*, 17 B. Mon. 536, 541, the court said: "There is no doubt that, as a general proposition, all absolute sales of personal property, when the possession remains with the grantor, are fraudulent in law. This is a well-settled general proposition. But the principal reason of this rule of law is, that such possession gives to the vendor a delusive credit, whereby he may be able to cheat and defraud those who may be ignorant of the transaction. Another reason is, that the possession of the vendor, under such circumstances, is incompatible with the sale, and is a badge of collusion. This rule of law is a safe and reasonable one, but it should not be applied to cases where the reason of it fails, and where indeed its application would be unreasonable. It is true, that in the present case the slaves were permitted to remain on the premises of the vendor, but under circumstances altogether consistent with the sale, and consistent with reason and propriety. No delusive credit was extended in consequence thereof, nor is it probable that there could have been delusive credit caused thereby. It was inconvenient to take the slaves away immediately, and the purchaser left them merely to procure a suitable conveyance, which he intended to procure on the following morning; and he either sent for

them the next morning, or declined to do so in consequence of receiving word that the sheriff had attached and taken them off. The rigorous application of the general rule, as insisted upon by the counsel, would scarcely allow a purchaser to go to a near neighbor's house to procure the means of taking away his property on the same day."

¹¹ *Wash v. Medley*, 1 Dana, 269.

¹² *Waller v. Cralle*, 8 B. Mon. 11; *Jarvis v. Davis*, 14 B. Mon. 529, 61 Am. Dec. 166; *Steir v. Robinson & Co.*, 2 Bush, 307; *Kahn v. Goodhart*, 3 Ky. L. Rep. 615; *McLeod v. O'Neill*, 15 Ky. L. Rep. 152, 22 S. W. 220. See also *Pitzee v. Rogers*, 3 Ky. L. Rep. 390.

¹³ *Kenningham v. McLaughlin*, 3 T. B. Mon. 30; *Enders v. Williams*, 1 Met. 346. In the case of *Forsyth v. Kreakbaum*, 7 T. B. Mon. 97, 99, the court said: "It would be a merciless act of the law to deprive an infant of possession, and declare him or her incapable of managing the estate, and for this cause to assign this possession to another, and afterward make it a fraud in the infant, for permitting that possession and to subject the estate either to the debts or sales of him, to whom the law confided the possession, barely because he had the possession. In such case the possession of the father is the possession of the child."

or a warehouse receipt¹⁵ no change in the actual possession of the property is necessary. If the objecting creditor had knowledge of a sale when he gave credit, he will not be permitted to treat it as void.¹⁶ Nor does the general rule apply in cases of judicial sales,¹⁷ transfers in trust for the payment of debts,¹⁸ or transfers of property exempt from execution.¹⁹ In a case which arose

¹⁵ Kentucky Refining Co. v. Globe Refining Co., 104 Ky. 559, 47 S. W. 602, 42 L. R. A. 353, 84 Am. St. Rep. 468.

¹⁶ Cochran v. Ripy, 13 Bush, 495.

¹⁷ In the case of Vanmeter v. Estill, 78 Ky. 456, 457, 459, 460, the court said: "This court has held, in an unbroken line of decisions, commencing with Bradley v. Buford, Sneed, 12, 13, and continuing down to Morton v. Ragan, 5 Bush, 334, that an absolute sale of personal property is, in judgment of law, *per se* fraudulent as to purchasers from and creditors of the seller, unless the possession of the property 'accompanies and follows' the title. But the court has more than once expressed its dissatisfaction with the rule, and declared that it should be 'strictly confined to that class of cases to which it had been previously authoritatively extended.' Daniel v. Morrison, 6 Dana, 185; Enders v. Williams, 1 Met. 346, 352. And in the latter case it was said that the tendency of modern decisions in this, as well as in the courts of most of the other States, has been to leave the question of fraud open to investigation, to be determined by all the facts which tend to show the actual intention with which the conveyance was executed; and in the former case the doctrine of *per se* fraud is characterized as arbitrary, and inconsistent with the harmony of legal science. Acting upon these views of the rule, this court, while recognizing it in all cases coming strictly and entirely within its terms

as too firmly established to be overturned by judicial action, has seized upon any slight circumstance that might enable it to make the case in hand an exception to the rule. * * * If a gift be valid against a purchaser with notice, although the possession remains with the donor, *a fortiori* a sale for value should be valid against a creditor whose debt is created with actual notice of the sale. No wrong is done to the creditor by so holding. He created his debt with knowledge that he could not look to the property previously sold for its payment without inflicting an injury on another, and to aid him to subject it would be to carry the doctrine of *per se* fraud to an extent to which it has not been previously carried, and to contravene the often declared purpose of this court not to extend that doctrine."

¹⁸ Greathouse v. Brown, 5 T. B. Mon. 280, 17 Am. Dec. 67; Kilby v. Haggin, 3 J. J. Marsh. 208; Allen v. Johnson, 4 J. J. Marsh. 235. Where the buyer had an execution against the seller in an officer's hands and the seller privately sold the property to him in satisfaction of his debt, the mere fact that the sale was not entirely voluntary did not prevent the seller's retention of possession from making the transfer fraudulent. Laughlin v. Ferguson, 6 Dana, 111.

¹⁹ Byrd v. Bradley, 2 B. Mon. 239; Christopher v. Covington, 2 B. Mon. 357; Lyons v. Fields, 17 B. Mon. 543.

²⁰ Anthony v. Wade, 1 Bush, 110; Morton v. Ragan, 5 Bush, 334.

in chancery,²⁰ the court regarded the rule of constructive fraud as imposing too great a hardship on a defendant who had acted in good faith, and whose failure to take possession had caused no damage to the plaintiff, a creditor having a claim prior to the sale. The court, therefore, compelled the plaintiff to permit the defendant to reimburse himself from the proceeds of the property to the extent of the price he had paid for it. A creditor whose claim arose subsequent to the sale would not, it seems, have been thus compelled. Where transfer of possession is practicable and is in fact made, if it amounts only to a mere momentary delivery, and the property is immediately put back into the seller's possession, as a loan, the change of possession will not satisfy the general rule, and the sale will be fraudulent.²¹

§ 371. **Louisiana.**—The rule of law is stated in the Civil Code.²² In order to give effect both to article 2247 and to article 2480, it was held in an early case,²³ that the cases referred to in the latter article must be regarded as exceptions to the rule contained in the former. This distinction was also expressly taken in several later cases.²⁴ The general rule contained in article 2247,

²⁰ *Short v. Tinsley*, 1 Met. 397, 71 Am. Dec. 482.

²¹ *Goldsbury v. May*, 1 Litt. 254.

²² Rev. Civil Code (1900), Art. 2247. "Sales or exchanges of movable property are void against bona fide purchasers and creditors unless possession is given before such bona fide purchaser or creditor acquires his right by possession. What a delivery of possession is depends on the nature of the property; it may be constructive or actual; the delivery of the key of a store in which it is contained, or an order accepted by the person in whose custody it is held, if at the order of the vendor, is good evidence of delivery." Art. 2480. "In all cases where the thing sold remains in the possession of the seller, because he has reserved to himself the usufruct, or retains possession by a precarious title, there is reason to presume that the sale is simulated, and with respect to third

persons, the parties must produce proof that they are acting in good faith, and establish the reality of the sale." Art. 533. "Usufruct is the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility and advantages which it may produce, provided it be without altering the substance of the thing. The obligation of not altering the substance of the thing takes place only in the case of perfect usufruct." Art. 3556, § 25. "That possession is called precarious, which one enjoys by the leave of another, and during his pleasure. The title which excludes the ownership, such as a lease, is also called precarious."

²³ *Williams' Exrs. v. Franklin*, 7 Mart. (N. S.) 670, 675.

²⁴ *Gontier v. Thomas*, 4 Rob. 455; *Sullice v. Gradenigo*, 15 La. Ann. 582; *McCloskey v. Central Bank*, 16 La. Ann. 284.

making sales without delivery of possession void against creditors, has been frequently applied.²⁵ More frequently, however, and uniformly during the last twenty years, cases have been held to be governed by article 2480, which allows the presumption that the sale is "simulated" to be overcome by proof of the good faith of the parties.²⁶ A sufficient change of possession is accomplished by the indorsement and delivery of a bill of lading,²⁷ or by the attornment of the vendor's bailee in actual possession.²⁸

§ 372. **Maine.**—Retention of possession by the seller of personal property is deemed *prima facie* evidence of fraud. The cases have not expressly said that such evidence in the absence of any satisfactory explanation is conclusive of fraud, but aside from some general language used in a few cases the decisions are reconcilable with this view.²⁹ The distinction between the requirement of delivery as against third parties, and the doctrine of fraudulent retention of possession, is, however, observed. In a case decided in 1840, the Supreme Court said: "It must be admitted that the strength of the reasoning upon which the rule rests, that there must be a delivery as respects other parties, has

²⁵ Durnford v. Syndics of Brooks, 3 Mart. (O. S.) 222; Norris v. Mumford, 4 Mart. (O. S.) 20; Fisk v. Chandler, 7 Mart. (O. S.) 403; Badual v. Moore, 9 Mart. (O. S.) 403; Wilson v. Smith, 12 La. 375; Jorda v. Lewis, 1 La. Ann. 59; McCandlish v. Kirkland, 7 La. Ann. 614; Lassiter v. Bussy, 14 La. Ann. 699 (here the rule was applied in the case of a note); McCarthy v. Baze, 26 La. Ann. 382; D'Armand v. Sheriff, 21 La. Ann. 382; Moss, Wise & Co. v. Johnson, 28 La. Ann. 308. In Lassiter v. Bussy, it was held that the fact that the creditor had notice of the sale made no difference.

²⁶ Hall v. Hill, 6 La. Ann. 745; Wartel v. Darbeire, 8 La. Ann. 506; Griffith v. Frellsen, 11 La. Ann. 163; Miltenberger v. Parker, 17 La. Ann. 254; Guice v. Sanders, 21 La. Ann. 463; Edwards v. Fairbanks, 27 La. Ann. 449; Spivey v. Wilson, 31 La. Ann. 653; Devonshire v. Gauthreaux,

32 La. Ann. 1132; Nieman v. Condran, 34 La. Ann. 847; Cole v. Cole, 39 La. Ann. 878, 2 So. 794; Cochran v. Gilbert, 41 La. Ann. 735, 6 So. 731. In Yale v. Bond, 45 La. Ann. 997, 13 So. 587, and Baldwin & Co. v. Bond, 45 La. Ann. 1012, 13 So. 742, the presumption of fraud was held to be rebutted by proof that the sale was a judicial one and that the vendor was left in possession as the vendee's agent.

²⁷ Flash, Lewis & Co. v. Schwabacker & Co., 32 La. Ann. 356.

²⁸ Davenport v. Adler & Co., 52 La. Ann. 263, 26 So. 836.

²⁹ Haskell v. Greely, 3 Greenl. 425; Reed v. Jewett, 5 Greenl. 96; Ulmer v. Hills, 8 Greenl. 326; Bartlett v. Blake, 37 Me. 124, 58 Am. Dec. 775; Vining v. Gilbreth, 39 Me. 496. Maine was not separated from Massachusetts until after the decision of Brooks v. Powers, 15 Mass. 244, 8 Am. Dec. 99.

been greatly impaired in this and other States, where the common law has been so modified as to allow the purchaser to prove that the sale was not fraudulent where possession did not accompany and follow it. What will amount to proof of delivery has been the subject to much discussion; and it is regarded more difficult and would probably be found impracticable, to state any general rule applicable to all cases, especially in those States where the law has been so modified as not to require an actual and permanent change of possession, and where delivery is, therefore, rather nominal and symbolical than actual. But because the reasoning upon which the rule of law was established does not operate as formerly, and the rule itself is less convenient in practice, that does not authorize a court of law, contrary to a uniform course of decisions, to declare that the rule no longer exists."³⁰ Accordingly a temporary change of possession, or delivery, at the time of the sale is required, but it may be accomplished by slight acts or even in some cases by mere words.³¹ In case of a *bona*

³⁰ *Ludwig v. Fuller*, 17 Me. 162, 167, 35 Am. Dec. 245. It is probable that the rule requiring delivery is much older than that in regard to fraudulent retention of possession. See *supra*, § 260. And though the rules relate to the same state of facts, they are not otherwise connected.

³¹ *Haskell v. Greely*, 3 Greenl. 425; *Stone v. Peacock*, 35 Me. 385; *Bartlett v. Blake*, 37 Me. 124, 58 Am. Dec. 775; *Fairfield Bridge Co. v. Nye*, 60 Me. 372; *Reed v. Reed*, 70 Me. 504; *Goodwin v. Goodwin*, 90 Me. 23, 37 Atl. 352, 60 Am. St. Rep. 231. In *Cobb v. Haskell*, 14 Me. 303, 305, 307, 31 Am. Dec. 56, the lumber sold was piled in the seller's lumber yard and merely pointed out to the buyer at the time of the sale. The court said: "The lumber was pointed out to the plaintiff, and he was informed by what mark it might be known. From the testimony it appears that the plaintiff was requested to take it away and make the best of it. But the plaintiff took no part of the lum-

ber, nor exercised any act of ownership over it, but left it in the debtor's possession as before, up to the time of the attachment, a period of two months. Considering, however, the nature and position of the property, it comes very nearly up to what has been required, to put it out of the reach of other creditors; but upon the whole, in our judgment, there was not quite enough done to produce this effect; and these transactions are so likely to occasion false credit and fraud upon creditors that the doctrine of constructive delivery ought not to be extended * * *. In the case under consideration, there was not the slightest indication of a transfer of the property. It remained as before in the debtor's millyard, still bearing the mark it then had, being the initial letter of the debtor's surname. And thus it continued, without a single movement on the part of the plaintiff, to avail himself of the property. To sustain his title, under these circumstances, against an at-

fide agreement at the time of the sale under which the seller remains in possession as the buyer's agent the seller's possession

taching creditor would be going farther than can be justified by the principles by which cases of this sort have been governed." In the case of *Vining v. Gilbreth*, 39 Me. 496, 498, it was said: "Where the articles sold are ponderous, a symbolical or constructive delivery will be equivalent in its effect to an actual one. So when goods sold are in a warehouse, the delivery of the key has been deemed sufficient. The delivery of wine in a cellar is held to be made by a delivery of the keys of the cellar. The title to a ship at sea may pass by a delivery of the bill of sale. In this case the ship was unsusceptible of manual tradition from its bulk. The delivery of the key was as complete a delivery as the subject-matter reasonably admitted, and if in good faith is sufficient to pass the title." In *McKee v. Garcelon*, 60 Me. 165, 166, 169, 11 Am. Rep. 200, the court said: "There must be such evidence arising from the conduct of the parties as shows a relinquishment of ownership and possession of the property by the vendor, and an assumption of these by the vendee. This is the case: 1. Actually, when there has been a formal tradition of the property to the vendee; or, 2. Constructively, when, the property not being present, or accessible, as a ship at sea, the vendor gives the vendee a grand bill of sale, under which he takes possession upon her arrival in port; or if the property is difficult of access, as logs in a stream, or incapable of manual tradition, as large blocks of stone, when the vendor approaches in view of it with the vendee, and proclaims a delivery to him; or, when a part of the goods are delivered for the whole; or, if

the goods are in the custody of a third party, where the parties to the sale give such party notice of the transfer; or, 3. Symbolically, when the vendor gives the vendee the key to the warehouse in which the goods are stored, or an order on the wharfinger, or warehouse-keeper, who has them in charge, or a duplicate invoice of a ship's cargo, authenticated by the master, or a bill of lading duly indorsed. Though the assignment and delivery to the vendee by the vendor of a bill of lading, invoice, or other like documentary evidence of his title to the goods has been held good, as a symbolical delivery, the delivery of a bill of parcels, or bill of sale by the vendor to the vendee has been held insufficient, as these depend solely upon the vendor for their authenticity, and may be multiplied indefinitely; such memoranda are not, technically considered, documentary evidence of the vendor's title. * * * In this case there was no actual delivery. John McKee, the vendor, and husband of the plaintiff, held the same possession after as before the sale of the cattle. There was no change of possession by the act of sale. The plaintiff had no possession either of the cattle or the farm on which they were kept. She resided on the farm simply because her husband did. Nor was there any constructive or symbolical delivery, unless the delivery of the bill of sale constituted one; and that, as we have seen, is not sufficient, there being nothing to prevent an actual delivery by a transfer of the manual possession of the property of the vendee." See also *Sawyer v. Nichols*, 40 Me. 212, 216, 217.

will be deemed the possession of the buyer.³² In no case can a creditor who has notice of a *bona fide* sale attach the property merely because there has been no delivery or change of possession, and in a suit where the sheriff is the nominal party to the action, notice to the creditor will be held good against him.³³ But notice to the sheriff if not communicated to the creditor is insufficient in a suit where the creditor is the party to the action.³⁴

§ 373. **Maryland.**—The recording of a bill of sale in conformity with the statutory requirements³⁵ prevents a conveyance from be-

³² *Goodwin v. Goodwin*, 90 Me. 23, 37 Atl. 352, 60 Am. St. Rep. 231. In the case of *Hotchkiss v. Hunt*, 49 Me. 213, 221, Kent, J., said: "It is insisted, however, that if the title actually passed under the first sale, that a resale can be effected only in the same manner as the original sale, and that, unless a delivery is proved, the title will not revest. This proposition, as a general rule, seems to be well established. But where, by the terms of the agreement, or by a fair implication therefrom, the article thus sold or resold is to remain in the possession of the vendor for a specific time or for a specific purpose, as part of the consideration, and the sale is otherwise complete, the possession of the vendor will be considered the possession of the vendee, and the delivery will be complete and sufficient. In the case of *Barrett v. Goddard*, 3 Mason, 107, it appeared that certain bales of cotton were sold by marks and numbers, then lying in vendor's warehouse, for which a note was given on six months, and it was agreed that they might remain rent free, at option of vendee, in vendor's warehouse; and, although there was no separation or formal delivery in any manner, it was held that the delivery was complete as against a subsequently attaching creditor, whose title was by assignment. Judge Story says: 'The principle is sound that a continuance

of the possession of the vendor does not prevent the delivery being complete, if nothing further remains to be done on either side, and the possession is by mutual consent. There is nothing in reason or principle to make the present case different, simply because the bales of cotton remained in the plaintiff's warehouse. It was part of the bargain that they should so remain, and a part of the consideration of the promise.' This case is cited and part of the above language quoted by Shepley, C. J., in *Means v. Williamson*, 37 Me. 556. The case of *Gleason v. Drew*, 9 Greenl. 79, 81, sustains the same view. That was a case of resale, and the point was urged that there was no delivery. The court admit the general principle that the same formalities were requisite in resale as in the original sale, but hold, that where, under the new agreement for a resale, one of the terms was that the vendor should retain the property as the vendee's, with a right to repurchase, that the property would be reinvested in the original owner without any other delivery."

³³ *Ludwig v. Fuller*, 17 Me. 162, 35 Am. Dec. 245.

³⁴ *McKee v. Garcelon*, 60 Me. 165, 11 Am. Rep. 200.

³⁵ Code (1904), Art. 21, §§ 41, 50. "No personal property, of any description whatever, whereof the vendor, mortgagor or donor shall re-

ing defeated on account of the vendor's retention of possession.³⁶ Where there is a sufficient change of possession, obviously no

main in possession, shall pass, alter or change, or any property therein be transferred to any purchaser, mortgagee or donee, unless by bill of sale or mortgage acknowledged and recorded as herein provided; but nothing herein shall be construed to extend to any sale or gift, where the same is accompanied by delivery, nor to invalidate such transfer as between the parties thereto." "No bill of sale or mortgage of personal property shall be valid, except as between the parties, unless the bargainee or vendee or mortgagee, or some one of them, or the agent of some one of them, shall make an affidavit that the consideration in said bill of sale or mortgage is true and bona fide as therein set forth." The general provisions of section 41 have been in force since enactment of the act of 1729, c. 8, § 5.

³⁶ *Fister v. Beall's Admrs.*, 1 H. & J. 31; *Hambleton's Exr. v. Hayward*, 4 H. & J. 443; *Clary v. Frayer*, 8 G. & J. 398; *Kreuzer v. Cooney*, 45 Md. 582; *Paine v. Young*, 56 Md. 314. In *Garrett v. Hughlett*, 1 H. & J. 3, 4, it was said: "The act of Assembly, by requiring the bill of sale to be acknowledged and recorded within a limited time, intended by those circumstances of notoriety to take off the presumption of fraud arising from the vendor's continuing in possession. But if there were other circumstances attending the transaction, which tended to show it fraudulent, those circumstances might be given in evidence." In *Bruce's Admrs. v. Smith*, 3 H. & J. 499, the bill of sale had been recorded in the District of Columbia where the parties resided at the time of the transfer. The grantor later moved

into Maryland with the slaves sold in his possession, and they were there attached by his creditors. The statute in the District of Columbia was identical with that in force in Maryland and the grantee was protected. In the following cases either no record or no acknowledgment of the sale was made, or that which was made was held to be insufficient under the statute, and the vendor's retention of possession, therefore, rendered the conveyance absolutely fraudulent as to third persons: *Coale v. Harrington*, 7 H. & J. 147; *Byer v. Etnyre*, 2 Gill, 150, 41 Am. Dec. 410; *Texter v. Orr*, 86 Md. 392, 38 Atl. 939; *Fersner v. Bradley*, 87 Md. 488, 40 Atl. 58; *Pleasanton v. Johnson*, 21 Md. 673, 47 Atl. 1025 (here the transfer was in the form of a mortgage). In the case of *Franklin v. Claflin*, 49 Md. 24, 44, where a bill of sale was properly recorded, the court used language suggesting that where the retention of possession and use of the property by the seller conflicts with the terms of the bill of sale, the sale should be considered constructively fraudulent. The court said: "Waiving for the present the fact that the bill of sale and deed of covenant of the 8th of January, 1876, purport to constitute an absolute transfer of all the right, title, and interest of the vendors, to the claimant, the vendee, in and to the chattels, choses in action, etc., of the vendors, and that the retention of an interest in and control over it, would be in direct conflict with those muniments of the vendee's title, nothing could, in our judgment, be more utterly inconsistent with a contract of sale purporting to be absolute than the existence of a right or in-

record of the transfer is necessary.³⁷ If the creditor seeking to attack the sale had notice of it when it was made, the sale will be valid against him although there was no change in the possession of the property, and no bill of sale was recorded.³⁸

§ 374. **Massachusetts.**—The law was settled at an early date to the effect that retention of possession by the seller is not conclusive of fraud but is merely strong evidence which may be rebutted by proof of the *bona fides* of the sale.³⁹ It is held as a dis-

terest in, or control over the same in the vendor. If such reservation was secret, it was evidence of collusion; if open, it tended to hinder and delay the creditor, and was legal or constructive fraud." The facts in the case, however, pointed strongly to fraud in fact, which had been found by the jury to exist, and the court merely affirmed the judgment on appeal.

³⁷ *Bryan v. Hawthorne*, 1 Md. 519.

³⁸ In the case of *Hudson v. Warner*, 2 H. & G. 415, 430, Archer, J., said: "The act of Assembly of 1729, c. 8, had for its object the suppression of secret sales. By demanding that transfers should be recorded, it was intended that notice should be given that no one might be injured or defrauded by secret and unknown conveyances. Its object, then, being to protect creditors from prior secret conveyances, any such creditor, who had notice of such incumbrance, could not be considered as falling in the class of those for whose benefit the act was passed. For when he had notice, how could he be considered as injured by the conveyance?"

³⁹ *Waite v. Hudson*, 1 Dane Abr. 635; *Gould v. Ward*, 4 Pick. 104; *Fletcher v. Willard*, 14 Pick. 464; *Ingalls v. Herrick*, 108 Mass. 351, 11 Am. Rep. 360. The language used in the following cases shows that the same view has not always been taken as to whether in the absence of any

explanation proof of the seller's retention of possession is conclusive of fraud. In the case of *Brooks v. Powers*, 15 Mass. 244, 247, 8 Am. Dec. 99, the court said: "It has been contended in this case that the possession of the vendor of personal chattels, after sale, is conclusive evidence in favor of creditors that the sale was fraudulent; or rather that it is itself a fraud. But we are all of opinion that, although it is generally evidence of the strongest kind, it is not conclusive. The vendee may, notwithstanding, upon proof that the sale was *bona fide* and for a valuable consideration, and that the possession of the vendor, after such sale, was in pursuance of some agreement not inconsistent with honesty in the transaction, hold under his purchase against creditors. And so it has been often decided in this court as well as in England." In *Wheeler v. Train*, 3 Pick. 255, 257, the effect of the vendor's retention of possession was held to be overcome by proof of a *bona fide* lease to him by the vendee. *Wilde, J.*, said: "The possession of the vendor after the sale is not a conclusive badge of fraud. It may be so when unexplained, but it is always open to proper explanations. It is evidence of fraud, and not fraud *per se*, and so has always been considered in this court." In *Allen v. Wheeler*, 4 Gray, 123, 127, the view was taken

inct principle, however, that a change of possession, or delivery, at the time of the sale is absolutely essential against every one save the seller.⁴⁰ The delivery of a bill of sale is not enough to accomplish a delivery such as the law requires,⁴¹ but a constructive delivery is held sufficient in some cases — as where the seller's bailee in possession is notified of the transfer,⁴² where samples are

that proof of retention of possession by the vendor was merely *prima facie* evidence of fraud for the consideration of the jury and that such proof did not throw upon the vendee the burden of proving the good faith of the sale. Metcalf, J., said: "It was not for the court to decide whether the evidence proved that the transactions between the plaintiff and Underwood were fraudulent as against Underwood's creditors. That was a question for the jury, upon a consideration of all the evidence as to the nature of those transactions." The same view seems to have been taken by the court in the case of *Green v. Rowland*, 16 Gray, 58, where the vendor remained in possession as the vendee's agent.

⁴⁰ *Butterfield v. Baker*, 5 Pick. 522; *Schumway v. Rutter*, 7 Pick. 56; *Hallgarten v. Oldham*, 135 Mass. 1, 46 Am. Rep. 433. In the case of *Lanfear v. Sumner*, 17 Mass. 110, 113, which established this rule, Jackson, J., said: "A few hours after this conveyance was made in Philadelphia the defendant attached the goods in Boston. The attaching creditors are to be considered as purchasers for a valuable consideration: and in the present case as purchasers *bona fide*, and without notice of the prior conveyance to the plaintiff. The defendant took possession under their title; and the plaintiff never acquired possession. The general rule is perfectly well established, that the delivery of possession is necessary in a conveyance of personal chattels as

against every one but the vendor. When the same goods are sold to two different persons, by conveyances equally valid, he who first lawfully acquires the possession will hold them against the other." It will be noticed that in this case the plaintiff was guilty of no lack of diligence in endeavoring to obtain possession.

⁴¹ *Clark v. Williams*, 190 Mass. 219, 222; *Carter v. Willard*, 19 Pick. 1; *Burge v. Cone*, 6 Allen, 412; *Dempsey v. Gardner*, 127 Mass. 381, 34 Am. Rep. 389.

⁴² *Russell v. O'Brien*, 127 Mass. 349; *Clark v. Williams*, 190 Mass. 219. But in the absence of such notice the buyer is not protected against attaching creditors. In *Carter v. Willard*, 19 Pick. 1, 8, 10, the court said: "Where the goods are in the hands of a custodian or third party, to be kept for the use of the vendor, a notice to such keeper by the parties, of the sale, is held to be a valid constructive delivery. Thus in *Tuxworth v. Moore*, 9 Pick. 347, 20 Am. Dec. 479, where a person had a horse at a livery stable, and sold it to the plaintiff, and both the vendor and vendee informed the livery stable-keeper of the sale, it was held to be a valid transaction against the creditor who afterward attached it as the property of the vendor. This is a case somewhat analogous to the one at bar. And if the vendee, who has agreed for the purchase of goods, desires the vendor to keep them for the vendee, and the vendor accepts an

delivered from large bales,⁴³ or actual delivery of part of a mass is made as a symbolical delivery of the whole,⁴⁴ or where negotiable mercantile documents representing the goods are indorsed and delivered.⁴⁵ And under extraordinary circumstances, even

order for that purpose, these transactions make a good delivery. *Elmore v. Stone*, 1 Taunt. 458 * * * We are all satisfied that the bill of sale or parcels, and notice of the same by the parties to Damon, as stated in the report, as to the property in the hotel and livery stable, do constitute a valid constructive delivery of the same, and that the plaintiff has a right to recover damages for the taking of the same. But in regard to the furniture in the Mansion House, which was in the possession of Mrs. Southwick, there was no notice of the sale given to her, nor any act done which can be construed to be a delivery, unless the giving of the bill of parcels shall of itself be considered as a delivery of the goods and chattels therein said to be sold. Now it cannot be considered as documentary evidence, for bills of parcels may be multiplied indefinitely; but not so the documentary papers properly so-called." In the case of *Kittredge v. Sumner*, 11 Pick. 50, the owner of a part interest in chattels was in actual possession and sold his interest to his co-owner, keeping possession as the latter's agent. The court held that no further delivery was necessary against creditors.

⁴³ *Ingalls v. Herrick*, 108 Mass. 351, 353, 11 Am. Rep. 360. Colt, J., said: "Upon this question, there was evidence tending to show that the flocks were bought for resale; that the bales were large, not easily moved, and requiring room for storage; that the plaintiff, having no convenient place, agreed with Bosworth, at the time of the bargain, to let them remain where they were,

and pay storage, and directed him to obtain samples of the flocks, which he, the plaintiff, could take with him to New York to sell by; and that Bosworth accordingly opened the bales, took out samples of two kinds of flocks, sewed up the bales, and gave the samples to the plaintiff at the time he delivered the bill of parcels. The plaintiff bought upon his own previous knowledge of the article, having seen the flocks at the storeroom of the factory a week or two before. The samples were not required or used by him in reference to his own purchase, and Bosworth, in taking them from the bales, acted under the directions and as the agent of the plaintiff, and with reference to future sales by him. It was a significant act of ownership and possession on the part of the plaintiff, after the sale was agreed on, through Bosworth, acting in this respect as his agent. There is something more, therefore, here disclosed, than a mere contract of sale without delivery or possession under it. And we are of opinion, under the law heretofore laid down by the court, that the case should have been submitted, with proper instructions to the jury."

⁴⁴ *Hobbs v. Carr*, 127 Mass. 532.

⁴⁵ *Pratt v. Parkman*, 24 Pick. 42 (bill of lading). But indorsement alone is insufficient. *Buffington v. Curtis*, 15 Mass. 528, 8 Am. Dec. 115. In the case of *Hallgarten v. Oldham*, 135 Mass. 1, 46 Am. Rep. 433, the warehouse receipt which had been delivered to the purchaser was not negotiable in form, and since the warehouseman had not been notified of the transfer the court held the sale void. * * *

though the delivery is delayed until some time after the sale, that is held not to be fatal if such delay is reasonable under the circumstances.⁴⁶ And it seems that if a creditor knew of the sale when it was made he cannot treat it as void.⁴⁷

⁴⁶This rule was applied in *Joy v. Sears*, 9 Pick. 4, and *Turner v. Coolidge*, 2 Mete. 350, where vessels were sold while at sea. In the case of *Putnam v. Dutch*, 8 Mass. 287, 291, a co-owner of a ship in a distant port secured a mortgage of the interest of the other co-owner. The court said: "If a ship be at sea, a transfer by bill of sale, without delivery, is good as against all persons; and the reason is, that as between the parties the contract is binding in all cases; and the subsequent possession of the vendor avoids it as to third persons only because it is an indication of fraud; which reason cannot apply in a case where delivery is impossible. We see no reason why the exception should not extend to protect contracts relating to ships which are at home, but in a port distant from the place where the contract is made. In such case the vendee should take possession within a reasonable time. Whether that was done in this instance the facts stated do not enable us to decide. We are of opinion that the distance between Salem and Manchester is immaterial, and we know not how long the vessel remained at the latter place, except that it was only a few days. But there is one circumstance upon which we are satisfied that the plaintiff is entitled to recover. The vessel was seized by the defendant in an hour after the execution of the bill of sale by Allen. She was then the property of the plaintiff, his title being liable to be divested by his subsequent laches. The possession of the defendant was, therefore, in its inception wrongful; and we are of opinion that the plain-

tiff, in suffering that possession to continue for a few days, was not guilty of such negligence as thereby to have forfeited his claim. Indeed it must be a strong case in which wrong by sufferance shall be matured to right. It will be observed that immediately on the vessel's arrival at her home in Salem the plaintiff went on board her and attempted to take possession." In *Lanfear v. Sumner*, 17 Mass. 110, 9 Am. Dec. 119, however, where ordinary chattels were sold, the sale was made at a distance and was held void against creditors who attached immediately afterward, although the buyer had not had time to take possession. It does not appear that any publicity need be given the temporary change of possession necessary to constitute a delivery. If the buyer takes possession before the seller's creditors attach, the latter cannot complain because of the fact that a considerable length of time elapsed after the sale before there was any change of possession. *Bartlett v. Williams*, 1 Pick. 288; *Foster v. Saco Mfg. Co.*, 12 Pick. 451 (case of assignment for creditors).

⁴⁷In *Bartlett v. Williams*, 1 Pick. 288, 295, it was thus said: "It is certainly a general rule that possession must follow and accompany the deed, and that the possession of the vendor after the bill of sale, unexplained, would render the conveyance void as against creditors. But such a possession may be explained, as in the case of *Kidd v. Rawlinson*, 2 B. & P. 59, and be perfectly consistent with justice. So if the creditor knew and assented to the sale, as in *Steel v. Brown*, 1 Taunt. 381."

§ 375. **Michigan.**—A statute⁴⁸ states the general rule of law.⁴⁹ A change of possession to be within the meaning of the statute

⁴⁸ Comp. Laws (1897), Vol. 3, § 9520. "Every sale made by a vendor, of goods and chattels in his possession, or under his control, and every assignment of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith, and shall be conclusive evidence of fraud, unless it shall be made to appear, on the part of the persons claiming under such sale or assignment, that the same was made in good faith, and without any intent to defraud such creditors or purchasers." § 9521. "The term 'creditors,' as used in the preceding section, shall be construed to include all persons who shall be creditors of the vendor or assignor, at any time whilst such goods and chattels shall remain in his possession, or under his control."

⁴⁹ The general rule was applied in the following cases as well as in those cited in the notes which follow in this section: *McLaughlin v. Lange*, 42 Mich. 81; *Williams v. Brown*, 137 Mich. 569. In the latter case the statute was held to apply to prior as well as subsequent creditors. In *Jackson v. Dean*, 1 Doug. 519, the first reported case which applied the statute, the transfer was by way of security. The jury had been charged: "That they were to decide from all the facts in the case whether the plaintiff (below) had sufficiently explained the want of possession in

himself; that his want of possession was *prima facie* evidence against him, and conclusive, unless explained; and that they were to determine as to the sufficiency of the explanation as well as to whether the transfer was made in good faith, or with intent to defraud." This instruction was held correct. In delivering the opinion in the case of *Hatch v. Fowler*, 28 Mich. 205, 211, Cooley, J., said: "The other important question arises upon the refusal of the court to charge the jury that if the sale was made by Doyle to the plaintiffs, but they left the lumber with him, and he acted with and treated it as his own, such sale would be deemed fraudulent and void as against the creditors of Doyle. The judge refused this on the ground that to charge it would be to take the question of fraud from the jury. But in this he was mistaken. In effect the charge requested would only have laid down the rule established by statute (Comp. Laws, § 4703), which declares that every sale made by a vendor of goods and chattels in his possession or under his control, unless the same be accompanied by an immediate delivery and be followed by an actual and continued change of possession, shall be presumed to be fraudulent and void as against the creditors of the vendor and subsequent purchasers in good faith, and be conclusive evidence of fraud, unless it shall be made to appear on the part of the person claiming under the same that it was made in good faith and without any intent to defraud such creditors or purchasers. The sale, therefore, not followed by actual and continued change of possession, was to be deemed or presumed to be fraudulent."

must be open, visible, and substantial, such as to give notice to the public of the transfer of title; and a mere temporary change will not suffice.⁵⁰ It need not be instantaneous.⁵¹ If the posses-

sioner is not in possession of the goods at the time of the sale, the presumption is that the sale is fraudulent as against creditors, unless the vendee made the satisfactory proof of good faith. To so instruct the jury was not to take the case away from them, but to give them the rule which the statute lays down for their guidance in passing upon the question of fraud which had been raised by the evidence." In the case of *Molitor v. Robinson*, 40 Mich. 200, the buyer testified to the good faith of the purchase and the payment in money of a fair price. It was held that although there was no distinct evidence to the contrary, it was a question for the jury whether or not the presumption of fraud had been rebutted.

⁵⁰ *Clark v. Lee*, 78 Mich. 221, 44 N. W. 260. In the case of *Hopkins v. Bishop*, 91 Mich. 328, 333, 51 N. W. 902, 30 Am. St. Rep. 480, the court said: "A careful examination of the charge of the court shows that the burden of proof was put upon the defendant to show that this sale was fraudulent as against creditors, without any reference to what the jury might find as a fact as to an actual and continued change of possession of the goods. This was error. There is no doubt that there was in law a sufficient immediate delivery; and if, upon the delivery of the key to plaintiff, he had gone into the store and assumed the management of it, the mere fact of his hiring his son to help him in the business or the management of it would not have militated against his 'actual and continued possession' under the statute; but there was testimony tending to show that the key was returned to the son a few days after-

ward, and that, so far as any outward evidence was concerned, the son was running the business after the sale the same as before. The jury should have been instructed that, if they found that the possession of these goods was not actually and continually in the plaintiff from the delivery up to the time of the levy, then it was for him to show that the sale was an honest one. It would not be necessary that the plaintiff himself should remain at the store and personally manage the business. He had the right to select an agent to do this for him. But he could not select a vendor of the goods as such agent unless something was done to give the public to understand that the possession of the vendor was the possession of the plaintiff, and that there had been a change in the ownership of the goods. This change must be an 'open, visible, substantial' one. *Clark v. Lee*, 78 Mich. 221, 231, 44 N. W. 260."

⁵¹ In the case of *Jansen v. McQueen*, 105 Mich. 199, 201, 63 N. W. 73, there was a sale by a husband to his wife of property used by the husband in connection with his business. The court said: "The circuit judge charged the jury, in effect, that if there was no immediate delivery of the property, and no actual and continued change of possession, then, by the terms of How. St., § 6190, the burden of proof rested upon the plaintiff to show that the sale was made in good faith and without intent to defraud creditors. It is contended that this instruction was misleading, as the jury must have understood that what was meant by the expression 'immediate

sion of the property is in a bailee at the time of the sale, serving notice upon him will be sufficient.⁵² In the case of the sale of ponderous and bulky articles where actual delivery is impracticable, some method of making the sale sufficiently public to notify those who deal with reference to the property is essential.⁵³ It seems that to rebut the presumption of fraud raised by the seller's retention of possession, mere proof that the purchase was made in good faith by the buyer is not sufficient, and that it must be clearly shown that the seller had no intention to defraud creditors.⁵⁴

delivery' was instantaneous delivery, and it is contended that this was too literal an interpretation of the statute. We think, however, that the jury could hardly have so understood this instruction, nor do we think the true import could have been well misunderstood, as applied to the facts of this case. If there was in fact no change in the indicia of ownership, and if, in consequence of this fact, Nelson Morris & Co. were induced to extend credit on Monday, when they would not otherwise have done so, it is clear that the immediate delivery contemplated and made necessary by the statute did not take place. *Kipp v. Lamoreaux*, 81 Mich. 299, 45 N. W. 1002. We do not mean to intimate that a brief delay in the delivery of property sold, when there has been no change in the situation of creditors or of the parties to be considered, will have the effect to shift the burden of proof under this statute. But such is not this case as made by the defendant."

⁵² *Carpenter v. Graham*, 42 Mich. 191, 3 N. W. 974.

⁵³ The rule was well stated in *Anderson v. Brennehan*, 44 Mich. 198, 201, 6 N. W. 222, a mortgage case, where a large quantity of pig iron was sold. Marston, C. J., said: "To be good as against the creditors of the rolling mill company, the proper instrument not having been placed on file, an 'immediate

delivery followed by an actual and continued change of possession' was absolutely essential. No such delivery and actual and continued change of possession of such bulky property could be expected or insisted upon. Yet there should be, even of bulky articles, such a clear and unequivocal designation thereof that creditors or subsequent purchasers could not be misled or be in doubt as to the nature of the transaction. What this should be must be a question for the jury under proper instructions."

⁵⁴ In delivering the opinion of the court in the case of *Kipp v. Lamoreaux*, 81 Mich. 299, 305, 45 N. W. 1002, Champlin, C. J., said: "It is not enough that the purchase was made in good faith—that is, for a valuable consideration, with intent to pass the title absolutely; but it is conclusive evidence of fraud, unless the purchaser shall also make it appear that the sale was made without any intent to defraud creditors. Under this statute a fraudulent intent on the part of the seller, although not participated in by the buyer, will avoid the sale as to creditors. In this respect it differs from sales attacked as fraudulent as to creditors, where there has been an actual and continued change of possession."

⁵⁵ Rev. Laws (1905), § 3496. "Every sale by a vendor of goods and chattels in his possession or under

§ 376. **Minnesota.**—By the terms of the statute⁵⁵ the buyer is permitted to remove the presumption of fraud arising because of lack of change of possession by showing that the sale was *bona fide* and made without any intent to defraud creditors.⁵⁶ It is not necessary, however, for him to produce evidence to prove that the seller had no intention to defraud his creditors; it is sufficient that such an intention was not present with him (the buyer).⁵⁷ What constitutes a sufficient change of possession to

his control, and every assignment of goods and chattels, unless the same is accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor or assignor and subsequent purchasers in good faith, unless those claiming under such sale or assignment make it appear that the same was made in good faith, and without any intent to hinder, delay, or defraud such creditors or purchasers. The term 'creditors,' as herein used, shall include all persons who are creditors of the vendor or assignor, at any time while such goods and chattels remain in his possession or under his control."

⁵⁵ In the following cases and in the cases cited in the remaining notes in this section the general rule of law was applied: *Molm v. Barton*, 27 Minn. 530, 8 N. W. 765; *Mullen v. Noonan*, 44 Minn. 541, 47 N. W. 164; *Mackellar v. Pillsbury*, 48 Minn. 396, 51 N. W. 222; *Cortland Wagon Co. v. Sharvy*, 52 Minn. 216, 53 N. W. 1147; *Bruggemann v. Wagener*, 72 Minn. 329, 75 N. W. 230; *Wilson v. Walrath*, 103 Minn. 412, 115 N. W. 203; *Murch v. Swensen*, 40 Minn. 421, 42 N. W. 290; *Hopkins v. Swensen*, 41 Minn. 292, 42 N. W. 1062. In the two cases last cited the attaching creditors gave credit after the sale. In the case of *Lathrop v. Clayton*, 45 Minn. 124, 125, 47 N. W. 544, a

bill of sale had been recorded on December 14th. The court said: "On the same day (December 14th), the attachment suit was commenced, and the property seized by the defendant officer as belonging to Clough. It had not been removed or handled by plaintiffs in any manner, and they are obliged to acknowledge that, if there had been a constructive delivery, it was solely by virtue of the sale on the 12th, and the execution and delivery of the bill of sale on the day following; for the act of filing either original or copy with a town clerk was of no avail, except, possibly, as it gave some publicity to the transaction. The statute nowhere authorizes or gives effect to the filing of such instruments in any of the public offices. It does (Gen. St. [1878], c. 39) provide for the filing of chattel mortgages and contracts relating to conditional sales; but this instrument purported to be and was, if anything at all, an absolute and unconditional bill of sale."

⁵⁷ In *Leqve v. Smith*, 63 Minn. 24, 25, 65 N. W. 121, 122, the court said: "The question of fraudulent intent * * * is a question of fact, and not of law, and must be submitted to a jury, unless the fraudulent sale is contained in an instrument which upon its face contains the evidence of the fraudulent intent. *Filley v. Register*, 4 Minn. 391, 77 Am. Dec. 522. This question of fraudulent intent was accordingly

take a case out of the statute depends upon the surrounding circumstances and the character of the property sold. Ordinarily a mere constructive change is not enough,⁵⁸ but if it would be

submitted to a jury, and the verdict rendered in favor of the defendants. It is admitted that the burden of rebutting the presumption of a fraudulent intent arising from the actual and continued possession of the property by the vendor rested upon the purchaser or vendee as against creditors. But there is no such burden resting upon the vendee to show that the vendor was not implicated in the fraud, because the fraudulent intent of the vendor cannot legally affect the rights of a *bona fide* purchaser for a valuable consideration and without notice. It is sufficient if the vendee is innocent of any fraud, and did not participate therein, and had no notice of the fraudulent intent of the vendor."

"Mitchell, J., in delivering the opinion of the court in *Chickering & Sons v. White*, 42 Minn. 457, 461, 44 N. W. 988, 989, said: "Possession cannot be taken by words and inspection, and the property then left in the hands of the vendor as agent for the vendee. While it is undoubtedly true that what will constitute a sufficient change of possession to answer the statute will depend somewhat on the character of the property, yet the delivery must be actual, and such as the nature of the property, and the circumstances of the sale admit, and such as the vendor is capable of making. A mere symbolical or constructive delivery and change of possession is not enough, when an actual one is reasonably practicable." In the opinion in the case of *Murch v. Swensen*, 40 Minn. 421, 423, 42 N. W. 290, the same judge said: "As the money, which was taken from the drawer in a saloon, was admitted to

be the proceeds of sales of the stock of liquors contained in it, the sole question was whether this stock was, as to creditors of J. H. Murch, his property, or that of plaintiff. Plaintiff, who is a nonresident, was not present or a witness at the trial. His brother, the defendant in the execution, was the principal witness in his behalf. He testified, in substance, that he had been engaged in the saloon business at this same stand for some time as proprietor, but that about August 1, 1886, he had sold out the whole business to plaintiff, who paid him therefor \$2,000; that plaintiff was here temporarily at the time of the sale, and 'took possession' of the property, but 'was called away, and left witness in possession;' that 'he has been away since;' that he (witness) 'continued to run the business just the same;' that 'he continued to conduct the business pretty near the same for his brother as he did before this transfer.' In fact, the evidence shows that the business was run by J. H. Murch after the alleged transfer precisely in all respects as before, without any apparent change of possession or proprietorship, except that the word 'agent' was attached to his name on the saloon window. There was not a word of evidence produced as to how or on what terms he was conducting the business for his brother, or how the latter, a nonresident, came to engage in the saloon business in Minneapolis. Neither was there a particle of evidence that from the day he left the State, shortly after the pretended transfer, down to the day of trial, he ever personally took part in or interested himself in

unusual and injurious to the property actually to move it, a constructive change is sufficient.⁵⁹ In any case where the seller apparently retains some control over the property and its location, and does not notify the public of the sale, it seems sufficient if the community nevertheless receives notice of the transfer.⁶⁰ Where the property is in the possession of a bailee, notice to him of the sale effects a valid change of possession.⁶¹

the business. * * * The statute is imperative that the change of possession necessary to exclude this presumption of fraud must be actual, and not merely constructive, and continuous. A mere formal and constructive taking possession, and immediately leaving the property in the actual possession of the vendor (which is the most that can be claimed for the evidence in this case), is not enough to prevent the presumption of fraud from obtaining."

⁵⁹ In the case of *Lathrop v. Clayton*, 45 Minn. 124, 125, 47 N. W. 544, cumbersome materials for building a bridge were sold. The court said: "As before remarked, when the alleged sale was made, the greater part of the material had been hauled and placed on the bank of the river where the bridge was to be built. To have made the slightest removal of this would have been a mere ceremony, very suspicious in fact, and a positive injury to plaintiffs, who had undertaken to fulfil Clough's contract with the county. Certainly the law would not require this, nor that they put some one upon the ground, openly in possession of the property. * * * It can safely be asserted that whenever the subject of the sale is capable of an actual delivery, such delivery must accompany, and the continued change of possession follow, the sale; but it often happens that the subject of the sale is not reasonably capable of actual delivery, and then a con-

structive delivery will be sufficient, as in cases like this, where it might not be impossible, but it would be unusual and injurious, to remove the property from where it happened to be at the time of the transfer. The law relating to the delivery of the property and a change of possession accommodates itself to its nature and situation, as well as to the circumstances about each case."

⁶⁰ In delivering the opinion of the court in *Tunell v. Larson*, 39 Minn. 269, 270, 39 N. W. 628, Collins, J., said: "In the case at bar delivery was claimed, and thereafter an actual and continued change of possession insisted upon by the plaintiff, concerning which there was enough testimony to warrant a finding in his favor. To be sure, the cattle were not driven off the father's farm; but it is quite evident that, after the alleged sale, the son openly claimed to be the owner, and that the father asserted no claim, and ceased to exercise his authority over the stock; all of which was made known to the neighbors. The court was fully justified in its refusal to charge, as requested by the appellant, that there was an entire failure of testimony tending to show either delivery or change of possession."

⁶¹ In *Freiberg v. Steenbock*, 54 Minn. 509, 513, 56 N. W. 175, there was a sale of whiskey which was stored in warehouses, and for which warehouse receipts or certificates had been issued. These certificates were

§ 377. **Mississippi.**—The buyer is allowed to overcome the presumption of fraud arising from the seller's retention of possession, but the evidence produced must be clear and conclusive.⁶²

held by third parties as pledgees at the time of the sale, and the pledgees were notified of the transfer. The court said: "Where the articles at the time of the sale or transfer are in the hands of one who has a lien upon them, notice to him of such sale or transfer is sufficient to constitute a delivery, as against subsequent attaching creditors. *Appleton v. Bancroft*, 10 Metc. (Mass.) 231; *Dempsey v. Gardner*, 127 Mass. 381, 34 Am. Rep. 389, and cases cited. It was not in the power of Boehm & Co. to make manual delivery of the property. All was done that the nature of the case admitted, and proper exertions were used to make an early delivery of the certificates. Nothing more was required."

"In *Carter v. Graves*, 6 How. 9, 34, the question seems to have arisen for the first time. The jury had been instructed that leaving possession with the seller was *prima facie* evidence of fraud. The court said: "We cannot say that it was less than *prima facie* evidence of fraud, and the state of the case does not require us to say that it was more. Being a *prima facie* case of fraud, the *onus probandi* to prove the honesty and fairness of the sale was thrown upon the claimant." In the case of *Rankin v. Holloway*, 3 Smedes & M. 614, 623, slaves were sold at public sale but not under legal process. The original purchaser sold them to his vendor's father. Sharkey, C. J., said: "When the plaintiff had proved that after the sale the possession remained with the vendor from 1818 until his death, in 1840, and afterward with his widow, at least a very strong *prima facie* case of fraud was made out,

and it devolved on the claimant to rebut it. His proof, however, tended to strengthen, instead of to destroy, the presumption of fraud. But it is said the transaction as between Ebenezer and John Ford was not fraudulent. It was as much *prima facie* fraud for John to leave the possession for so long a time with his son, as though he had been the original purchaser; besides which, his declaration to the witness as to the object of the sale made a stronger case of fraud against him than that which existed between Elias and Ebenezer. He had communicated the fraudulent design of the sale, and everything which occurred subsequently confirmed the truth of his statement to the witness. It is also said that the transaction was not fraudulent as to this creditor, whose debt was subsequently contracted. Fraud vitiates everything into which it enters. Permitting the negroes to remain with the son was enabling him to obtain a credit on his apparent ownership, and was fraudulent as to all creditors whose debts were contracted during such possession." See also *Harney v. Pack*, 4 Smedes & M. 229. In the case of *Comstock v. Rayford*, 12 Smedes & M. 369, 394, the court said: "The first thing calculated to throw a suspicion over this transaction is the manner in which the bill of sale was executed, and the declarations of the parties at the time the contract was made. It was duly proven by the subscribing witness, and recorded. This was not necessary, and looks as though it might have been done for effect, to give the semblance of open reality to that which was fictitious." The rule

If the sale was public under a deed of trust or under execution no presumption of fraud arises.⁶³

was recognized in *Summers v. Brannin*, 42 Miss. 749, and a distinction was taken between absolute sales and deeds in trust or mortgages. In *Johnson v. Dick*, 5 Cush. 277, 281, the court said: "It is very clearly established that the sum agreed to be paid, was a full and fair price for the property. But it is alleged and proved by the depositions taken in the cause, that the vendors, notwithstanding the sale, continued in the uninterrupted possession, control, and management of the property, treating and using it in all respects as absolute owners do their property. They appear thus to have been in possession at the time the bill was filed. It is further established by the evidence, that the vendors, Henry and Thomas H. Christmas, were, at the time of the sale, not only embarrassed, but were actually insolvent. Suits for large amounts were then depending in the United States court at Jackson, and in the Circuit Court at Madison county. The same allegation is made in regard to Richard Christmas, and, it may be said, sustained by the same proof. Norfleet is shown to have been entirely destitute of means. Under this statement of the facts, there can be but little difficulty in applying the principles of law which must be decisive of the controversy. It is now too well settled to admit of argument that an absolute conveyance of property by a person at the time largely indebted, especially when this indebtedness is about to ripen into judgments, and his subsequent possession and continued enjoyment of the property create such a presumption of fraud as to require clear and satisfactory proof of the

fairness of the transaction. This presumption becomes the stronger when it appears that the conveyance was made, as in this instance, to near relatives, who were themselves at the time laboring under equal, if not greater, embarrassments. The fact that a full price was agreed to be paid for the property is not alone sufficient to rebut the presumption of fraud. The facts affording the evidence in this respect must be explained. The possession and acts indicating absolute ownership must be shown to be consistent with the title of the parties, or the *bona fides* of the transaction."

⁶³ In delivering the opinion of the court in the case of *Garland v. Chambers*, 11 Smedes & M. 337, 342, 343, 49 Am. Dec. 63, Clayton, J., said: "It is true, that the general doctrine is now settled, that the possession of property by the vendor, after a voluntary sale, is *prima facie* evidence of fraud. Sales, under executions publicly and notoriously made, are regarded with more indulgence. On this head Chancellor Kent thus states the doctrine: 'The purchaser of goods, under execution, is protected from other executions, though the goods were suffered to continue in possession of the defendant, on the ground that the transaction was necessarily notorious to the neighborhood, and the execution notice to the world. If the case be free from fraud in fact, it is, under such circumstances, free from the inference of fraud in law. But still the question of fraud, in such cases, is a question of fact for the jury.' 2 Kent, 518;" and, "The same notoriety attends public sales under deeds of trust, as sales under execution,

§ 378. **Missouri.**—During the first half of the last century the Supreme Court overthrew the doctrine of constructive fraud which it had first adopted, and held that the seller's retention of possession might be explained. The Legislature in its turn, after first embodying the new rule in a statute, finally, in 1865, passed the act now in force,⁶⁴ thus practically restoring the old rule of constructive fraud.⁶⁵ Most of the decisions under the present statute have dealt with the sufficiency of the change of possession needed to take a case outside of its terms. It is well settled that where the seller remains in manual control of the property as agent or employee, the change must be open and notorious, so that third persons may know of the transfer.⁶⁶ The

and the same rule should prevail. *Leonard v. Baker*, 1 M. & S. 251. In a sale of such character the law does not infer fraud, from the leaving of the property in the possession of the original owner, or his family. Benevolent motives alone may induce the act. The case is to be left to the jury to determine, whether fraud in fact exists, in view of all the circumstances."

"Rev. St. (1899), § 3410. "Every sale made by a vendor of goods and chattels in his possession or under his control, unless the same be accompanied by a delivery in a reasonable time, regard being had to the situation of the property, and be followed by an actual and continued change of the possession of the things sold, shall be held to be fraudulent and void, as against the creditors of the vendor, or subsequent purchasers in good faith."

"The early law of the State was reviewed, shortly after the present statute was passed, in the case of *Clafin v. Rosenberg*, 42 Mo. 439, 447, the court citing *Twyne's Case*, 3 Coke, 80; *Edwards v. Harbin*, 2 T. R. 587; *Hamilton v. Russell*, 1 Cranch, 309; *Rocheblave v. Potter*, 1 Mo. 561, 14 Am. Dec. 305; *Foster v. Wal-*

lace, 2 Mo. 231; *Sibley v. Hood*, 3 Mo. 290; *King v. Bailey*, 6 Mo. 575; and as overruling previous Missouri decisions, *Shepherd v. Trigg*, 7 Mo. 151. Under the first statute it was necessary, in order to rebut the presumption of fraud, to give "good and sufficient reasons" for leaving the property in the possession of the vendor. *Kuykendall v. McDonald*, 15 Mo. 416, 419, 57 Am. Dec. 212. The general rule of law stated in the present statute was applied in the case of *Crane v. Timberlake*, 81 Mo. 431, as well as in the cases cited in the notes which follow.

"*Lesem v. Herriford*, 44 Mo. 323; *Wright v. McCormick*, 67 Mo. 426 (here a sale of a stock of merchandise was held fraudulent since the only persons notified of it were the seller's clerks); *Stern v. Henley*, 68 Mo. 262; *Mills v. Thompson*, 72 Mo. 367; *Stewart v. Bergstrom*, 79 Mo. 524 (here the buyer of a quantity of ties put a mark on each one, but that was held to be insufficient); *Hill v. Taylor*, 125 Mo. 331, 28 S. W. 599; *State v. Stone*, 111 Mo. App. 364 (here the mere measuring of the lumber purchased was held not to accomplish a sufficient change of possession). In the case of *State v.*

rule seems to be somewhat relaxed in the case of sales of certain

Schulein, 45 Mo. 521, a sale of a stock of merchandise to a clerk was held void since there were not "such marks of change that customers would be advised" of the transfer. In *Farrar v. Levison*, 33 Mo. App. 246, after a similar sale changes were made on the letter-heads, the sale was advertised in a newspaper, and statements were sent to the trade, including the attaching creditor himself. This was held sufficient to support a finding by the jury that there had been a change of possession. In the case of *Criley v. Vasel*, 52 Mo. 445, one partner sold property owned and controlled jointly by himself and his copartners to the latter, and remained as employee. The sale was held to be valid against creditors. In the case of *State v. Merritt*, 70 Mo. 275, 283, the court said: "The defendants asked the court to give the following instruction: 'Unless the jury are satisfied from the evidence that Pierce had actual possession of the goods in question, and that the change of possession was visible, continued, and exclusive as against Brock, Rogers & Co.; *such a change of possession as to indicate to purchasers at large that said Brock, Rogers & Co. no longer had possession or control over said goods, then said sale was fraudulent and void as against creditors, even though the jury believe from the evidence that said sale from Brock, Rogers & Co. to Pierce was made in good faith and for a valuable consideration.*' It was refused as asked, and given, omitting the italicized clauses. The instruction, as refused, was an exact copy of one asked and refused in the case of *Claffin v. Rosenberg*, 42 Mo. 439, 447, 97 Am. Dec. 336, which this court held should have been given, remarking, that 'the vendee must take

actual possession, and the possession must be open, notorious, and unequivocal, such as to apprise the community, or those who are accustomed to deal with the party, that the goods have changed hands, and that the title has passed out of the seller into the purchaser.' The same doctrine was announced in *Burgert v. Borchert*, 59 Mo. 80. There was no instruction given which was equivalent to this, and the evidence in relation to the change of the possession of the goods was of a character to justify the demand of that instruction by defendants." In *Meyer Bros. Drug Co. v. White*, 66 Mo. App. 24, 27, there was a sale of cattle which were left on the seller's farm. The court said: "We can conceive of circumstances under which there might be a delivery and change of possession of live stock, such as the statute requires, without its removal from the premises of the vendor, but there was no attempt to show that such a thing was feasible in this particular sale, which is a sufficient answer to the appellant's argument. To effect such a delivery it would certainly be necessary to put the animals into a barn, or a closed lot, with some sort of indication or notice to the public of the change in the possession. This could not have been safely done with the sows and ewes here in controversy, as their condition was such that they should run at large and get the benefit of the grass, which probably accounts for the failure of the appellant to introduce any evidence on the subject. To have simply changed them from one pasture to another (if there was more than one pasture on the farm) would certainly not have satisfied the statute." In *Claffin v. Rosenberg*, 42 Mo. 439, 449, 97 Am. Dec. 336, it was said: "The main objec-

kinds of property between husband and wife,⁶⁷ and in the case of sales of growing crops.⁶⁸ Where a third person is in pos-

sion urged against the instructions is that they require the possession to be exclusively in the vendee, as against the vendor, and the court seems to have refused them principally upon that ground. In *Wordall v. Smith*, 1 Campb. 333, Lord Ellenborough, in speaking on this subject, said: 'To defeat the execution there must have been a *bona fide* substantial change of possession. It is mere mockery to put another person in to take possession jointly with the former owner of the goods. A concurrent possession with the assignor is colorable; there must be an exclusive possession under the assignment, or it is fraudulent and void as against creditors.' Although the statute does not use the word 'exclusive,' it necessarily implies it, and it is obviously essential to carry out its plain intention.'

⁶⁷ In the case of *Elliott v. Keith*, 32 Mo. App. 119, 123, the court said: "The instructions refused for defendant were correct except as they relate to the question of possession; and the error in this respect lies in not having regard to the relationship of the parties to the alleged sale. There is much personal property connected with the household of a husband and wife, and used by them in common, that may be said to be, in a certain sense, in their joint possession, and whereby an open, notorious, and unequivocal change of possession, such as is required by the statute between an ordinary vendor and vendee, could not well be established by evidence. There must be a change of possession in fact, but the difficulty lies in making it apparent, and in passing on the validity of a statutory sale of personal property. When the vendor and vendee are

husband and wife, I think regard should be had to that exceptional and peculiar relationship. If the article be a bureau or dressing case in their bedroom, it could not be expected that it should be given up to the use of one to the exclusion of the other, or that it should be changed to some other apartment. * * * Unless then we are prepared to say that there cannot be in this State a sale of personal property between husband and wife, we are compelled to recognize the exceptional situation, as vendor and vendee, of such parties. A question somewhat of this nature was considered in regard to a conveyance from one of three parties to the other two. *Criley v. Vassel*, 52 Mo. 445. The question, as it relates to a gift, was considered in *Davis v. Zimmerman*, 40 Mich. 24, and the conclusion of Cooley, C. J., was the same as herein stated."

⁶⁸ *State v. Casteel*, 51 Mo. App. 143, 144, related to a sale of standing corn. *Ellison, J.*, said: "The chief contention here is whether there was a legal statutory sale of the corn before the levy of the execution, and that is made to turn principally upon whether there was a delivery of possession to plaintiff. Plaintiff bought the corn at \$1.50 per barrel while it was standing in the field. It was to be panned or pulled and thrown in piles between the rows as plaintiff might elect. He rode through both pieces, and paid to Samuel Nelson \$25, and to John \$60 before the levy. All of Samuel's was cut down, and some of it was shocked before the levy. It does not appear whether anything had been done toward consummating the sale of John's part, more than riding through it and paying \$60. The question as to

sion of the property as bailee at the time of the sale, notice to him is all that is necessary to accomplish a change of possession, and it makes no difference if he refuses to hold for the buyer.⁶⁹ What constitutes the "reasonable time" within which a delivery must be made depends upon circumstances.⁷⁰ A sale is valid without any change of possession until such a "reasonable time" has elapsed.⁷¹ After it has elapsed without a change, a later change will not generally validate the sale,⁷² but it has been held that in no case is a sale void as to those who were creditors at the time of the sale if possession is taken by the purchaser before they attach the property.⁷³ Aside from this exception, however, prior and subsequent creditors are given equal protection under the statute.⁷⁴ A change of possession is not prevented from being "continued" by the fact that the seller is later given possession, provided the vendee's possession lasted long enough and was of such a nature as to meet the spirit and object of the statute.⁷⁵

whether there had been a delivery, regard being had to the situation of the corn, was submitted to a jury, under proper instructions, and the finding was very properly for the plaintiff. There certainly was as much possession taken of this property before the levy as could be well done under the circumstances and in its situation."

⁶⁹ *How v. Taylor*, 52 Mo. 592; *Halderman v. Stillington*, 63 Mo. App. 212.

⁷⁰ *Bishop v. O'Connell*, 56 Mo. 158. In the case of *State v. Goetz*, 131 Mo. 675, 680, 33 S. W. 161, Burgess, J., said: "What is 'reasonable time' is a question of fact when the evidence is conflicting as to the character and condition of the property, and the length of time necessary for its delivery, and it is only where the facts are undisputed, and the evidence substantially all one way, that it becomes a question of law. The undisputed evidence in this case is that Kraemer remained in possession of the property for two days after the sale to plain-

tiff before it was seized by the sheriff under the attachment, and that the same sign was kept up as before, although the property was of such a character that but a very short space of time would have been necessary for its delivery and such a change of possession as contemplated by the statute. * * * There was no such change of possession of the property in this case as required by statute, and the court correctly held the sale to be fraudulent as a matter of law."

⁷¹ *Dillin v. Kincaid*, 70 Mo. App. 670.

⁷² *Link v. Harrington*, 41 Mo. App. 635.

⁷³ *McIntosh v. Smiley*, 107 Mo. 377; *Scully v. Albers*, 89 Mo. App. 118.

⁷⁴ *Knoop v. Nelson Distillery Co.*, 102 Mo. 156, 14 S. W. 822.

⁷⁵ In the case of *Reynolds v. Beck*, 108 Mo. App. 188, 194, the court said: "But whilst the change must be continued, it need not be perpetual in order to subserve the purpose of the law. If an open, unequivocal delivery of the article, and an actual

If the property sold was by law exempt from execution,⁷⁶ or if the sale was a public one,⁷⁷ the seller's retention of possession has no effect. But the fact that a creditor knew of the sale when it was made does not prevent him from treating it as void.⁷⁸

§ 379. **Montana.**—By statute⁷⁹ retention of possession by a seller of personalty makes the sale constructively fraudulent.⁸⁰

change of possession takes place, and the exclusive and visible possession of the buyer continues long enough to give reasonable notice to the public that the original owner has transferred and the buyer acquired the title, nothing further, in aid of the purpose of the statute, will be gained by prohibiting the buyer from thereafter bailing the particular article to the original owner, just as he would any other article, should the course of business make it convenient for him to do so."

⁷⁶ *Boyd & Co. v. Pottle*, 65 Mo. App. 374.

⁷⁷ *Clark v. Cox*, 118 Mo. 652, 659, 24 S. W. 221. "The reason of the rule," said the court, "is that the sale is not that of the debtor, but is the act of the law."

⁷⁸ *Collins v. Wilhoit*, 108 Mo. 451, 18 S. W. 839; *Bowles Live Stock Commission Co. v. Hunter*, 91 Mo. App. 418.

⁷⁹ Civil Code (1895), § 4491. "Every transfer of personal property, other than a thing in action, or a ship or cargo at sea, or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in

possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or incumbrances in good faith subsequent to the transfer."

⁸⁰ *Botcher v. Berry*, 6 Mont. 448, 13 Pac. 45 (here the transfer was in the form of an assignment); *Bickle v. Irvine*, 9 Mont. 251, 23 Pac. 244; *Harmon v. Hawkins*, 18 Mont. 525, 46 Pac. 439; *Morris v. McLaughlin*, 25 Mont. 151, 64 Pac. 219; *Ettien v. Drum*, 32 Mont. 311. In the last case cited a *bona fide* purchaser was protected in his right to cattle left with the seller by a former purchaser. The first purchaser had secured possession of part but not of the whole of the herd which he had bought. The court held that the rule of law could not be changed by an alleged custom giving the buyer of a herd of cattle title to all in case of a delivery of part. The result would, of course, have been the same had it been the case of a creditor instead of a subsequent purchaser. In the case of *Finch v. Kent*, 24 Mont. 268, 275, 61 Pac. 653, the question was not squarely raised on the pleadings but the court in the course of its opinion said: "The well-recognized rule is that the subject of a sale constructively fraudulent because of a want of a change of possession may be seized by a creditor—the property itself may be taken—but that the purchaser at such a sale is not liable for its proceeds, nor for the property

A change of possession in order to satisfy the provisions of the statute must give notice to third persons of the transfer of title. It is doubtful, however, whether the statute applies in a case where the parties to the sale are husband and wife.⁸¹ The requirement that the delivery of possession shall be immediate is not violated even though there is a slight delay in cases where the circumstances make an instantaneous delivery impossible.⁸² It

taken in exchange for the property sold, provided the proceeds arise or the exchange be effected before the creditor obtains a lien; as to the proceeds or the property taken in exchange, the seller did not have possession or control, nor was either obtained or purchased from him. *Weeks v. Prescott*, 53 Vt. 57; *Capron v. Porter*, 43 Conn. 383. Hence the declaration in section 226 of the fifth division of the Compiled Statutes of 1887 cannot be successfully evoked as against the purchaser guilty of constructive fraud only, so as to reach any property other than the identical chattels transferred, unless the chattels have been converted or exchanged after the creditors have secured a lien."

⁸¹ In the case of *Webster v. Sherman*, 33 Mont. 448, 457, a wife bought live stock from her husband together with the brand which he had used, and he thereafter used another brand. She listed the property so purchased and paid taxes on it, but after the sale her husband helped care for the cattle. It was generally known throughout the neighborhood that the brand bought by the wife and stock bearing it belonged to her. It was held that the evidence was sufficient to show such a change of possession as the statute required. After reaching this conclusion, *Holloway, J.*, said: "Thus far we have proceeded upon the assumption that section 4491 above is applicable to a transfer of personal property between husband

and wife; but it is at least a serious question whether it has such application. Under its provision any creditor of the vendor can raise the question of the want of immediate delivery or actual and continued change of possession of the property sold; but, if the transaction be between husband and wife, may the rule not be altogether different? If the sale was sufficient to pass title from the husband to the wife, as between themselves, the property actually becomes the separate property of the wife, and, under section 227 of the Civil Code, cannot be held liable for the debts of the husband unless such property is in the sole and exclusive possession of the husband, and then only to such persons as deal with the husband in good faith on the credit of such property without knowledge or notice that the property belongs to the wife. Under this section these inquiries are pertinent: Did the husband have the sole and exclusive possession of the property? Did the creditor deal with the husband in good faith on the credit of the property? And, finally, did the creditor have any knowledge of the wife's ownership of the property? Under section 4491 above, not any of these inquiries would be material."

⁸² In the case of *O'Gara v. Lowry*, 5 Mont. 427, 434, 435, 5 Pac. 583, the facts stated in the opinion were as follows: "It appears in evidence in this case that the sale was made in the city of Butte on the 21st of

is entirely permissible for the buyer to let the seller at a later time have possession of the subject-matter of the sale, provided he (the buyer) has first taken and kept such possession of the property as to satisfy the spirit of the statute.⁸³ In the case of

July, between 10 o'clock A. M. and 2 o'clock P. M.; that the property was from seven to ten miles out in the country; the wagon, harness, etc., at the house of Cutler, the vendor, about seven or eight miles from Butte, and the horses were on the range, over which they grazed, at distances from two to three hundred yards to three or four miles from the house of Cutler. That after the sale was made, the plaintiff and Cutler went from Butte on the afternoon of the 21st of July, and arrived at his house about 6 o'clock in the evening. That the property was not delivered then. That next morning, the 22d of July, at 6 o'clock, Cutler went out and brought in the horses at 8 o'clock in the forenoon from the range, and then the property was all delivered to the plaintiff, O'Gara, who then took possession of it. The horses were harnessed and driven away with the wagon and other property, except the wood, to Bull Run, two miles away. The wood was hauled away subsequently." Coburn, J., said: "The court below, in this case, gave the following instruction to the jury on this point: 'In determining what, under the law, is an immediate delivery of the property sold, you are to consider the surrounding circumstances, the nature of the property to be delivered, its situation, and the difficulty or ease of making delivery, and whether the delivery was made in the ordinary way that men of prudence and business would make delivery, if they were acting in good faith, and with the desire and intention to carry out their contract of sale according

to law.' And the court further instructed the jury, that 'if you determine from the evidence that when Cutler sold to O'Gara there was an immediate delivery of the property mentioned in the complaint, from Cutler to O'Gara, and an actual and continued change of possession you must find for the plaintiff.' We are of opinion that these instructions are correct, and that it was proper for the jury to consider the facts connected with and surrounding the delivery of the property to determine whether the same was valid and made in compliance with the Statute of Frauds. The fact that the property was sold one day to the plaintiff, and not delivered until the next day, does not render the sale void, if it appears in evidence that the delivery was impossible on the day of sale; and it is properly a question for the jury to answer, whether the property was so situated, and the parties were so located at the time of the making of the sale that instant delivery could not be made, and whether it was made as soon thereafter as practicable."

"O'Gara v. Lowry, 5 Mont. 427, 5 Pac. 583. In Dodge v. Jones, 7 Mont. 121, 14 Pac. 707, it was held as a matter of law that there was a sufficient change of possession where the buyer branded the horses he had purchased and immediately turned them back on the range where they had been before. It appeared that the range was used as a common pasturage for the public. This case was followed in the later case of Cady v. Zimmerman, 20 Mont. 225, 229, 50 Pac. 553, the court citing

a sale by a cotenant of his interest, if the property is not in the actual possession of the seller but in that of his co-owners, no change is necessary, and it makes no difference that the co-owners in possession are not notified of the sale.⁸⁴

§ 380. **Nebraska.**—A statute⁸⁵ makes a sale without a change of possession fraudulent against creditors unless it is shown that it was made in good faith and without any intent to defraud third persons.⁸⁶

also *Porter v. Bucher*, 98 Cal. 451, 33 Pac. 335. In the case of *Gallick v. Bordeaux*, 22 Mont. 470, 482, 56 Pac. 961, Brantly, C. J., said: "The apparent exclusive possession by Bordoni on the 15th, thirteen days after the sale, was not inconsistent with the conclusion, possible from a consideration of all the evidence, that the sale was in compliance with the law and made in good faith; nor was it within the province of the court to say that the return of the property to the vendor after four hours furnished ground for a conclusive presumption of fraud."

⁸⁴ In the case of *Yank v. Bordeaux*, 23 Mont. 205, 209, 58 Pac. 42, 75 Am. St. Rep. 522, Pigott, J., said: "The conclusive presumption that a transfer of personal property, in the absence of an immediate delivery and actual and continued change of possession of the subject of the transfer, is fraudulent and void as to the creditors of the person making the transfer, is to be indulged only where the person making the transfer has at the time the possession or control of the property. * * * Our attention has not been drawn to any rule of law requiring notice to be given to co-owners in actual possession of the common property of a sale by co-owners whose possession is merely constructive. We do not think that the omission of notice avoids such sale as to creditors of the vendors, and hence we do not decide whether

the notice given to Hughes serves as a notice to his associates."

⁸⁵ Comp. St. (1889), § 3185. "Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, by way of mortgage and security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession, of the things sold, mortgaged, or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith; and shall be conclusive evidence of fraud unless it shall be made to appear on the part of the persons claiming under such sale or assignment that the same was made in good faith, and without any intent to defraud such creditors or purchasers." § 3186. "The term 'creditors,' as used in the last section shall be construed to include all persons who shall be creditors of the vendor or assignor at any time whilst such goods and chattels shall remain in his possession or under his control."

⁸⁶ The general rule as laid down in the statute was applied in the following cases: *Densmore v. Tomer*, 11 Neb. 118, 7 N. W. 535, and 14 Neb. 392, 15 N. W. 734; *Miller v. Morgan*, 11 Neb. 121, 7 N. W. 755;

§ 381. **Nevada.**—By statute⁸⁷ retention of possession by the vendor makes a sale constructively fraudulent.⁸⁸ It seems that a change of possession in order to take a case out of the statute must be such as to notify third parties of the transfer of title.⁸⁹

Snyder v. Dangler, 44 Neb. 600, 63 N. W. 20; *Powell v. Yeazel*, 46 Neb. 225, 64 N. W. 695; *Neeley v. Trautwein*, Neb. , 113 N. W. 141. In *Robison v. Uhl*, 6 Neb. 328, 332, it was held that where the buyer was in possession before the sale, the lack of a change of possession was of no importance.

⁸⁷ Gen. St. (1885), § 2633. "Every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of things sold or assigned, shall be conclusive evidence of fraud, as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith." § 2634. "The term 'creditors' as used in the last section, shall be construed to include all persons who shall be creditors of the vendor or assignor at any time while such goods and chattels shall remain in his possession or under his control."

⁸⁸ *Conway v. Edwards*, 6 Nev. 190; *Gaudette v. Travis*, 11 Nev. 149; *Thomas v. Sullivan*, 13 Nev. 242; *Ivancovich v. Stern*, 14 Nev. 341; *Comaita v. Kyle*, 19 Nev. 38, 5 Pac. 666 (the delivery of a bill of sale was here held insufficient); and cases cited in succeeding notes in this section. In the case of *Tognini v. Kyle*, 17 Nev. 209, 212, 215, 30 Pac. 829, 45 Am. Rep. 442, there was a sale of 12,000 bushels of charcoal in pits on the vendor's land. *Belknap, J.*, in delivering the opinion of the court

said: "At the time of the execution of the bill of sale the charcoal was in the pits in which it had been burned upon the land of the vendors. No attempt was made to remove it. A few days after the sale, and about twenty-five days prior to the time when the attachment was laid, plaintiffs sent a person to the coal pits and caused them to be severally marked with their name. This person remained in charge of the property for about a fortnight, when he left, and another, who lived upon an adjoining ranch, was requested to look after it. This latter person made occasional visits each day to the coal pits. Nothing further was done by the plaintiffs down to the time of the levy by the defendant. There is no difficulty in the application of the statute to sales of personal property capable of actual delivery, as, for instance, in the case of the sale of a few bushels of charcoal, but the application of the statute to sales of cumbrous property, such as 12,000 bushels of charcoal, has been fruitful of litigation. What will amount to a change of possession sufficient to satisfy the requirements of the statute in one case will fall short of its demands in another. Each case must be decided with the relation to the character and situation of the property at the time of the sale. * * * The creditors of the vendors could not have been misled by the failure of the plaintiffs to remove the charcoal before selling it, and it was not necessary to subject them to that expense."

⁸⁹ *Gray v. Sullivan*, 10 Nev. 416. The principle stated above was recog

After there has been such a change it makes no difference that the seller is given possession, especially if it is under circumstances different from those under which he originally held the property as owner.⁹⁰ Where the possession of the property sold is in a bailee at the time of the sale, notice to him accomplishes a sufficient change of possession; but this is not true where the possession is in a mere servant of the seller, for his possession

nized in this case, but it was a close question whether there was in fact such a change of possession. Beatty, J., in a strong dissenting opinion maintained that there was not. In following *Gray v. Sullivan*, in the later cases of *Twist v. Kelly*, 11 Nev. 377, and *Estey v. Cooke*, 12 Nev. 276, the court went far (especially in the latter case) toward holding a change of possession sufficient although to all appearances the property remained as before. In the case of *Sharon v. Shaw*, 2 Nev. 289, 292, 90 Am. Dec. 546, the court said: "The principal question presented for consideration in this court is, whether the delivery of the personal property by Tregloan to the plaintiff was sufficient to meet the requirements of the Statute of Frauds? Our conclusion is, that the delivery of that portion of the property transferred by the bill of sale which was in the mill and office or on the premises conveyed by the deed fully met the requirements of the law. The bill of sale passed the right of possession, and the deed and the subsequent surrender of the possession of the real estate upon which the personal property was kept, was a complete delivery of the possession of that personal property. We are unable to see what further delivery or change of possession could have taken place. The plaintiff having received a conveyance of the real estate whereon all the personal property was needed

for use, it would be a harsh construction of the law to hold that a complete delivery could not take place without a removal from it from the place where it had been kept by the vendor of the plaintiff. There was not only a transfer of the right of possession by means of the deed and bill of sale, but the plaintiff's vendor surrendered possession of everything about the premises, and delivered the keys to the agent of Mr. Sharon. Thus, the title and the possession were passed, and the deed which was placed upon record before the levy by the sheriff imparted notice to the world that the premises upon which the personal property was kept had been conveyed to the plaintiff." If, however, in such a case the buyer merely takes possession of the realty on which the property is situated jointly with the seller, the rule approved by the court in *Sharon v. Shaw* does not apply. *Lawrence v. Burnham*, 4 Nev. 361, 97 Am. Dec. 540.

⁹⁰ *Carpenter v. Clark*, 2 Nev. 243, 248; *Lewis v. Wilcox*, 6 Nev. 215. In *Carpenter v. Clark*, the court said: "It seems to us that the reasonable construction to be placed upon the statute is that the change of possession must be actual, *bona fide*, and must continue for such a length of time as will, under the circumstances of each case, be likely to operate as a general advertisement of the sale or change of title of the property."

is his master's.⁹¹ The fact that a creditor knew of the sale has been held not to deprive him of his right to treat it as void.⁹² Section 2634 of the statute does not give the creditors there referred to a permanent right to treat a sale as void. Unless the objecting creditor secures a lien on the property while the seller is in possession, he cannot treat the sale as void although there may have been a considerable delay in transferring possession to the buyer.⁹³

§ 382. **New Hampshire.**—Where the seller retains possession after an absolute sale of personalty, the sale is held to be fraudulent as a matter of law, irrespective of the intention of the parties. The early cases referred to the possibility of giving a "sufficient explanation" why the possession was not changed, but such an explanation when held good by the court amounted merely to an exception to the general rule, and the law as established to-day seems to be clear that where the seller retains possession, unless a case is brought within some exception to the rule, or unless the sale is open and notorious, creditors may treat it as void.⁹⁴ The

⁹¹ *Doak v. Brubaker*, 1 Nev. 218, 223; *Sharon v. Shaw*, 2 Nev. 289, 90 Am. Dec. 546. In the former case cattle had been mortgaged and the herdsman in charge notified. *Lewis, C. J.*, said: "Where the property is in the possession of a bailee, also, an actual delivery is unnecessary, because the vendor himself not having the possession, the only delivery which could be made would be to give an order for it, or deliver the receipt and obtain the recognition of the transaction by the bailee. * * * But in the case at bar, the cattle were in the possession and under the control of the mortgagor, for the herdsman was merely his servant or agent, having no property in the cattle, and whose possession was only for his master, the mortgagor. * * * The case of *Hurlburt v. Bogardus*, 10 Cal. 518, 519, is directly in point against the appellant here."

⁹² In the case of *Lawrence v. Burnham*, 4 Nev. 361, 368, 97 Am. Dec.

540, it was said: "The statute makes the want of delivery 'conclusive evidence of fraud.' No court has the right to say that the want of delivery shall not be so where the creditor has knowledge that a sale has been attempted by the debtor. Whether the attaching creditor knew the fact or not is a matter of no consequence. The law only requires him to show that no delivery accompanied the sale. When that is done his proof is conclusive that the sale was fraudulent as to him, and no evidence of an honest purpose or fair intention upon the part of the vendor and vendee, or the knowledge by the creditor of the fact that a sale had taken place, can overcome the conclusive evidence of fraud which the want of delivery establishes."

⁹³ *Clute v. Steele*, 6 Nev. 335.

⁹⁴ The leading case is that of *Coburn v. Pickering*, 3 N. H. 415, 425, 426, 14 Am. Dec. 375. *Richardson, C. J.*, in delivering the opinion of the court

general tendency has been to restrict the operation of the rule,

said: "A sale of goods, in order to be considered as made *bona fide* with respect to creditors, must be made without any trust whatever, either express, or implied. This is the doctrine of Twyne's Case; and we are not aware that the soundness of it has ever been questioned. It is not permitted to a debtor to convey away his goods, by sale, with any secret understanding between him and the vendee, that the goods shall be holden for the benefit of the vendor, in any way, whatever. The nature of the benefit, reserved in the sale, is immaterial. It matters not whether the benefit is to consist in the use of the goods, or in some other favor to be shown by the vendee. Anything of this kind is a trust, and what the law denominates a fraud. * * *

After a most attentive and careful examination of the books, on this subject, we have not been able to entertain a doubt, that the true rule, to be deduced from all the adjudged cases, is, that when the sale is absolute, possession and use of the goods, afterward, by the vendor, is always *prima facie*, and, if unexplained, conclusive evidence of a trust. * * * To this rule, it can hardly be said that any exception is to be found in the books. For the cases of sales of ships at sea seem not to come within the spirit of the rule, until the vessels arrive in port; and then the rule itself applies. * * * So cases of goods, bought at a sheriff's sale, and afterward loaned to the execution debtor, have been held not to come within the rule. * * * And the case of Steel v. Brown, 1 Taunt. 381, where it was decided that a bill of sale of goods, made for a valuable consideration, unaccompanied with possession, was valid as against the vendor, and as against a creditor, with whose

knowledge it was made, is not within the rule; because the assent of the creditor puts him on the ground of a party to the sale." In the case of French v. Hall, 9 N. H. 137, 146, 32 Am. Dec. 341, Parker, C. J., said: "It seems to be conceded, if the contract of sale is to be tried by the laws of this State, that there was a sufficient change of the possession, and that the sale must be held valid and the plaintiff's action sustained. If we rightly apprehend the law of Vermont, as gathered from the cases cited by the defendant's counsel, the result of a trial by that law must probably have been the same. It seems to be supposed that there is a substantial difference in the rule relative to sales of personal property, as held in the two States; possession of personal property, after an absolute sale, in this State, being held to be, *prima facie* and if unexplained, conclusive evidence of fraud; while in Vermont it is held to be fraud *per se*. The expressions in some of the cases, taken alone, might perhaps well lead to such a supposition; but the general current of the authorities seems to indicate that the principle held in both may perhaps be substantially the same. By the law of this State, in order to a valid sale as against creditors, there must be a change of possession; and doubtless an open, visible, and substantial change; or there must be some sufficient explanation why the property was left in the possession of the vendor. It is not said that the change must be actually known and notorious. What will constitute a sufficient explanation has never been fully settled; but its nature is, in some degree, indicated by the fact that an agreement that the vendor might retain possession, under a lease, has been held not to

and in one instance, at least, in recent years, it was severely criti-

be sufficient. In this case, however, there was a change of possession, continuing about two months; and the courts of Vermont, although they hold that 'a sale of personal property, unaccompanied with a change of possession, is *per se* fraudulent as against the creditors of the vendor,' do not hold, where there has been a visible, substantial change of the possession, that the sale is fraudulent, if the property is, afterward, upon a hiring, suffered to go back into the possession of the vendor, for a temporary purpose. *Farnsworth v. Shepard*, 6 Vt. 521; *Morris v. Hyde*, 8 Vt. 352, 356, 30 Am. Dec. 475; *Harding v. Janes*, 4 Vt. 462. From the opinion of Mr. Justice Prentiss, 2 Aik. 69, 70, it seems there are exceptions to the rule as held in Vermont. Perhaps an impossibility of removal and change of possession, from whatever cause, might be held to constitute an exception. If what would be held here to be a sufficient explanation would there negative the fraud and form an exception, the difference between the law, as held in the two States, is rather one of terms than of principles." In *Kendall v. Fitts*, 22 N. H. 1, 7, the court said: "But what amounts to a 'sufficient explanation' where the possession is not changed has not, as we can discover, been definitely determined. * * * Should we, under the decisions in our own reports, attempt to lay down any rule upon this subject, it might, perhaps, be that all agreements or bargains, express or implied, which entered into the contract of sale, whereby the vendor should retain possession of the property for the advantage of either party, and not for the accommodation of the vendee; and all agreements and contracts to retain possession, made

directly after the sale, either without changing the possession, or immediately after changing it, should be regarded as conclusive evidence of fraud." In the case of *Janelle v. Denoncour*, 68 N. H. 1, 2, 44 Atl. 63, there was a sale of a kiln of brick by one Morrell to the plaintiff. The court said: "The acts indicating change of ownership relied on by the plaintiff are the recording of the bill of sale in the office of the town clerk on the day of its date, permission by Mrs. Morrell that the kiln might remain in the yard until disposed of, and the putting of a covering over the kiln by the plaintiff's servant, by his direction, prior to the attachment. The bill of sale not being an instrument required by law to be recorded, the record was not notice to creditors of the sale. Mrs. Morrell having no estate in the brickyard during the life of her husband, and no possession or right of possession, her permission to the plaintiff to occupy it was of no more effect than that of any stranger to the title. Morrell was tenant for life of the brickyard, remainder in his wife. The bricks were manufactured in the yard, and were in the kiln when sold to the plaintiff. His act in permitting them to remain on the land of the vendor after a reasonable time for removing them, without the exercise of visible acts of ownership, was a leaving of them in the vendor's possession. There remains the fact that the plaintiff, by his servant, after his purchase and before the attachment, put a covering over the kiln. This was the only act of open, visible ownership exercised by the plaintiff. The trade was not made at the yard, and the plaintiff did not personally go to the kiln before the attachment. It is manifest there was no such visible

and notorious change of possession as would amount to notice to creditors of a change in ownership." In the case of *Harrington v. Blanchard*, 70 N. H. 597, 49 Atl. 576, one Moulton sold his stock of goods to the defendant. Pike, J., said: "To render the sale valid as against Moulton's creditors, there should have been 'an open, visible change of possession' of the goods. No such change resulted from the delivery of the key to the defendant, or the taking of the inventory. *Smith v. Moore*, 11 N. H. 55, 65. Save that he was acting in the capacity of agent, Moulton exercised precisely the same control over the goods after the sale as before. In fact, it appears that it was arranged between the defendant and himself that the goods should be left in his actual possession to sell upon commission. The signs upon the place of business indicated that the character of the possession was not changed. There is no statute which makes the publication of a notice of the sale in a newspaper equivalent to a change of possession. Such a publication resembles an unauthorized record of a bill of sale in the town records, which has been held to be ineffective. *Janelle v. Denoncour*, 68 N. H. 1, 44 Atl. 63. At most it would only give notice of an alleged sale. It would afford no explanation of Moulton's continued possession. It certainly could be no more effective in that direction than would be knowledge by the attaching creditor that the plaintiff claimed to own the goods by purchase from Moulton. *Sanborn v. Putnam*, 61 N. H. 506. Moulton's retention of possession without satisfactory explanation was, as against attaching creditors, conclusive evidence of fraud." In *Weeks v. Fowler*, 71 N. H. 518, 521, 51 Atl. 624, Chase, J., said: "Two cases are relied upon by

the defendant to sustain the proposition that the facts reported show, as matter of law, that the change of possession was insufficient — *Sanborn v. Putnam*, 61 N. H. 506, and *Harrington v. Blanchard*, 70 N. H. 597, 49 Atl. 576. Although there is much similarity between these cases and the present case, there are differences which, though small, are very material and distinguish the cases from this one. In both of the cases the business was carried on after the sale the same as before, while in this case a significant change was made — a closing-out sale was begun. This change was likely to attract attention, especially as the business was that of selling provisions. In *Sanborn v. Putnam*, the vendee was employed in the business prior to the sale, and it was found as a fact that there was no visible change in the possession of the property; while in this case the plaintiff, so far as appears, had no connection with the business before he became a purchaser, with others, of the stock of goods. Whatever possession the plaintiff then received and subsequently retained was entirely new. In *Harrington v. Blanchard*, there was no manual delivery of the stock; while in this case the goods and fixtures were turned over to the vendee, and he took charge of the business, and was in and out of the store. Upon the facts reported, it cannot be held as a matter of law that there was not sufficient change of possession on August 18th and subsequently to render the sale valid as against the vendors' creditors, nor that there was not sufficient evidence to support the finding of possession, as a matter of fact." The general rule was also applied in the following cases: *Parker v. Pattee*, 4 N. H. 176; *Trask v. Bowers*, 4 N. H. 309; *Lewis v. Whittemore*, 5 N. H. 364, 22 Am. Dec. 466 (here since there was

cised.⁹⁵ The change of possession necessary to take a case out of the rule need not be made contemporaneously with the sale in all cases. When the property cannot be removed immediately because of its character or situation, it is permissible to leave the seller in possession for a reasonable time until the necessary means of removal can be procured.⁹⁶ A mere momentary formal

no secrecy connected with the sale it was held valid); *Paul v. Crooker*, 8 N. H. 288 (here subsequent as well as prior creditors were held entitled to treat a sale without a change of possession as void); *Walcott v. Keith*, 22 N. H. 196; *Coolidge v. Melvin*, 42 N. H. 510; *Shaw v. Thompson*, 43 N. H. 130; *Lang v. Stockwell*, 55 N. H. 561; *Cutting v. Jackson*, 56 N. H. 253; *Flagg v. Pierce*, 58 N. H. 348; *McDonough v. Prescott*, 62 N. H. 600; *Doucet v. Richardson*, 67 N. H. 186, 29 Atl. 635.

⁹⁵In the case of *Thompson v. Esty*, 69 N. H. 55, 66, 70, 71, 45 Atl. 566, *Carpenter, C. J.*, said: "This rule, erroneously called a presumption of law, compels the judge to hold in very many cases that the sale was fraudulent when it is plainly apparent that it was attended with the utmost good faith toward the vendor's creditors. It becomes the means, in perhaps a majority of cases where it is applied, of depriving innocent parties of their property bought at a *bona fide* sale thereof. Although the evidence before the jury is contradicted that the sale was not only fair but made in the interest of the vendor's creditors, they are instructed that they must negative that fact by a presumption announced by the court as a principle of substantive law. That mischief has resulted from such a palpable conversion of a question of fact into one of law is not surprising. If it is conceded that the actual purpose of the vendor is not important, but only the effect of the transaction

upon the rights of creditors is to be considered, it is manifest that the question is still one of fact."

⁹⁶In *Morse v. Powers*, 17 N. H. 286, 296, there was a mortgage of a quantity of lumber. *Parker, C. J.*, said: "We are of opinion that this would be sufficient in the case of an absolute sale, where the goods were at the time in the possession of the vendor. In such case there must be sufficient explanation, if the possession is not changed. *Coburn v. Pickering*, 3 N. H. 415, 14 Am. Dec. 375. But it is a sufficient explanation that the property is left until the vendee can procure the necessary means of removal. He could not be required to go to the house of the debtor, prepared with carts, in anticipation of a purchase; nor to remove at midnight, in order to manifest the *bona fide* character of a purchase which he had completed." In the case of *Corning v. Records*, 69 N. H. 390, 392, 393, 76 Am. St. Rep. 178, the court said: "No different delivery is required in the case of a mortgage than of an absolute sale. A delivery sufficient to pass the title as against third persons in the one case will in the other. * * * 'The general rule is that delivery of possession is necessary in a conveyance of personal chattels as against every one except the vendor. * * * An actual delivery by the vendor * * * is not in all cases necessary. It is enough if the delivery be such as the situation of the property admits. * * * And when the goods are so situated

delivery where the property is immediately returned to the seller will not constitute a sufficient change of possession.⁹⁷ A concurrent possession by the buyer and seller is no better than an exclusive possession by the latter.⁹⁸ If at the time of the sale the property is in the possession of the seller's bailee, notice to him is sufficient to amount to a change of possession.⁹⁹

as to admit of no delivery, the sale will be valid without any delivery.

* * * All cases of sales of chattels which are so situated that there can be no delivery at the time of the sale are within the exception to the general rule, whether the chattels be upon the land or upon the water. Negligence on the part of the vendee to take possession may invalidate his claim, as against creditors or subsequent purchasers without notice; but if there be no laches on the part of the vendee if he take possession in a reasonable time, his title can in no case be impeached for want of possession.' *Ricker v. Cross*, 5 N. H. 570, 571, 572, 22 Am. Dec. 480. * * * In the present case, the property is described in the agreement given records by Clark as 'all the personal property in and about Maplewood Hotel premises at Bethlehem, N. H.,' a description in substance that given us by the referee. It was located at Bethlehem, the parties were at the time in Boston, and, if nothing else appeared, the property might well be held to have passed without manual tradition on account of its character and situation relative to the parties, subject to impairment of Clark's title in its validity as to third persons by his negligence in obtaining actual possession."

"*Page v. Carpenter*, 10 N. H. 77. In the case of *Towne v. Rice*, 59 N. H. 412, there was a satisfactory immediate change of possession, and six days after the sale the property

was put back in the possession of the vendor for a temporary purpose, and a creditor attached it. It was held that the creditor could not treat the sale as void. In the case of *Parker v. Marvell*, 60 N. H. 30, the vendor took possession for several days, but returned the property to the vendor and allowed him to keep it for more than a year prior to the attachment by his creditors. The court in this case protected the creditors.

⁹⁷ *Plaisted v. Holmes*, 58 N. H. 293.

⁹⁹ *Stowe v. Taft*, 58 N. H. 445. In the case of *Corning v. Records*, 69 N. H. 390, 395, 46 Atl. 462, 76 Am. St. Rep. 178, Records transferred to the claimant certain property which was in the possession of Cruft who held under a lease. *Parsons, J.*, said: "Unless by the terms of the lease to Cruft a transfer of the general ownership terminated the lease, there is no reason why notice to him should be essential to pass the title. If upon such notice he was not discharged from his lease, he could not dissent and refuse to hold the property. If he could not dissent, his assent could not confer any right. If he could not dissent, his continuing to hold the property would not be an assent and agreement to hold the property for Clark. If neither his assent nor his dissent, or his refusal to do either, affected the title, no legal reason exists why he should have an opportunity for a choice which he could not be compelled to exercise and which was immaterial

It is sufficient if the change though delayed is effected before the seller's creditors attach.¹ In case of a public execution sale, leaving the execution debtor in possession of the property seems not to give rise to any presumption even of fraud.² Knowledge by a creditor at the time of the attachment that the buyer claims to own the property as purchaser does not render the sale valid as to him.³ But if the creditor had notice of the sale when it was made it seems that such notice will prevent him from treating it as fraudulent.⁴ And by a statute enacted in 1895, constructive

if made. His holding was under his lease, and no legal reason can be given for an arbitrary power of assent or dissent vested in him as a restraint upon the power of alienation in the general owner. Hence, Clark's title is equally valid whether Cruft dissented or assented, whether Cruft had or had not notice. The reason assigned in all the cases declaring the unexplained possession by the vendor after an absolute sale conclusive evidence of fraud is that the vendor is given an opportunity to treat the property as his own and thereby gain a false credit. It is the open possession by the vendor as owner that works the fraud. In this case Records never had any possession. There was nothing about the continued possession of Cruft that tended to give Records any false credit. If it should be suggested that upon inquiry of Cruft his statement as to the general ownership would have effect, there is no more foundation for such claim than there would have been had he owed him a debt on account or a promissory note. Neither would Cruft have been under any obligation to furnish information if he had it. Delay in notifying Cruft may or may not under all the circumstances have weight on the question of fraud in fact, and undoubtedly was duly considered by the referee; but of itself it cannot under the circumstances amount to fraud as matter of law."

¹Weeks v. Fowler, 71 N. H. 518, 53 Atl. 543. In Mandigo v. Healey, 69 N. H. 94, 45 Atl. 318, the original vendee did not take possession, but the plaintiff who purchased from him with notice of all the facts secured possession from the original vendor and was protected against the latter's creditors.

²Although not necessarily involved in either decision, this principle was recognized in Coburn v. Pickering, 3 N. H. 415, 426, 14 Am. Dec. 375 (quoted from in first note to this section), and Clark v. Morse, 10 N. H. 236, 241.

³Sanborn v. Putnam, 61 N. H. 506. In this case evidence of such knowledge by the creditor was held in a brief opinion to have been properly excluded since it did not show "such a publicity in the sale as would naturally give it notoriety." The case was cited with approval in Harrington v. Blanchard, 70 N. H. 597, 598, 49 Atl. 576.

⁴In the case of Parsons v. Hatch, 63 N. H. 343, since the creditor knew of the sale when it was made, assented to it, and derived benefit from it, it was held that he could not attack it. The court relied on the *dictum* in Coburn v. Pickering, 3 N. H. 415, 426, 14 Am. Dec. 375, quoted from in the first note to this section, where the rule stated in the text is recognized.

notice may be given of the sale of certain bulky articles.⁵ No exception to the general rule seems to be made in the case of a sale of property which is exempt from execution.⁶

§ 383. **New Jersey.**—After some uncertainty as to the rule of law,⁷ it was finally settled by the Court of Errors and Appeals in 1861 in a mortgage case that retention of possession by the

* “Constructive notice may be given of a sale of grain, threshed or unthreshed, straw, corn-fodder, hay, flax, potatoes, leaf tobacco, lumber, bark, wood or other fuel, bricks, stones, lime, gypsum, ore, manufacturing or other machinery, or hides in the process of tanning, or any building situate on land not belonging to the owner of the building,” by written memorandum conforming to certain specified requirements. Pub. St. (1901), 450.

⁶ *Tilton v. Sanborn*, 59 N. H. 290.

⁷ In 1822, in the case of *Chumar v. Wood*, 1 Halst. 155, it had been held by the Supreme Court that a later purchaser of chattels must prevail over a prior purchaser who had left the vendor in possession. From the report of the case the court seemed to sanction the broad rule that any conveyance of chattels unaccompanied by possession was absolutely void against third persons. In the case of *Hall v. Snowhill*, 14 N. J. L. 8 (2 Green), the question of the effect of the mortgagor's retention of possession was expressly left open. The question was raised in a mortgage case before the Court of Chancery in 1858. The court said: “At common law, a deed of sale absolute, unaccompanied by possession, is good between the parties, but it is void as to third persons. This of course has the qualification that the property is capable of delivery, as in the case of property on the ocean. And in such case there must be no unreasonable delay in assuming the possession

so soon as the property is in a situation to make a delivery feasible. This has been considered the law of this State since the case of *Chumar v. Wood*, 1 Halst. 155. But a distinction has always been recognized between an absolute and a conditional sale. *Conrad v. The Atlantic Insurance Co.*, 1 Pet. 386, 449, 7 L. ed. 189. To what extent that distinction is to be carried is the vexed question which has given occasion to the contrariety of views which have been entertained by eminent judges, and brought their judicial decisions into apparent, if not real, conflict. It appears to me, however, that the mere fact of the bill of sale containing a condition upon which the sale shall be considered void ought not necessarily to make the deed valid. If so, the rule, that a conveyance of chattels unaccompanied with possession is void against third persons, is utterly valueless. All the fraud-doer, who makes his arrangements to defraud his creditors, need do is to put in his fraudulent deed a condition, and the burthen is thrown upon the creditor to prove the fraud. There ought to be some protection to third parties where the chattels are permitted to remain in the possession of the vendor. Such possession should be considered *prima facie* evidence of fraud, and the party who claims the benefit of a mortgage under such circumstances should have the burthen thrown upon him of proving the *bona fides* of the transaction.” *Runyon v. Groshon*, 1 Beasley, 86, 89.

seller or mortgagor might be explained by showing the *bona fides* of the transaction.⁸

⁸ *Miller v. Pancoast*, 29 N. J. L. 250, 252. Whelpley, C. J., citing *Twyne's Case*, 3 Coke's Rep. 80, and *Edwards v. Harben*, 2 T. R. 587, said: "The result to which the courts have been long tending, and short of which there seems to be no stopping place, is the adoption of the rule laid down by the court in the much-considered case of *Bissell v. Hopkins*, 3 Cow. 166, 188, 15 Am. Dec. 259. The question in every case is, whether the act done is a *bona fide* transaction or a trick and contrivance to defraud creditors. The possession by the vendor of personal chattels after the sale is not conclusive evidence of fraud. The vendee may notwithstanding, upon proof that the sale was *bona fide* and for a valuable consideration, and that the possession of the vendor after sale was in pursuance of some agreement not inconsistent with honesty in the transaction, hold under his purchase against creditors. In *Frazier v. Fredericks*, 4 Zab. 162, 169, Green, C. J., said: 'By the common law, as understood in England and in this State, delivery is not necessary, upon a sale of chattel, to vest the title in the vendee; and although they be sold subsequently to a second purchaser, or seized by the vendor's creditors, the vested property of the first purchaser, in the absence of fraud, will prevail.'" * * * *Churmar v. Wood*, 1 Halst. 155, is a case in which this court is reported to have held that a conveyance of chattels unaccompanied with possession was void. The case came before the court upon certiorari, and is loosely reported. If the court, in deciding that case, meant to hold such a conveyance to be void under all circumstances the decision can-

not be supported, and has never been followed. It is probable that all the court intended to say was, that a bill of sale of chattels unaccompanied by possession was, in the absence of explanatory evidence of the *bona fides* of the transaction, void. * * * In *Hall v. Snowhill*, 2 Green, 8, it is assumed, both by Hornblower, C. J., and Ford, J., that the *dictum* attributed to the court in *Chumar v. Wood*, is not the settled law of this State; and I think it may be safely said that the ruling at the circuits for the last twenty years has not been in accordance with that *dictum*." After citing *Martindale v. Booth*, 3 B. & Ad. 498, the court continued: "If in any case nothing else appears but the mortgage unaccompanied by possession of the chattels, a jury should be instructed that the transaction under the evidence appears to be fraudulent, but if a sufficient reason is shown for the nontransfer of possession, the verdict should be otherwise. In all cases, whether fraudulent or not, it is a question of intent to be settled as a question of fact by a jury. * * * Although the mortgage may not be invalid against creditors or subsequent purchasers for want of possession in the mortgagee, it by no means follows that it may not be void against subsequent purchasers by reason of the mortgagees suffering the mortgagor to use and manage the mortgaged chattels in such a way as to deceive *bona fide* purchasers as to the right of the mortgagor to sell and dispose of the chattels; as in case of the stock of a merchant or manufacturer, if the mortgagee of such a stock should permit the mortgagor to remain in possession, selling and dis-

§ 384. **New Mexico.**—The question seems never to have been raised in the Supreme Court.

§ 385. **New York.**—By statute⁹ the presumption of fraud arising from the seller's retention of possession of the chattels sold may be rebutted by proof that the sale was made in good faith and without intention to defraud third parties. In 1812, Kent, C. J.,¹⁰ attempted to establish the rule of constructive fraud, with

posing of his stock without restriction in the ordinary course of trade, such conduct would be evidence of fraud to go to a jury; evidence that the mortgage was kept on foot for fraudulent purposes, and the mortgage would be held void, at least so far as property sold in the ordinary course of the trade permitted, was concerned. Or, as suggested by Lord Mansfield, the property subsequently sold might be held discharged from the lien of the mortgage, as sold by the assent of the mortgagee by the mortgagor, as his agent authorized to do so, and received the purchase money for his benefit. This principle would not apply to the case of the sale of an entire stock of goods out of the ordinary course of trade by the mortgagor, unless the mortgagor had been permitted, with the express knowledge of the mortgagee, to hold himself out to the world as the owner of the property unincumbered by any mortgage." Since the decision in the case of *Miller v. Pancoast*, the question has not been squarely before the court, but that case has several times been referred to with approval. *Muchmore v. Budd*, 53 N. J. L. 369, 392, 22 Atl. 518; *Knickerbocker Trust Co. v. Penn Cordage Co.*, 65 N. J. Eq. 181, 185.

⁹ 2 Birdseye's Rev. St., etc., 2636. "Every sale of goods and chattels in the possession or under the control of the vendor, and every as-

signment of goods and chattels by way of security or on any condition, but not constituting a mortgage nor intended to operate as a mortgage, unless accompanied by an immediate delivery followed by actual and continued change of possession, is presumed to be fraudulent and void as against all persons who are creditors of the vendor or person making the sale or assignment, including all persons who are his creditors at any time while such goods or chattels remain in his possession or under his control or subsequent purchasers of such goods and chattels in good faith; and is conclusive evidence of such fraud, unless it appear, on the part of the person claiming, under the sale or assignment, that it was made in good faith, and without intent to defraud such creditors or purchasers. But this section does not apply to a contract of bottomry or respondentia, or to an assignment of a vessel of goods at sea or in a foreign port."

¹⁰ *Sturtevant v. Ballard*, 9 Johns. 337, 339, 344, 6 Am. Dec. 281. Kent, C. J., in delivering the opinion of the court, said: "The great point is whether the fact of permitting the vendor to retain possession of the goods did not render this sale fraudulent in law, notwithstanding such permission was inserted in the deed as a condition of the contract. If there had been no such insertion, but the sale had been absolute on the face

the modification that in certain exceptional cases which were to be dealt with by the court, the effect of the seller's retention of possession might be overcome. As early as 1815, however, the doctrine that retention of possession makes a sale only *prima facie* fraudulent was sanctioned without discussion.¹¹ This was followed in 1823 by a similar decision,¹² and in 1824, the Supreme Court definitely adopted this view in a mortgage case.¹³ The rule laid down by Kent, C. J., was treated as reconcilable with those cases in two later decisions.¹⁴ But the law was finally set-

of it, and possession had not immediately accompanied and followed the sale, it would have been fraudulent, as against creditors; and the fraud, in such case, would have been an inference or conclusion of law, which the court would have been bound to pronounce. This is a well-settled principle in the English courts. It is to be met with in a variety of cases, and especially in that of *Edwards v. Harben*, 2 T. R. 587, and it has been recognized and adopted by some of the most respectable tribunals in this country. *Hamilton v. Russell*, 1 Cranch, 309; *Dawes v. Cope*, 4 Binn. 258. But it by no means follows that such a sale, with such an agreement attached to it, and appearing on the face of the deed, is necessarily valid. There must be some sufficient motive, and of which the court is to judge, for the nondelivery of the goods, or the law will still presume the sale to have been made with a view to 'delay, hinder, or defraud creditors.'"

¹¹ *Wickham v. Miller*, 12 Johns. 320, 323.

¹² *Butts v. Swartwood*, 2 Cow. 431.

¹³ *Bissell v. Hopkins*, 3 Cow. 166, 188. 15 Am. Dec. 259. *Savage, C. J.*, in delivering the opinion of the court, said: "I do not think it necessary to enter upon a minute review of the cases. Kent, C. J., has examined many of them, in *Sturtevant v. Ballard*, 9 Johns. 337, 338, 6 Am. Dec.

281, and comes to the conclusion that a voluntary sale of chattels, with an agreement, either in or out of the deed, that the vendor may keep possession is, except in special cases and for special reasons to be shown to and approved of by the court, fraudulent and void as against creditors. The learned judge, no doubt, intended to say here, as in *Barrow v. Paxton*, 5 Johns. 258, 261, 4 Am. Dec. 354, that possession continuing in the vendor is only *prima facie* evidence of fraud, and may be explained. The question in every case is whether the act done is a *bona fide* transaction, or whether it is a trick and contrivance to defeat creditors. *Cadogan v. Kennett*, Cowp. 432, 435. The possession, by the vendor, of personal chattels after the sale is not conclusive evidence of fraud. The vendee may, notwithstanding, upon proof that the sale was *bona fide*, and for a valuable consideration, and that the possession of the vendor, after such sale, was in pursuance of some agreement not inconsistent with honesty in the transaction hold under his purchase against creditors." *Bissell v. Hopkins* was referred to with approval by the Court of Errors in the case of *Seward v. Jackson*, 8 Cow. 406, 453.

¹⁴ *Jennings v. Carter*, 2 Wend. 446, 20 Am. Dec. 635; *Archer v. Hubbell*, 4 Wend. 514.

tled in 1830 by the enactment of a statute to the same general effect as the one now in force.¹⁵ A mere constructive change of possession where the seller is left in control of the property as agent for the buyer is not such a change as the statute contemplates.¹⁶ Neither is possession by the buyer, concurrently with the seller, sufficient.¹⁷ It is enough, however, if the change is notorious and public, even though the seller is left with some control over the property¹⁸ Even after a change of possession which has lasted a considerable

¹⁵ Savage, C. J., in delivering the opinion in the case of Hall v. Tuttle, 8 Wend. 375, 378, shortly after the enactment of the statute, said: "The rule, as I understand it, is that possession by the vendor or mortgagor, after forfeiture, is *prima facie* evidence of fraud; but that such possession may be explained, and if the transaction be shown to have been upon sufficient consideration, and *bona fide*, that is, without any intent to delay, hinder, or defraud creditors or others, then the conveyance is valid, otherwise not." The general rule as set forth in the statute of 1830 and the statute now in force was applied in the following cases: Collins v. Brush, 9 Wend. 198; Blaud v. Gabler, 77 N. Y. 461; Siedenbach v. Riley, 111 N. Y. 560, 19 N. E. 275; Preston v. Southwick, 115 N. Y. 139, 21 N. E. 1031; Schidlower v. McCafferty, 85 N. Y. App. Div. 493, 83 N. Y. Suppl. 391. The statute does not apply to the sale or assignment of choses in action. Browning v. Hart, 6 Barb. 91.

¹⁶ Butler v. Stoddard, 7 Paige, 163.

¹⁷ Spotten v. Keeler, 22 Abb. N. C. 105.

¹⁸ Menken v. Baker, 40 N. Y. App. Div. 609, 57 N. Y. Suppl. 541; *affd.*, without opinion, in 166 N. Y. 628, 60 N. E. 1116; Fisher v. Stout, 74 N. Y. App. Div. 97. In Stanley v. The National Union Bank, 115 N. Y.

122, 136, 22 N. E. 29, the court said: "The law does not require a family to be broken up or a wife to separate from her husband to enable her to acquire and maintain possession of property lawfully owned by her. Her possession must be such as the circumstances of the case permit and such as she is capable of taking and enjoying; and when she has done all that it is possible for her to do in this respect it is a question of fact to be determined by a jury whether she was, in fact, in possession of the property or not. Here the wife took possession of the mortgaged property, advertised it for sale, and sold it at public auction; she notoriously became its purchaser on such sale; she acquired from its lawful owner the possession of the farm on which it was used; she delivered the milk produced from the cows in her own name at the cheese factory where it was manufactured, and drew the price derived therefrom and disbursed it as her own property. No element of secrecy entered into the transactions, and everything relating thereto was openly and publicly done under a claim of legal right. We have no doubt but that these facts fully justified the finding of the jury that there had been an actual and continued change of possession of the property mortgaged within the meaning of the statute."

time, if the seller is put back into possession, the presumption of fraud arises.¹⁹ In the case of bulky and cumbersome chattels, although there need be no change in their location, something must be done to indicate the change of title.²⁰ To rebut the pre-

¹⁹ *Tilson v. Terwilliger*, 56 N. Y. 273, 275, 276. The court in its opinion said: "It is true, the sale was accompanied by immediate delivery to the vendee, and an actual change of possession; and much time then passed before the chattel came again into the possession of the vendor. This matters not; save as a circumstance to be considered by the jury, on the issue of good faith and absence of intent to defraud. The change of possession into the vendee did not continue. With no other title in the meantime claimed to it than that of the vendee, it had come, with his knowledge and assent, into the open and notorious control and possession of the vendor. The law will not measure the lapse of time, from the sale and delivery, to this renewed possession by the vendor directly from his vendee, and say, that a change of possession continued for this longer period, will satisfy the statute; but for that shorter period will not. The statute is imperative, that the sale must be followed by a continued change of possession, or it shall be presumed to be fraudulent. It is then, upon the vendee to make it appear, that the transaction was in good faith, and with no intent to defraud." Compare with this decision the language in an earlier decision of the Supreme Court in regard to property returned to the seller's possession for a mere temporary purpose and later returned to the buyer's possession. *Knight v. Forward*, 63 Barb. 311, 318. The court said: "Was it the intention of the Legislature to provide that after a sale of goods and chattels, they may not at

any time pass into the possession of the vendor, without raising the presumption that the sale was made with intent to defraud creditors? It seems to me not. When it appears that property has passed into the hands of the vendor for a mere temporary purpose, and under circumstances which show that the return of the possession was not with a view of enabling the vendor to use it as his own while the legal title was in another, the creditors of the vendor are not authorized to attack the sale as fraudulent and void. In this case, it would seem, the father occasionally allowed his son, the vendor, to use the property, and after use it was again returned to his possession. The change of possession was immediate, and was continued, within the meaning of the statute; and there was no presumption of fraud against the sale."

²⁰ In *Stimson v. Wrigley*, 86 N. Y. 332, 337, the court said: "It is said that the immediate removal of the property sold was excused because it was heavy machinery screwed to the floor of the mill and not easily handled. Undoubtedly the bulky and cumbersome character of articles sold affects the nature of acts of delivery and taking possession. But some act, definite and distinct, is always required. Actual removal from the mill might not have been necessary, but something tantamount to an actual delivery, some plain surrender of possession on the one hand and assumption of it on the other, is necessary, and the finding of the Special Term negatives the existence of any such fact."

sumption of fraud after it has arisen, it is not necessary to show any special reason for the buyer's retention of possession.²¹ The fact that a sale is a public execution sale does not prevent the presumption of fraud from arising.²² And it has been held to make

²¹ *Hanford v. Artcher*, 4 Hill, 271; *Mitchell v. West*, 55 N. Y. 107. It was held in an early case that merely showing that the seller was allowed to keep possession for his accommodation was not sufficient. *Gardner v. Adams*, 12 Wend. 297, 298. The court said: "Under this statute, we hold that possession remaining in the vendor or mortgagor may be explained; and if reasons can be shown which negative any intent to defraud creditors or purchasers, the sale or mortgage is held valid. In this case no reason is shown, only that it was for the accommodation of the mortgagor. That reason might be assigned in every case; and if held sufficient, the burden of proving fraud would be thrown upon the plaintiff, whereas the statute intended that those concerned in such a transaction should be obliged to prove it not only done upon good consideration, but free from all intention of defrauding any one, or defeating any creditor in the collection of his debt." In the later case of *Clute v. Fitch*, 25 Barb. 428, 432, one Timby sold a sleigh to the defendants. The language used by the court can hardly be reconciled with the holding in *Gardner v. Adams*. Welles, J., said: "We are also of the opinion that if it was incumbent upon the defendants to account for or explain the fact that the sleigh remained in Timby's barn after the sale as above stated, they have done so in a manner which should be regarded as satisfactory. The sale was made in July or August, a season of the year when no use could be made of the sleigh. It does not appear that Timby ever

claimed or used it afterward, or exercised any acts of ownership over it. The fair presumption is that when he moved to Syracuse in the following fall he left it in his barn where it was when he sold it to the defendants, and that it remained there until the following January, the usual season for sleighing, when the defendants brought it away. It was found in the same barn where the plaintiff attached it within a week before it was attached. The transaction was natural and reasonable, and perfectly consistent with honesty and good faith." In the case of *Prentiss Tool & Supply Co. v. Schirmer*, 136 N. Y. 305, 32 N. E. 849, 32 Am. St. Rep. 737, uncontroverted evidence showed that goods, the manufacture of which had not been completed, were sold and left with the seller for completion. It was held as a matter of law that the presumption of fraud was rebutted.

²² In the case of *Fonda v. Gross*, 15 Wend. 628, 630, the creditors of Van Horne, an execution creditor, attached the property sold before there had been any change of possession. Nelson, C. J., said: "It was said in *Farrington v. Caswell*, 15 Johns. 430, that if a party purchasing goods upon an execution issued by him suffers them to remain in possession of the debtor, it is *prima facie* evidence of fraud, as against a subsequent execution. In my opinion, a third person should be considered in no better situation. He, as well as the plaintiff in the execution, may rebut the presumption of fraud, by accounting for the continued possession, and giving some reasonable ex-

no difference that the execution creditor after delaying took possession before creditors attached.²³

§ 386. **North Carolina.**—It was settled before the end of the eighteenth century that retention of possession by a vendor was only *prima facie* evidence of fraud and might be explained.²⁴

planation for its continuance. The case is not within the *terms* of the *fifth section* of the act relative to fraudulent conveyances of goods and chattels (2 Rev. St. 136), as Van Horne is not a vendor, or assignor, but it is within the *reason* of that provision, and may very properly be subjected to the sound common-law principle adopted by it. It is true, the court below put the question of fraud to the jury, which they were, perhaps, bound to do under the *fourth section*, p. 137, of the statute above referred to; but the court should have advised the jury that the plaintiff was bound to explain the long-continued possession in Van Horne, and as he has not done so, it was *conclusively* fraudulent, as against the execution under which the levy was made." In the case of *Stimson v. Wrigley*, 86 N. Y. 332, 337, the court said: "In a case like the present it is the judgment, execution, and sale by the sheriff which constitutes together the conveyance by which title is transferred; and to say that such transfer, because of its form and character, proves good faith as against an assailing creditor, is to except from the operation of the statute one mode of conveyance, although the rule relates equally to all and makes no exceptions. The cases cited by the appellant on this point * * * in no respect contravene this doctrine."

²³ *Gardenier v. Tubbs*, 21 Wend. 169.

²⁴ *Cox v. Jackson*, 1 Hayw. 423; *Vick v. Kegs*, 2 Hayw. 126; *Falkner*

v. Perkins, 2 Hayw. 224. In *Hodges v. Blount*, 1 Hayw. 414, 1 Am. Dec. 563, decided in 1796, this rule was held to apply as against a later *bona fide* purchaser. In *Ingles v. Donaldson*, 2 Hayw. 57, 59, an absolute bill of sale had been given, intended merely as security. Haywood, J., said: "As to what has been said respecting the want of possession, if it be necessary in the present case to resort to that circumstance, the want of possession is a strong badge of fraud. The property is placed in the creditor, the possession continues in the debtor, and by that means other creditors perceiving no visible diminution of the debtor's effects, rest satisfied, and take no measure to secure their debts until perhaps the whole estate of the debtor is exhausted, whereas, should the creditor immediately take possession, other creditors would thereby have notice that the debtor's estate was wearing away and apply for the discharge of their demands in time. It has this further ill effect, that the debtor, still continuing in possession, and being reputed owner, obtains credit upon a belief that he is the owner, and so by fault of the vendee possesses the means of contracting debts without the means of paying them. But in general, this want of possession is only evidence of fraud, which may be explained and repelled by contrary evidence; it is not absolutely conclusive, but is only a stronger sign of fraud, which, by circumstances equally strong, tending the other way, may be overturned."

This rule has been consistently followed since that time with the exception of a few years in the first quarter of the last century during which the Supreme Court temporarily shifted its position.²⁵

§ 387. **North Dakota.**—The present statute which makes the seller's retention of possession only *prima facie* evidence of

²⁵ In the case of *Gaither v. Mumford*, N. C. T. R. 167, although the attaching creditor had had notice of the transaction, a transfer by an absolute bill of sale intended as a mortgage was held to be fraudulent for want of a change of possession. This case was overruled by the case of *Trotter v. Howard*, 1 Hawks, 320, 324, 9 Am. Dec. 640. Henderson, J., said: "Whether a deed be fraudulent or *bona fide* is a question of fact, and possession, or the want of possession, is evidence tending to establish it one way or the other. To make the deed void because possession does not follow it is making it so, not because it is fraudulent, but because possession is wanting. It is true that the want of possession is so strong an evidence of fraud that the evidence is taken for the fact, because it almost invariably follows that a conclusion of fraud is drawn by the jury, as a demand and refusal is frequently confounded with a conversion, for the same reason. Nor do I feel myself bound by the decision of the late Supreme Court, in the case of *Gaither v. Mumford*, N. C. T. R. 167, for however I may be disposed to follow precedents, and particularly those of our own courts, yet I cannot yield my assent to a decision which converts a question of fact into a question of law and transfers from the jury to the court that which, by the fundamental laws of our State and jurisprudence, exclusively belongs to the jury." The general rule has been applied in the following cases: *Howell v. Elliott*, 1 Dev. 76; *Rea v. Alexander*,

5 Ired. 644; *Cheatham v. Hawkins*, 76 N. C. 335, 80 N. C. 161; *Boone v. Hardie*, 83 N. C. 470, 87 N. C. 72; *Brown v. Mitchell*, 102 N. C. 347, 9 S. E. 702, 11 Am. St. Rep. 748. The following cases recognize the rule of law, holding that evidence of the declarations and acts of the vendor remaining in possession are admissible to rebut or confirm the presumption of fraud: *Askew v. Reynolds*, 1 Dev. & B. 367; *Foster v. Woodfin*, 11 Ired. 339; *Marsh v. Hampton*, 5 Jones L. 382; *Bank v. Levy*, 138 N. C. 274, 276. In the last case cited the court said, citing *Twyne's Case*, *Smith's Lead. Cas.*, Vol. 1, p. 1, and *Askew v. Reynolds*, 1 Dev. & B. 367, 368: "The possession and control of the goods having been retained by the debtor, Stone, up to April 21st, and after his alleged sale to the defendant on April 6th, was sufficient of itself to impress upon the transaction a fraudulent character. It was incumbent upon the defendant to explain the character of that possession. The defendant offered his own evidence tending to remove the legal presumption of fraud and to prove that, without any knowledge upon the part of Young or any one else, the defendant left Stone in possession as defendant's agent and bailee. Was such possession of Stone in fact and truth the possession of a bailee of the purchaser or was it merely colorable and a part of the machinery of fraud? The character of Stone's possession thus became a most material inquiry upon the second issue."

fraud²⁶ repealed the rule of constructive fraud which had been embodied in an earlier act of the Legislature.²⁷ The act now in force has been interpreted only once and then in a case which had arisen before its enactment and came to trial afterward.²⁸ It was held in this case that the new statute was not a mere regulation of the law of evidence, that it formed part of the substantive law, and that under the earlier statute the attaching creditor had obtained a vested right which entitled him to treat the sale as absolutely void. A symbolical delivery, consisting in the delivery of the key to the building where the property was stored, was held to effect a sufficient change of possession to satisfy the requirement of the first statute that the change of possession be "actual and continued."²⁹ Although giving notice of the sale to a bailee

²⁶ Rev. Code (1895), § 5053. "Every sale made by a vendor of personal property in his possession or under his control and every assignment of personal property, unless the same is accompanied by an immediate delivery and followed by an actual and continued change of possession of the property sold or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor or assignor, or subsequent purchasers or incumbrancers in good faith and for value, unless those claiming under such sale or assignment make it appear that the same was made in good faith and without any intent to hinder, delay or defraud such creditors, purchasers or incumbrancers."

²⁷ See *Conrad v. Smith*, 2 N. Dak. 408, 410, 51 N. W. 720.

²⁸ *Conrad v. Smith*, 6 N. Dak. 337, 70 N. W. 815.

²⁹ *Morrison v. Oium*, 3 N. Dak. 76, 79, 54 N. W. 288. Bartholomew, J., in delivering the opinion of the court said: "It will be noticed that under our statute the failure to comply with its terms raises a conclusive presumption of fraud. Under statutes of this character it is perhaps true that somewhat higher evidence of delivery

is required than under statutes where the fraudulent presumption raised by the law may be rebutted. *Ludwig v. Fuller*, 17 Me. 162. The delivery in this case was symbolical, as distinguished from actual (which takes place when there is manual tradition of the property from vendor to vendee), or constructive (which is effected by bill of sale when the property is not present, as a ship at sea, or by the parties approaching within view of the property, and the vendor proclaiming delivery to the vendee when the property is ponderous to a degree that precludes actual delivery). But the symbolical delivery that is manifested when the vendor delivers to the vendee the key to the building where the property is stored has long been regarded by the law as equally effective in transferring the title and possession from the vendor to the vendee with actual tradition. What the law requires, and all that the law requires, is that the conduct of the parties should clearly show a relinquishment of ownership and possession, and all rights of control on the part of the vendor, and an assumption of ownership and possession and control on the part of the vendee.

of the seller might under proper circumstances be sufficient to satisfy such a statute, it was held to be insufficient in a case where the seller exercised the same control over the property after the sale as before.³⁰ A creditor whose claims accrued before the sale was within the protection of the statute.³¹

§ 388. Ohio.— Retention of possession by the seller of chattels, after a sale, raises a presumption that the sale was fraudulent against third persons, but the presumption may be rebutted by proof of the good faith of the transaction. This rule has never

* * * We think the trial court rightly held as matter of law that the undisputed evidence showed an immediate delivery, and actual and continued change of possession, good as against existing creditors of the vendors." It was further held to make no difference that a third party also had property in the warehouse and held a key thereto, the seller having agreed with him that his possession should be exclusive.

³⁰ In the case of *Conrad v. Smith*, 2 N. Dak. 408, 410, 413, 51 N. W. 720, Corliss, C. J., said: "On October 1, 1889, McKee sold the stallion to Conrad, the plaintiff, who paid him \$500 for the animal. The stallion at this time was in the livery barn of William H. Doyle. On that day McKee and Conrad came to the barn, and the former stated to Doyle, in the presence of Conrad, that the horse had been sold by him (McKee) to Conrad. Had Conrad from this time exercised exclusive control over the stallion there would have been a sufficient delivery to satisfy the requirements of the statute. It has been repeatedly held, and the doctrine stands upon a sound basis, that when the property sold is at the time of sale in the possession of a third person as bailee, it is sufficient that the former owner notifies such third person of the sale, and abandons all claim to or control over the property,

and the bailee thereafter holds it for the vendee. But the plaintiff failed to keep that exclusive control over the stallion which the statute requires. It is uncontroverted that after the sale McKee continued to drive the animal, just as before the sale, and apparently controlled him in all respects the same as before. The plaintiff himself testified that when he purchased the horse he did not take him away, but left him at Doyle's until January 1st, after plaintiff purchased him; that the understanding was that McKee was to have the use of the horse until the 1st of January. * * * We feel that the statute works a wrong in this case, as it appears to be conceded that plaintiff paid a fair price for the horse, and bought it in good faith, and was governed by no bad motive in leaving it in the possession of McKee. It is a matter for the serious consideration of the Legislature whether a statute under which a wrong like that wrought in this case can be accomplished ought not to be so modified as to leave the question of the good faith of the transaction to a jury as a question of fact, as is the case in many of the States, either by virtue of the statute or because the courts have modified the severity of the old common-law rule."

³¹ *Conrad v. Smith*, 6 N. Dak. 337, 70 N. W. 815.

been departed from and it has not been necessary to reaffirm the old decisions in recent years.³²

§ 389. **Oklahoma.**—The rule of constructive fraud prevailed in Oklahoma before it became a State by force of a statute.³³ It

³² In most of the cases the sales were attacked by later *bona fide* purchasers. This was true in the case of *Burbridge v. Seely, Wright*, 359, 360. The court said: "In the sale of goods, where the possession is left unchanged, it is *prima facie* evidence of fraud. It lies on the claimant, under such sale, to do away with this presumption, and if he fail, the sale is esteemed fraudulent." In *Rogers v. Dare, Wright*, 136, 137, the contention was between two parties who had received bills of sale intended to operate as securities. The later grantee had notice of the other's claim. The court said: "The court has frequently decided that the want of actual possession following a bill of sale of personal property was not *fraud in itself*, but only a circumstance of fraud." The rule was also applied in *Hombeck v. Vanmetre*, 9 Ohio, 153, another case of a later *bona fide* purchaser. The court in a brief opinion in this case review some of the authorities in other States. *Ranney, J.*, in delivering the opinion of the court in the case of *Freeman v. Rawson*, 5 Ohio St. 1, 7, said: "In this State the uniform holding has been that it is a badge of fraud, but not conclusive, and subject to be rebutted by evidence showing some good, honest, and sufficient reason why the possession was not changed. *Hombeck v. Vanmetre*, 9 Ohio, 153; *Collins v. Myers*, 16 Ohio, 547. Without arrogating to ourselves the credit of having placed beyond the reach of criticism a question upon which learned judges have so essentially differed, we still think that the rule

adopted recommends itself for its general convenience, and is better calculated than any other to attain the ends of justice. When viewed in the light of a court of equity, a mortgage is a mere security for the debt. The retention of possession, therefore, by the mortgagor is not absolutely inconsistent with the nature and objects of the conveyance. But, while the right of the creditor to take such security is undoubted, he ought to be required to exercise it in such manner as not to injure others; and as all experience proves that men get credit upon what they possess and apparently own, and as such a conveyance gives the legal right to possession, he ought not to be permitted to expose creditors and purchasers to the hazards of fraud and deception, without giving some good and substantial reason for leaving the property in the hands of the debtor." This doctrine was applied in the later mortgage case of *Kleine, Hegger & Co. v. Katzenberger & Co.*, 20 Ohio St. 110.

³³ Comp. St. (1893), c. 27, § 7. "Every transfer of personal property other than a thing in action, or a ship or cargo at sea, or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or *respondentia* is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent and

was held that the change of possession required by the statute must be open and notorious, and of such a nature as to apprise the community or those accustomed to deal with the seller that there had been a transfer of title.³⁴ In spite of a delay in the change of possession, it seems that the buyer is protected if he obtains possession before creditors secure their rights by attachment.³⁵

§ 390. **Oregon.**—The statute governing the matter³⁶ allows the presumption of fraud which arises where a seller of personalty retains possession after a sale to be rebutted by certain specified

therefore void against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any person on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or incumbrancers in good faith subsequent to the transfer."

³⁴ In *Swartzburg v. Dickerson*, 12 Okla. 566, 567, 73 Pac. 282, the following instruction was held correct: "Unless you believe from the evidence that the plaintiff purchased the goods in question from A. C. Pickens in good faith and immediately took open and notorious possession of said goods, such as would apprise the defendant and community of such change of possession you must find for the defendant as to any goods he claimed he purchased from the said A. C. Pickens. By open and notorious possession I mean public change of possession, which is to continue and to be manifested continually by the outward and visible signs, such as render it evident that possession of the judgment debtor has ceased." See also *Love v. Hill*, Okla. , 96 Pac. 623.

³⁵ In the case of *Woods v. Faurot*, 14 Okla. 171, 174, there was a sale of several horses. The first vendee under an agreement left the vendor in possession for some months and

finally sold the horses to the plaintiff. The day after the sale the plaintiff had them driven from the vendor's pasture into his own. He was protected in his claim as against creditors of the original vendor who attached after this change of possession. The court said: "This did in fact constitute an actual delivery of the property, and the change of possession was sufficient to comply with the law in this class of property. Where range stock is the subject of the sale, every requirement of the law is complied with when the stock is taken charge of by the purchaser or his agents or employees, and driven from the pasture of the seller, and placed in the pasture of the purchaser, and if some of the stock shall afterward escape and stray back to its former range without the knowledge or connivance of the purchaser, such fact will not defeat his title. The change of possession in this case had been actual, absolute, and complete prior to the levy of the writ of attachment, and it does not appear from the evidence that there was any actual fraud in the sale."

³⁶ Annot. Codes & St. (1902), § 788, subd. 40. "Every sale of personal property, capable of immediate delivery to the purchaser, and every assignment of such property, by way of mortgage or security, or upon any

evidence.³⁷ Although the change of possession may be delayed, if the buyer secures possession before creditors attach, there is no presumption of fraud.³⁸ The change of possession required to take a case out of the provision of the statute must be actual as opposed to constructive, of such a character as to give notice of the change, and exclusive of the seller.³⁹

condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession, creates a presumption of fraud as against the creditors of the seller or assignor, during his possession, or as against subsequent purchasers in good faith and for a valuable consideration, disputable only by making it appear on the part of the person claiming under such sale or assignment that the same was made in good faith, for a sufficient consideration, and without intent to defraud such creditors or purchasers; but the presumption herein specified does not exist in the case of a mortgage duly filed or recorded as provided by law."

³⁷ Before Oregon became a State the Supreme Court of the Territory held the presumption of fraud to be conclusive in such a case. *Monroe v. Hussey*, 1 Or. 188, 189, 75 Am. Dec. 552. In this case the attaching creditor gave credit after the transfer. An act passed in 1853 provided that "no bill of sale for the transfer of personal property shall be valid as against existing creditors, or innocent purchasers, where the property is left in the possession of the vendor, unless the bill of sale be recorded in the auditor's office of the county in which the property is situated, within ten days after such sale shall be made." The court admitted that this statute did not apply and held as a matter of common law that the transfer was rendered conclusively fraudulent by the seller's retention of possession.

The rule of the present statute was applied in the following cases as well as in those cited in the notes which follow in this section: *Moore v. Floyd*, 4 Or. 101; *McCully v. Swackhamer*, 6 Or. 438.

³⁸ *Rule v. Bolles*, 27 Or. 368, 41 Pac. 691; *Wyatt v. Wyatt*, 31 Or. 531, 49 Pac. 855.

³⁹ This question was dealt with in *Pierce v. Kelly*, 25 Or. 95, 99, 34 Pac. 963, a mortgage case. Bean, J., in delivering the opinion of the court, said: "The change of possession necessary to overcome and rebut this presumption must be actual, and not merely constructive or legal; it must be effected in a way calculated to give notice to the public that there has been a change in the ownership or control of the property, and a mere constructive possession, or one taken by words and inspection, will not satisfy the statute. 1 *Cobbeys, Chattel Mortgages*, § 497. The possession of the mortgagee must be exclusive, and accompanied with such outward acts and indicia of ownership as will apprise the public, and particularly those who are accustomed to deal with the parties that the goods have changed hands, and the possession has passed from the mortgagor to the mortgagee. There must be a complete change in the dominion and control over the property, and a concurrent or joint possession with the mortgagor is not sufficient (*McKibbin v. Martin*, 64 Pa. St. 352, 3 Am. Rep. 588; *Kitchen v. Reinsky*, 42 Mo. 427, 437), al-

§ 391. **Pennsylvania.**—The general rule has been settled for almost a century that a sale of personalty unless followed by a change of possession is fraudulent as matter of law against the vendor's existing creditors.⁴⁰ The fact that it is stipulated in the

though where there is such a change in the possession and control there, perhaps, can be no legal objection to the employment of the mortgagor to render services in and about the business, or any other agent or employee."

⁴⁰In the leading case of *Clow v. Woods*, 5 S. & R. 275, 278, 281, 9 Am. Dec. 346, the transfer was in the form of a mortgage. Gibson, J., in delivering the opinion of the court, said: "The inclination of my mind is to give the statute a liberal, perhaps an enlarged, construction by putting the rule requiring a change of possession on grounds of public policy, and confining its exceptions to those cases where, from the very nature of the transaction, possession either could not be delivered at all, or, at least, without defeating fair and honest objects, intended to be effected by and which constituted the motive for entering into the contract. Where possession has been withheld pursuant to the terms of the agreement, some good reason for the arrangement, beyond the convenience of the parties, should appear. * * * To come, however, to the case before us: I do not object to the transaction altogether on the ground of the possession not having been immediately delivered. The hides, being in the process of tanning, could not be removed without great deterioration; and, until finished, were unfit for market. The bark and tools were necessary to complete the process; and I think the fair construction of the contract is that all was to be delivered as soon as the leather should be in a fit state to be sold. Possession of the hides in the vats, to en-

able the mortgagor to complete the tanning, would have been unavailing without possession of the tanyard at the same time, which was not intended to be included in the mortgage. If the case stood clear of objection on another ground, I think a good reason might be assigned for the mortgagor continuing in possession as the agent of the mortgagee. I can see no objection to an absolute sale of an article undergoing a process of manufacture to be delivered when finished; and if such a sale would be good, a mortgage under the same circumstances would also be good. If, however, the intention were to conceal the lien thus created, and the transaction were industriously kept secret, it would amount to actual fraud. But where, from the nature of the transaction, possession cannot be given, the parties ought, in lieu, to do everything in their power to secure the public from that deception which the possession of property without the ownership always enables a person to practice. When a ship at sea is sold, the grand bill of sale is delivered, and that divests the vendor of his last badge of ownership; and when goods are too bulky to admit of manual possession, the key of the room is handed over. In every case where possession is not given, the parties must leave *nothing* unperformed, within the compass of their power, to secure third persons from the consequences of the apparent ownership of the vendor. Here the defect is, that the articles conveyed are not described, or particularized, either in a schedule, or in the body of the instrument. This is fatal. In

instrument of transfer or the bill of sale that the vendor shall retain possession does not make the sale valid.⁴¹ The question which has occasioned most trouble in the great number of cases which have arisen on this subject has been as to just what is necessary to constitute a sufficient change of possession. In the more recent cases the tendency has been toward a rather more liberal view than that formerly held. Due regard must be had to the character of the property, its intended use, the nature of the transaction, and the position of the parties; and the question is ordinarily one for the jury. Accordingly it is not necessarily fatal that the property was left with the seller in possession either exclusively or jointly with the buyer as the vendee's agent. But the change to be valid in such a case must be of such a character that it would give reasonable notice of the transfer of title.⁴²

a case of this kind, the slightest neglect in any circumstance the nature of the case may admit of as an equivalent for actual possession is unpardonable." In the case of *Streep v. Eckart*, 2 Whart. 302, 304, 30 Am. Dec. 258, the following was part of a charge held correct: "Any mere temporary possession taken with a view of evading the rule of law relative to unequivocal possession, but which is followed by placing the party and the property visibly in the face of the world, just where they were before the alleged transfer would be fraudulent." The general rule was also applied in the following cases as well as those cited in the succeeding notes: *Babb v. Clemson*, 10 S. & R. 419, 13 Am. Dec. 684; *Forsyth v. Matthews*, 14 Pa. St. 100, 53 Am. Dec. 522; *Pounder v. Foos*, 1 Walk. 27; *Janney v. Howard*, 150 Pa. St. 339, 24 Atl. 740.

⁴¹ *Streep v. Eckart*, 2 Whart. 302, 30 Am. Dec. 258; *Stephens v. Gifford*, 137 Pa. St. 219, 20 Atl. 542, 21 Am. St. Rep. 868.

⁴² *Smith v. Crisman*, 91 Pa. St. 428; *Barr v. Boyles*, 96 Pa. St. 31; *Ziegler & Co. v. Handrick*, 106 Pa.

St. 87; *Renninger v. Spatz*, 123 Pa. St. 524, 18 Atl. 405, 15 Am. St. Rep. 692; *Stephens v. Gifford*, 137 Pa. St. 219, 20 Atl. 542, 21 Am. St. Rep. 868 (reviewing the authorities); *Pressel v. Bice*, 142 Pa. St. 263, 21 Atl. 813; *Goddard, Hill & Co. v. Weil & Co.*, 165 Pa. St. 419, 30 Atl. 1000. In the case of *Haynes v. Hunsicker*, 26 Pa. St. 58, 60, the following charge was held to be correct: "There must be such a delivery and change of possession attending the transfer as the nature of the property is capable of; otherwise the law pronounces the sale fraudulent as against creditors and *bona fide* purchasers. A large quantity of lumber piled up in a millyard is not susceptible of the same delivery that can be made of a horse. The purchaser should take the delivery of the former by counting or ascertaining its quantity, and by marking it conspicuously with his name, and by reducing it into his actual possession by removal at as early a period as, from the nature of the property, it can reasonably be done. * * * Ulster is the point on the river where this lumber was to be drawn for raft-

In many cases it has been held that the mere fact that a seller continued to act as clerk in selling the goods or in conducting the business which was sold would not necessarily render the sale

ing, a distance of thirteen miles from the mill. According to the evidence, within two or three days after it was paid for and delivered the snow went off and the roads became broken up and nearly or quite impassable for heavy loads, and so continued until after the lumber was levied upon; that teams could not be employed to haul, and that it would have cost as much or more than the lumber was worth to have hauled it. If the jury believe this, the plaintiff was not bound to haul the lumber at such a sacrifice, but might wait until he could do so at a reasonable cost; and that the leaving of the lumber in the millyard, up to the time of the levy upon it, under such circumstances, would not in law make the sale fraudulent and void, and subject the property to levy and sale on an execution against Miller." Sterrett, J., in delivering the opinion of the court in the case of *Garretson v. Hackenberg*, 144 Pa. St. 107, 111, 22 Atl. 875, said: "The property in controversy, consisting of the ordinary appliances of a lumbering camp, such as teams, sleds, harness, tools, chains, etc., was used by Burt in cutting and hauling logs, peeling bark, etc., on lands of Messrs. Goodyear, under contracts with them. Burt was indebted to plaintiffs on book account in nearly \$2,500, for goods and supplies sold and delivered to him; and in August, 1889, while the work was in progress, plaintiffs' manager went to the camp, bought the property from Burt for \$1,643, and took from him an assignment of his contracts with the Goodyears. The evidence tended to show that Burt's employees were notified that their wages then

due them would be paid by the vendees, in whose service they were expected to continue, and that Goodyears were informed of the transfer, and thereafter recognized the plaintiffs as assignees of the lumbering contracts by settling with them. It was also arranged that Burt should thereafter act as plaintiffs' foreman, subject to their instructions. The price of the property was credited on Burt's account, leaving a balance of nearly \$800 due plaintiffs. It was virtually conceded that the transaction, as between plaintiffs and Burt, was *bona fide* and untainted by anything like actual fraud." The court held it was error to hold the transaction fraudulent as matter of law. "It is quite true, as suggested by this language, that a more formal delivery of the property could have been made." The several kinds of property in actual use at different points might have been collected together, and, after a formal delivery of the possession thereof to the plaintiffs by Burt, the latter might have withdrawn from the premises entirely and a new manager might have been placed in charge; but, in view of the character and situation of the property, the use that was being made of it, etc., no such ceremony was necessary to a valid sale and delivery thereof, even as against other creditors of the vendor. The case should have been submitted to them (the jury) under proper instructions, to find from the evidence whether the sale was in good faith or colorable, and whether, under the circumstances, the change of possession was all that could reasonably be expected of the vendees, taking into considera-

tion the character and situation of the property. There are many instances in which, from the necessity of the case, there can only be a constructive delivery. *Evans v. Scott*, 89 Pa. St. 136. It is well settled that a change in the location of the property is not always necessary or even practicable. Due regard must be had to the character of the property, its intended use, the nature of the transaction, position of the parties," etc. In the case of *McCullough v. Willey*, 200 Pa. St. 168, 170, 49 Atl. 944, Brown, J., said: "The building in which this machinery was located belonged to McCullough (the vendee), and there was not only no reason why it should be taken elsewhere, but there were very good ones why it should remain. The machines weighed tons; were bolted down to the floor of the mill; were of great length and covered with very fine steel wire; and appellee's tenants — his vendors, to be sure — needed the machinery in their business. All of these conditions were properly taken into consideration by the jury. After the execution and delivery of the transfer to McCullough, he was bound, by some act, to indicate his ownership of the property and to assume control of it, and it was for the jury to determine whether he had submitted evidence to justify a finding that he had done all that was required of him under the circumstances. That ownership was asserted over the machinery after it had been transferred is clearly established by the testimony of Lord, who states that he 'tagged all the machinery as bearing title of James A. McCullough & Company,' and that, when he found that some of the tags had been taken off before the sheriff's levy, he replaced them. Control over it was exercised in leasing it to Beswick and Crowthers." In the

case of *Riggs v. Bair*, 213 Pa. St. 402, the judgment was affirmed on the opinion of the court below, in which the court said: "The rule of law that a sale of personal property without a delivery to the vendee is a fraud against creditors has long been the rule in this State and has not been modified by any recent decisions. But as to what will constitute a delivery in a particular case has been reformed to meet the changed requirements of business from what they were 100 years ago. This modification, and the reason therefor, has been so well set forth by Mr. Justice Dean in the case of the *Keystone Watch Case Co. v. Bank*, 194 Pa. St. 535, 45 Atl. 328, that we quote at large from that opinion: 'In the eighty years that have elapsed since the decision of *Clow v. Woods*, 5 S. & R. 275, 9 Am. Dec. 346, the rigor of the rule laid down in that case, and it is the leading one in this State, has been greatly relaxed. Nor, considering the progress in population and wealth and the change in methods of conducting business, could it have been strictly adhered to without great obstruction to business and hardship to individuals. Under that ruling the cases were rare where, as to creditors, the ownership of chattels could be in one and the possession in another; in such circumstances, with few exceptions, the transaction was constructively fraudulent as to creditors. But in the long line of cases following it, step by step, the rule has been so softened that now it may be said, with few exceptions, where the purpose of the contracting parties was as between themselves an honest one, and there was no concealment, as to creditors, of its true nature, the contract is not constructively fraudulent; in other words, the law will be slow to hold

the parties scamps constructively if the contract, in view of its purpose, was actually an honest one.' We do not understand the court to have meant, in the case just quoted, that there was any change in the rule laid down in *Clow v. Woods*, but that what would be sufficient delivery of possession now, owing to the changed conditions of business, might not have been a good delivery at the time the latter case was decided. And this is the meaning of the opinion of the court in *White v. Gunn*, 205 Pa. St. 229, 54 Atl. 901. Less than a year ago we said: 'There has been no deviation from the general rule that delivery of possession is indispensable to transfer of title by the act of the owner that shall be valid against creditors.' What, however, would be a sufficient delivery of possession and retention of it in one case might not be in another; and in saying that the rigor of the rule requiring the purchaser to take and keep possession of property purchased by him has been relaxed, nothing more was meant than that the law does not have nor set up an unbending test of the sufficiency of delivery and retention of possession to be applied in all cases, but that in passing upon the sufficiency of possession taken by the purchaser in a particular case, there must be taken into consideration the character of the property, the use to be made of it, the nature and object of the transaction, the position of the parties, and the usages of trade or business. Let us apply this rule to the case in hand: The purchaser was buying coffee from the company that roasted his coffee, and the Huff Company, it must be borne in mind, were not only dealers in coffee, they stored coffee and roasted it for the trade. The transaction was an honest one. The price paid for the coffee was the current

price for that article. The purchaser paid part cash and gave bankable notes for the balance, which he subsequently paid. He left his coffee with the Huff Company to be roasted, as he had been doing for seven or eight years. We do not understand the defendant to contradict the proposition that he could leave the coffee with Huff and still make the sale to him valid as against creditors. Certainly no one would insist that Riggs should have shipped his coffee to Wellsville and reshipped it back to Pittsburg in order to have it roasted. But it is contended that the separation from the coffee of the vendor was not complete. True, they might have placed Riggs' coffee all in one pile; they might have marked every individual sack; but how that would have been more of an identification of his coffee than what was done in this case we are at a loss to see. Each pile was marked by a tag which told to the person who looked at it that that coffee was sold to E. H. Riggs, giving the number of bags so sold, which corresponded with the number of bags in the row. And if there was a row of coffee on either side of this Riggs row belonging to the Huff Company, it was separate and distinct from it, both by actual space and by the markings on the the Riggs' coffee. And so as to the weighing of the coffee. It is alleged that this was not an accurate weighing, and that there would have to be another weighing out before the actual shipment of the coffee to Riggs. Certainly with the weighing that was done Riggs could have demanded and received all of the coffee that had been set apart to him; and that is all that is in question in this case. If all of his coffee had not been set apart to him, and if, as between him and Huff, he had a claim for other coffee, that is not material here, as

fraudulent.⁴³ Although a mere constructive or symbolical change

he is only claiming what was set apart; but if Huff had weighed out to him in the manner in which he did more than 7,000 pounds of coffee, still Riggs could claim the amount set apart. And as the evidence goes to show that this was the ordinary, customary way of weighing out large quantities of coffee such as this, there can be no question but what this was a proper weighing. 'Unusual and unnecessary formalities in such transactions are generally a badge of fraud rather than honesty.' *Garretson v. Hackenberg*, 144 Pa. St. 107, 22 Atl. 875. We are of opinion that the admitted facts in this case show that a delivery of the coffee was made to Riggs, and the sale was valid against execution creditors of the Huff Company."

⁴³ *McVicker v. May*, 3 Pa. St. 224, 45 Am. Dec. 637; *Bell v. McCloskey*, 155 Pa. St. 319, 320, 26 Atl. 547; *McCullough v. Willey*, 192 Pa. St. 176, 43 Atl. 999. In the case of *McKibbin v. Martin*, 64 Pa. St. 352, 359, 3 Am. Rep. 588, there had been a sale of all the furnishings in a large hotel. Notice had been given through an advertisement in newspapers, and the buyer personally assumed general charge of the business, but the seller, his son, was retained as superintendent. *Sharswood, J.*, in delivering the opinion, said: "But the law undoubtedly is, that not only must possession be taken by the vendee, but that possession must be exclusive of the vendor. A concurrent possession will not do. 'There cannot in such case,' said Mr. Justice Duncan, 'be a concurrent possession; it must be exclusive, or it would by the policy of the law be deemed colorable.' *Clow v. Woods*, 5 S. & R. 275, 287, 9 Am. Dec. 346. And again, in *Babb v. Clemson*, 10 S. & R. 419, 428,

13 Am. Dec. 684. * * * But what is the concurrent possession which will be deemed such as matter of law? Evidently as owner, or accompanied with the ordinary indicia of ownership, such as will lead any person not in the secret to infer that there has been no actual change. The vendor must appear to occupy the same relation to the property as he did before. In such a case the court must pronounce it fraudulent and colorable *per se*. We have been referred to three cases only in our books which were determined on this ground. These were all of the character I have stated: *Hoffner v. Clark*, 5 Whart. 545; *Brawn v. Keller*, 43 Pa. St. 104, 82 Am. Dec. 554; *Steelwagon v. Jeffries*, 44 Pa. St. 407. Certainly it may be considered as settled by abundant authority in this court that where there has been a sufficient actual or constructive delivery to the vendee, and he is in possession, the fact that the vendor is employed as a clerk or a servant about the establishment, in a capacity which holds out no *indiciu*m of ownership, does not constitute such a concurrent possession as the law condemns. In such cases it is a question for the jury whether the change of possession has been actual and *bona fide*—not pretended, deceptive, and collusive. If there are facts tending to show that he had a beneficial interest in the business; that the proceeds of it went to him beyond a reasonable compensation for his services; that he had an unlimited power to draw upon the till; or that with the knowledge of the vendee he took money to pay his own debts—these are facts for the jury. I will refer to a few of the cases which sustain this view. Thus in *McVicker v. May*, 3 Pa. St. 224, 45 Am. Dec.

637, a sale by a father to a son; when the son had removed to another tavern-stand and the father continued to live with him, and was employed about the house as a servant. 'When the son opened the new tavern,' say the court, 'his mother and sister kept house for him, and his father did jobs; but the son's possession and use of the goods were exclusive. But if mere cohabitation were a badge of fraud, a father's sale to his unmarried son would seldom be sustained. It certainly was not necessary for the son to turn his father out of doors.' *Forsyth v. Matthews*, 14 Pa. St. 100, 53 Am. Dec. 522, as explained by Mr. Justice Lowrie, before whom the case had been tried below (2 Casey, 74), was a sale by a son to his father, and though the business continued to be conducted in the same place and with the assistance of the son, yet there being evidence of an actual transfer of the possession and control of the property, the sale was sustained. *Childs v. Simmons*, an unreported case, cited 26 Pa. St. 74; the transfer was by a storekeeper to his clerk; the vendor continued to aid in the store, but the sign was changed and the sale was upheld. *Hugus v. Robinson*, 24 Pa. St. 9; the subject was a drug store. The vendee bought it for his son, who had been a clerk and apprentice of the vendor, and put him in possession. The vendor attended the store very much as before, and the signs were not changed. It was left as a question of fact, to the jury, and the judgment was affirmed. In *Dunlap v. Bournonville*, 26 Pa. St. 72, two brothers transferred a coach-maker's establishment to a third, and the vendors remained in the capacity of foremen. It was held that it ought to have been submitted to the jury. Chief Justice Thompson has said that this case stands on the very

outer verge of settled principles, but on its facts is still within them. 44 Pa. St. 412. In *Billingsley v. White*, 59 Pa. St. 464, two partners sold out a store of goods to the brother of one of them. One of the vendors continued in the store as a third hand. 'If,' said Mr. Justice Williams, '*Billingsley's* acts and declarations as a salesman had been such as to leave it doubtful whether he was acting as owner or agent, then his presence and connection with the goods would have been such evidence of retained possession as to render the sale fraudulent. But if his acts and declarations were professedly and apparently those of a mere agent, and were so understood by the parties with whom he dealt, as all the evidence tends to show, then they continued no such badge of fraud or evidence of retained possession as would justify the court in declaring the sale fraudulent.'" In the case of *Milne, Brown & Co. v. Henry*, 40 Pa. St. 352, a notice of the sale of stock of merchandise had been inserted in a daily paper. Nothing else indicated to the public that there had been a transfer of title. The sale was held fraudulent as a matter of law. In the case of *Miller v. Garman*, 69 Pa. St. 134, furniture and furnishings of a hotel was sold. Here too there had been a notice of the sale in a newspaper and the buyer had had possession for a few days jointly with the seller. The sale was held fraudulent as a matter of law, since on the whole the change was not such as to give reasonable notice of the transfer of title. The general rule stated in the text has been applied in numerous cases where the parties to the sale lived together upon the premises where the property sold was situated: *Evans v. Scott*, 89 Pa. St. 136; *Pearson v. Carter*, 94 Pa. St. 156; *Crawford v. Davis*, 99 Pa. St. 576; *Crowley v. Irwin*, 1 Pennyp. 227

will ordinarily not be sufficient,⁴⁴ such a change has been held satisfactory in cases where an actual change is impracticable.⁴⁵

(here there was a sale of a horse by a father to his daughter, and since nothing gave notice to the world of the transfer to the title, it was held fraudulent); *McClure v. Forney*, 107 Pa. St. 414; *McGuire v. James*, 143 Pa. St. 521, 22 Atl. 751. Dean, J., in delivering the opinion of the court in the case of *Lehr v. Brodbeck*, 192 Pa. St. 535, 539, 43 Atl. 1006, 73 Am. St. Rep. 828, said: "But there was no change of possession, such as the property was capable of, following the sale, either actual or symbolical. True, the brother was not required to separate from his sister and leave the farm, so that she could remain in the exclusive possession of the property; but he could have withdrawn from the control of it; could have surrendered the keys of the barn to her; both or either could have, in some public manner, manifested the change of ownership which had taken place. But to all outward appearances, his ownership remained the same as before; there was no break in the possession, real or ostensible. As to creditors, therefore, the sale was constructively fraudulent, under all the authorities from *Clow v. Woods*, 5 S. & R. 275, 9 Am. Dec. 346, down to *Pressel v. Bice*, 142 Pa. St. 263, 270, 21 Atl. 813."

"*Cunningham v. Nevill*, 10 S. & R. 201; *Hoofsmith v. Cope*, 6 Whart. 53 (an "actual, visible, and notorious" change required); *Dewart v. Clement*, 48 Pa. St. 413 (change held insufficient where a bill of sale was given on the transfer of title to a canal-boat).

"In *Barr v. Reitz*, 53 Pa. St. 256, the buyer was given a key to the house leased by the seller where the property was stored, and the seller abandoned the house from three to six days afterward. The

court held there had been a sufficient change of possession. In *Benford v. Schell*, 55 Pa. St. 393, it was held that a delivery of the keys to a large safe and a key to the room in which it was located constituted a sufficient change of possession of the safe as against the seller's creditors. Porter, J., delivering the opinion in the case of *Chase v. Ralston*, 30 Pa. St. 539, 541, 542, said: "If possible, the delivery must be actual; if the nature and bulk of the article preclude this, then it must be constructive, a better term, I think, than symbolical, borrowed from the ancient ceremony of feudal investiture. In every case, every species of divestiture which can give the world notice should be resorted to. * * * What was to be done with this timber? It could not be driven off, like the oxen in *Young v. McClure*, 2 W. & S. 147; or hauled away at once, like the hides in *Pritchett v. Jones*, 4 Rawle, 260. Indeed, of all the articles of property which have stirred litigation on this subject, it is the least capable of manual delivery, for its removal requires the application of great force, and squared timber, such as this, can be properly transported only over snow. It was, therefore, sold and paid for. It was formally delivered in the presence of witnesses, and marked by stamping the purchaser's peculiar mark on each stick. To be sure it was not measured, but the sticks were counted, and an experienced woodman's eye would soon have given the contents in feet with sufficient exactness for practical purposes. * * * In this state of the law and the facts, it is questionable whether the court exercised all the power which they might have assumed. The complaining party certainly was not hurt by the charge."

But even where manual delivery cannot reasonably be required, all must be done that the circumstances of the case allow, in order that those dealing with the property may not be deceived.⁴⁶ A

⁴⁶*Cadbury v. Nolen*, 5 Pa. St. 320; *Cessna v. Nimick*, 113 Pa. St. 70, 4 Atl. 193; *Garretson v. Hackenberg*, 144 Pa. St. 107, 22 Atl. 875 (quoted in a former note); *Ayers v. McCandless*, 117 Pa. St. 49, 23 Atl. 344. In the case of *Chase v. Ralston*, 30 Pa. St. 539 (quoted in the preceding note), and in *Long v. Knapp*, 54 Pa. St. 514, heavy timber was sold and unfavorable conditions prevented its removal before attachment by creditors of the seller. It was held that a formal delivery followed by placing the buyer's mark upon it might be sufficient. In the case of *McKibbin v. Martin*, 64 Pa. St. 352, 357, 3 Am. Rep. 588, the court (Sharswood, J.), said: "Whenever the subject of the sale is capable of an actual delivery, such delivery must accompany and follow the sale to render it valid against creditors. The court is the tribunal to judge whether there is sufficient evidence to justify the inference of such a delivery. If there is any question upon the evidence as to the facts, or resting upon the credibility of witnesses, the determination of that must be referred of course to the jury. But if not, it is incumbent upon the court to decide it, either by a judgment of nonsuit or a binding direction in the charge. But it often happens that the subject of the sale is not reasonably capable of an actual delivery, and then a constructive delivery will be sufficient. As in the case of a vessel at sea, of goods in a warehouse, of a kiln of bricks, of a pile of squared timber in the woods, of goods in the possession of a factor or bailee, of a raft of lumber, of articles in the process of manufacture, where it would be not indeed

impossible, but injurious and unusual to remove the property from where it happens to be at the time of the transfer. *Clow v. Woods*, 5 S. & R. 275, 9 Am. Dec. 346; *Cadbury v. Nolen*, 5 Pa. St. 320; *Linton v. Butz*, 7 Pa. St. 89, 47 Am. Dec. 501; *Haynes v. Hunsicker*, 26 Pa. St. 58; *Chase v. Ralston*, 30 Pa. St. 539; *Barr v. Reitz*, 53 Pa. St. 256; *Benford v. Schell*, 55 Pa. St. 393. In such cases it is only necessary that the vendee should assume the control of the subject so as reasonably to indicate to all concerned the fact of the change of ownership. * * * This seems to be just the difference between the case of *Steelwagon v. Jeffries*, 44 Pa. St. 407, upon which the court below relied, and the evidence as it appears on this record. That was the sale of the furniture of a dwelling-house. Nothing is easier than to remove it to another house, or if that be not necessary, for the vendor to leave the house and the vendee to take possession with all the ordinary indicia of ownership. * * * But the circumstances of a large establishment like the 'Merchants' Hotel' are entirely different. Here are many hundred lodging-rooms, parlors, and sitting-rooms, besides the culinary department with its necessary offices, all fully furnished. To what other building can the vendee remove them, or at least without great deterioration and expense? They are valuable mainly for the purpose for which they are used and in the place where they are situated. It is enough that the vendee assume the direction and control of them, and in such an open, notorious manner as usually accompanies an honest trans-

change of possession may, of course, be accomplished as well by the old owner going out and the new owner coming in while the property remains in the same place, as by the new owner taking it away to a new place.⁴⁷ The buyer's possession must be exclusive; a concurrent possession with the seller is no better than no change at all.⁴⁸ The change must be made at the time of the sale, or within a reasonable time thereafter.⁴⁹ But even though delayed, if a considerable time elapses between the time when the buyer assumes possession and when the attaching creditors levy, the buyer will be protected.⁵⁰ A mere temporary change followed by possession in the seller will not suffice.⁵¹ But after a satisfactory change for a substantial period, it is permissible to let the seller have possession for a temporary purpose.⁵² The failure to change possession of the property sold does not

action. Whether all was done that ought to have been done in this instance, and whether the change of possession was real and *bona fide* — not merely colorable and deceptive — leaving the actual possession and control in the vendors, were questions of fact which ought to have been submitted to the jury."

⁴⁷ *Post v. Berwind-White Coal Min. Co.*, 176 Pa. St. 297, 35 Atl. 111.

⁴⁸ This question was well summed up by the court in *McKibbin v. Martin*, 64 Pa. St. 352, 359, 3 Am. Rep. 588, in the passage quoted near the beginning of note 43, *supra*. In *Worman v. Kramer*, 73 Pa. St. 378, it was held error to instruct the jury that "concurrent possession exists only where the person in actual possession of the property has some interest in it as part owner."

⁴⁹ In *Carpenter v. Mayer*, 5 Watts, 483, 485, Kennedy, J., said: "It is not sufficient to make a transfer of goods available against the creditors of the assignor that the possession be in the assignee or changed at the time of the levy; in order to render such transfer good, a corresponding change of the possession must accom-

pany the transfer or follow it within a reasonable time thereafter; that is, as soon as the nature of the property or thing and the circumstances attending it will admit of its being done."

⁵⁰ *McMarlan v. English*, 74 Pa. St. 296. Here the delay lasted more than a month, but nine months elapsed before the levy and the court relied on this as a ground for protecting the vendee.

⁵¹ *Young v. McClure*, 2 W. & S. 147 (vendor in possession one hour); *McBride v. McClelland*, 6 W. & S. 94 (possession here lasted part of the day); *Streeper v. Eckart*, 2 Whart. 302, 30 Am. Dec. 258 (quoted in the first note in this section); *Garman v. Cooper*, 72 Pa. St. 32.

⁵² *Cameron v. Montgomery*, 13 S. & R. 128; *Brady v. Haines*, 18 Pa. St. 113 (buyer here had possession for five weeks); *Graham v. McCreary*, 40 Pa. St. 515, 80 Am. Dec. 591 (buyer's possession here continued for four or five weeks); *Boud v. Bronson*, 80 Pa. St. 360 (possession by the buyer covering a period of six months).

render a sale fraudulent as to persons who give credit at any time subsequent to the sale.⁵³ When at the time of the sale, possession of the property is in a bailee of the seller, and the seller does not take possession after the sale, the rule requiring a change does not apply.⁵⁴ But this is not true where the third person in possession is merely a servant of the seller.⁵⁵ Where one partner sells his interest in a chattel which is in the possession of another partner, and the latter is notified, no change is necessary as against the creditors of the seller.⁵⁶ Where, after a sheriff's sale, the execution debtor is left in possession as bailee by the purchaser, the transfer is not thereby rendered fraudulent, since a judicial sale should be deemed to be fair until proved to

⁵³ *Buckley v. Duff*, 114 Pa. St. 596, 8 Atl. 198; *Ditman v. Raule*, 124 Pa. St. 225, 16 Atl. 819; *McCullough v. Willey*, 192 Pa. St. 176, 43 Atl. 999. In the case of *Buckley v. Duff* (p. 603), the court said: "The rule in Pennsylvania is that a transfer void as to existing creditors is not necessarily void as to subsequent creditors; it is bad only as to those it was intended to defraud. *Byrod's Appeal*, 7 Casey, 241; *Monroe v. Smith*, 29 P. F. Smith, 459. If the transaction is not fraudulent as to existing creditors, and in this case, as we have said, there were none, subsequent creditors can avoid the sale only under special circumstances, as for instance, by showing that it was made with a view to incurring liability, or to provide against the contingencies of a hazardous business, which gave rise to their debts; and cases of this character are ordinarily under proper instructions for the determination of a jury."

⁵⁴ *Linton v. Butz*, 7 Pa. St. 89, 47 Am. Dec. 501; *Worman v. Kramer*, 73 Pa. St. 378; *Woods v. Hull*, 81½ Pa. St. 451.

⁵⁵ It was so held by a divided court in the case where a railroad car on a siding watched over by Wilson, one

of the company's servants, was sold by one McCormick to the plaintiff. "It is evident," said the court, "that to leave a railroad car on the siding is not in itself a delivery. Delivery, in such a case, can only be constructive, and this requires something more to be done. It must appear that there was an intention to transfer the possession, but of this there is no evidence in the case, unless we hold that a mere oversight of the truck by the agent of the railroad company is to produce this effect. But, clearly, this was not the intention of McCormick. He was in possession, and he left the truck on the siding, just as an owner ordinarily would. He made no delivery to Wilson, formal or otherwise. The possession continued in him, after the sale to Trunick, in January. Nothing was done to evidence a change of possession until April, and then no removal took place, no notorious act of dominion was exercised by Trunick, but the truck remained just as it had been, on the siding, and so far as the world knew the possession still continued in McCormick." *Trunick v. Smith*, 63 Pa. St. 18, 23.

⁵⁶ *Whigham's Appeal*, 63 Pa. St. 194.

be otherwise, and there is no secrecy connected with such a transaction.⁵⁷ This is true although the purchaser at the sheriff's sale is the execution creditor.⁵⁸ The fact that the creditor who attacks a sale was given notice of it shortly after its completion does not deprive him of the right to treat it as constructively fraudulent.⁵⁹ In fact, it would seem that no notice of any sort to an individual creditor will render a sale unaccompanied by change of possession valid as to him. Although it appears in the reports of several cases that some notice was given, the question seems never to have been discussed as an original one in any decision.

⁵⁷ *Waters' Exrs. v. McClellan*, 4 Dall. 208; *Craig's Admr.'s Appeal*, 77 Pa. St. 448; *Maynes v. Atwater*, 88 Pa. St. 496; *Rohland v. Rooke*, 127 Pa. St. 139, 17 Atl. 805; *Staller v. Kirkpatrick*, 1 Monaghan Supr. Ct. 486; *Stoddart v. Price*, 143 Pa. St. 537, 22 Atl. 811; *Chambers v. Stine*, 3 Walk. 196. *Gibson, C. J.*, in delivering the opinion in the case of *Myers v. Harvey*, 2 Pen. & W. 478, 481, 23 Am. Dec. 60, said: "Retention of possession by the former owner of a chattel sold at sheriff's sale is not an index of fraud, because the sale is not the act of the person retaining, but of the law; and because a judicial sale, being conducted by the sworn officer of the court, shall be deemed fair, till it is proved to be otherwise. It may, like a judgment, however, be shown to be collusive and fraudulent in fact; but the presumption of the law is favorable to it in the first instance. A chattel thus purchased then may safely be left in the possession of the former owner on any contract of bailment that the law allows in any other case." The same judge in the case of *Fidler v. Maitland*, 5 W. & S. 307, 309, where there had been an assignment for the benefit of creditors, said: "In *Myers v. Harvey*, (2 Pen. & W. 478, 481, 23 Am. Dec. 60), we held that retention of possession by the former owner of a

chattel sold at sheriff's sale, is not an index of fraud, because such a sale is the act of a sworn officer under the control of a court; and there can no more be a sham sale, by a general assignment, than there can be by an execution. The recording of the instrument within thirty days gives not only notice to the creditors and the world, but such publicity to the transaction as puts it out of the power of the parties to suppress it, the trust becomes fixed by it, and the trustee may be forced to execute it or be removed." In the case of *Lothrop v. Wightman*, 41 Pa. St. 297, 304, *Woodward, J.*, gave as the reason for the rule that: "The judicial sale was legal notice to the world of the change of property."

⁵⁸ *Bisbing v. Third Natl. Bank*, 93 Pa. St. 79, 39 Am. Rep. 726; *Tisch v. Utz*, 142 Pa. St. 186, 21 Atl. 808. But if in any case a purchaser falsely appeals to the benevolence or cupidity of the bidders or creditors by giving out that he is buying for the debtor's family, or to sell again at an advanced price for the benefit of creditors, the property will remain with the debtor subject to subsequent executors. *Walter v. Gernant*, 13 Pa. St. 515, 53 Am. Dec. 491.

⁵⁹ *Warwick Iron Co. v. First Natl. Bank*, 13 Atl. 79.

§ 392. **Rhode Island.**—Retention of possession by a seller of personalty affords a strong, but not a conclusive, presumption of fraud. Accordingly where it is shown there is no fraud in fact, the sale will be upheld as valid against creditors.⁶⁰

§ 393. **South Carolina.**—Before the end of the eighteenth century the doctrine had been established that retention of possession by the vendor of personalty after the sale rendered the sale conclusively fraudulent as to creditors.⁶¹ By 1831 this view had

⁶⁰ This doctrine was established in the case of *Mead v. Gardiner*, 13 R. I. 257, 259. One Newcomb conveyed to the plaintiffs, by a bill of sale, the furniture which he used in a restaurant. After a momentary change of possession he was left in control of the property in order that he might dispose of it to the best advantage: the arrangement being that the amount secured was to go to the plaintiffs in part payment of a debt due them. Later, the defendant levied on the property while it was still in the seller's possession. The court said: "The preponderance of authority and the tendency of the modern decisions seem to favor the rule that the retention of possession by the vendor affords a strong but not conclusive presumption of fraud. * * * The parties are permitted to show, if they can, that the vendor's continued possession is consistent with a fair and honest purpose. This rule, recognized in *Anthony v. Wheatons & Whitford*, 7 R. I. 490, 498, seems better calculated to promote justice than the strict rule of the older cases, since it leaves the question of fraud to be determined not by a single fact, but upon all the facts involved in the transaction. The motive of the plaintiffs in putting Newcomb into possession of the property, and his motive in receiving it being to continue the business temporarily for the purpose of disposing of the property for a larger

price than could otherwise be obtained, its value being confessedly much less than the plaintiff's claim, cannot be said to have been fraudulent as to other creditors." In *Anthony v. Wheatons*, cited by the court in the above quotation, a purchaser of personalty attempted to treat as fraudulent an earlier sale by his vendor of the same goods. The warehouseman, who was in possession at the time of the first sale, was notified of it, and the plaintiff left him in possession of the goods after his purchase. The court held that there had been a sufficient change of possession, but intimated that even if the seller had retained possession, a later purchaser, who in turn did not secure possession, could not treat the earlier sale as fraudulent. The general rule of *Mead v. Gardiner* was recognized in the later case of *Harris v. Chaffee*, 17 R. I. 193, 21 Atl. 104, where the instrument of transfer was in form a bill of sale, but was intended as a mortgage.

⁶¹ The earliest case was that of *De Bardeleben v. Beekman*, 1 Desaus. 346, decided in 1793. Here the *bona fides* of the transaction was clear, the buyer having left his uncle, the seller, in possession of slaves which he had purchased, since they were necessary to his comfort. In the language of the court "The bill of sale must be considered void on the principle that possession is the cri-

been considerably modified, and it was settled that proof that the retention of possession was for a proper *bona fide* purpose, as under an arrangement for rent or hire, or where a parent retains possession for an infant child, would rebut the presumption of fraud and render the sale valid as to creditors.⁶²

terion of personal property." In the case of *Kennedy v. Ross*, 2 Mill, 125, decided in 1818, the same view is taken. In later cases attempts were made to distinguish these early decisions. See the discussion in the case of *Nelson & Co. v. Good*, 20 S. C. 223, quoted in a later note in this section.

⁶² In the case of *Smith v. Henry*, 2 Bail. 118, 122, decided in 1831, O'Neill, J., said: "Where, after an absolute sale, the vendor still retains possession, I have always thought that it was a fraud *per se*, in other words that it was a legal fraud; and, if I have been in error in this respect, I have the consolation of knowing, that I am in company with the late venerable and distinguished Judge Nott, and with Chancellor Kent. This court has, however, held, in two recent cases, *Terry v. Belcher*, 1 Bail. 568, and *Howard v. Williams*, 1 Bail. L. 575, 21 Am. Dec. 483, that notwithstanding possession may be retained after an absolute sale or gift by the vendor or donor, yet the fact is susceptible of explanation, and, if possession is shown to have been retained for any *bona fide* purpose, such as on rent or hire, or by a parent for his infant child, the sale or gift is not vitiated by it. To these decided cases, I would not undertake to oppose either my own opinion, or any reasoning, however satisfactory or conclusive it might be to my mind: for I acknowledge the value of the maxim, *stare decisis*." The early cases were reviewed by the court in *Nelson & Co. v. Good*, 20 S. C. 223, 232, 234. The court said:

"It is, however, earnestly contended on the part of the appellants that these badges of fraud are conclusive evidence of the fraud charged, and are incapable of being explained or rebutted by evidence. It is not to be denied that there are authorities which seem to support this proposition, and very possibly if the question were *res integra* it might be regarded as the safer and better rule. But we think that the more recent cases, not only in England and in the Supreme Court of the United States, but also in this State, show that such a proposition cannot now be sustained; and that the true rule is that while these badges of fraud constitute such strong evidence that they will be regarded as conclusive, unless explained by the most satisfactory testimony, yet they do not constitute such a presumption of fraud as to be irrebuttable by any evidence. * * * The court then cited *De Bardeleben v. Beekman*, 1 Desaus. 346; *Kennedy v. Ross*, 2 Mill, 125; *Kid v. Mitchell*, 1 Nott & McC. 334, 9 Am. Dec. 702; *Terry v. Belcher*, 1 Bail. 568; *Smith v. Henry*, 2 Bail. 118, 1 Hill, 16; *Jones v. Blake*, 2 Hill Ch. 629; *Anderson v. Fuller*, McMull Eq. 27, 36 Am. Dec. 290; *Fulmore v. Burrows*, 2 Rich. Eq. 95; *Pringle v. Rhame*, 10 Rich. 72, 67 Am. Dec. 569; and held that where a *bona fide* arrangement was made that the vendor should serve as the vendee's agent in selling the goods in question, the fact that the remuneration he was to receive seems excessive should not justify the court in treating the sale as void.

Under the early decisions it seemed that the presumption of fraud was not rebutted by merely showing that the transaction was *bona fide*, even where the sale was between parties living together.⁶³ But later cases seem to make it clear that proof of good faith only is sufficient.⁶⁴ Where all that was shown to explain the retention of possession was that a fair consideration had passed, it seemed under the early cases that that was insufficient to rebut the presumption of fraud. Such, at least, was the view of the learned reporter of one of the leading cases.⁶⁵

⁶³ In the case of *Smith v. Henry*, 2 Bail. 118, 123, O'Neill, J., said: "On the present occasion it is said, however, that they are explained, first, by the fact that the plaintiff lived in the family of the vendor; and second, that she actually paid for the negroes a sum of money, fully equal to their value. The fact relied on in explanation is, however, not sufficient for that purpose; for although she was an inmate of the vendor's family, yet she was fully capable of managing her own property. In the cases, where the possession remaining with the vendor has been held to be consistent with it, the relation of parent and child has subsisted between the parties. In these, it was both the interest and the duty of the parent to protect the property of his child, whose infancy rendered him incompetent to manage it himself. In this case, it is true, the vendee was the vendor's sister-in-law; but there was neither moral obligation on the part of the vendor to guard her interests, nor legal incapacity on hers, prudently to manage them. If she was capable to buy, she was also capable so to apply her purchase, as to be most beneficial to herself. If she had thought proper to hire the negroes to the vendor, it might, under the decision of *Terry v. Belcher*, have rebutted the presumption of fraud; but

unaccompanied by any proof of this, or any other good reason why the possession remained in the vendor, it must be held to be evidence of fraud."

⁶⁴ In the case of *Lott v. De Graffenreid*, 10 Rich. Eq. 346, 354, a mother had sold slaves to her adult son. She lived after the sale on part of his estate and continued to exercise exclusive control over four of the slaves. The court said: "The custody of Mrs. De Graffenreid of the four slaves allowed for her comfort, after his purchase in January, 1836, is too well accounted for by reasons and principles, the direct opposite of fraud, to require or allow of its being set down to that account. Mere custody is not the possession of an owner. To custody must be added the right under which the property is held. This was determined, if authority were required, in *Penn v. Blocker*, and I content myself with referring to that case." In the case of *Perkins v. Douglas*, 52 S. C. 129, a husband sold chattels to his wife. Apparently the only proof necessary to rebut the presumption of fraud was that the transaction was made entirely in good faith.

⁶⁵ In a note to the case of *Smith v. Henry*, 2 Bail. 118, 126, it was said: "The retaining possession by the vendor, after an absolute sale, presents a very different case. There

When the doctrine of constructive fraud had been partially repudiated, the view was taken that if the consideration or even if part of the consideration for the transfer was a pre-existing debt, the sale was conclusively presumed to be fraudulent.⁶⁶ This view was finally abandoned fifty years later, and now whenever it is shown that the possession was "not retained as a benefit to the debtor, but under an independent and subsequent *bona fide* contract," the sale will be held to be valid as to creditors.⁶⁷

the vendee is fixed, not only with notice, but with actual participation in the fraud; for the presumption is that the sale was colorable and pretensive only: and this presumption is not, in the smallest degree, rebutted by proof of payment of the purchase money. The payment may be made with solemn parade before many witnesses; and yet the money may be secretly returned immediately afterward; and this return is one of the presumptions which arises from the fact of possession being retained by the vendor. Hence, from *Twyne's Case* down, the actual existence of a consideration has always been held wholly insufficient, of itself, to rebut the presumption, arising from the vendor's retaining possession, that the sale was colorable and fictitious. 3 Rep. 81; 5 Taunt. 212; 2 Buls. 226; 2 Vern. 510; 1 Ves. 245; 2 T. R. 587."

⁶⁶ *Smith v. Henry*, 1 Hill, 16, 24; *Fulmore v. Burrows*, 2 Rich. Eq. 95. In *Smith v. Henry*, the parties to the transaction were related to each other and lived in the same house.

⁶⁷ *Simpson, C. J.*, in delivering the opinion in the case of *Pregnall v. Miller*, 21 S. C. 385, 390, 391, 53 Am. Rep. 684, said: "In our State, previous to *Smith v. Henry*, 1 Hill, 16, the cases seemed to hold that retention of possession was a badge of fraud, not conclusive, but *prima facie*; but if the testimony proved that the sale was founded upon a

valuable consideration, the sale could not be impeached, except by positive fraud, want of *bona fides*. * * * Thus stood the law in this State until *Jones v. Blake*, 2 Hill Ch. 629, followed by *Pringle v. Rhame*, 10 Rich. 72, 67 Am. Dec. 569, in which the court modified the stringent rule laid down in *Smith v. Henry*, as to a sale upon a pre-existing debt, with possession retained under a contract of hire. Upon examination of this case, however, it will be seen that this modification was not based simply on the ground that possession was retained by virtue of a contract of hiring, but because the fact of hiring showed that such retention was not the price of a preference which the vendee had obtained over other creditors, but was a *bona fide* possession obtained by the debtor, independent of the sale, and having no necessary connection therewith. Such being the fact, in applying *Jones & Briggs v. Blake and Wife*, and *Pringle v. Rhame*, we must not confine ourselves to their facts, but we must look to the principle upon which they were decided. Guided by this principle, we cannot say that the only exception to *Smith v. Henry* is a case of hiring; on the contrary, in every case where possession is retained, if it is not retained as a benefit to the debtor, but under an independent and subsequent *bona fide* contract, it is open to explanation."

§ 394. **South Dakota.**—The rule of constructive fraud prevails by force of the statute.⁶⁸ In the first of the few cases which have arisen under the statute, Bennett, J., used the following language: "The vendor, under this statute, must deliver to the vendee possession in order to consummate the sale, and render it valid as against creditors. The delivery must be actual, such as the nature of the property and the circumstances of the sale will reasonably admit, and such as the vendor is capable of making. There must be not only a delivery, but a continuing possession, and it must be accompanied with such unmistakable acts of control and ownership as a prudent, *bona fide* purchaser would do in the exercise of his right over property, so that all persons may have notice that he owns and has possession of it."⁶⁹ It has been held that

⁶⁸ Civil Code (1903), § 2369, p. 857. "Every transfer of personal property other than a thing in action, or a ship or cargo at sea, or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any person on whom his estate devolves in trust for the benefit of others than himself, and against purchasers and incumbrancers in good faith subsequent to the transfer."

⁶⁹ Longley v. Daly, 1 S. Dak. 257, 262. It was clear in the case that there had been no change of possession. In the case of Howard v. Dwight, 8 S. Dak. 398, 402, 403, it was held that there had not been a sufficient change of possession of a stock of merchandise which had been

sold to the plaintiff. The court said: "The delivery and change of possession contemplated by the provisions of this section must, to a considerable extent, be governed by the nature of the property transferred, and the circumstances surrounding the parties (Tunell v. Larson, 39 Minn. 269, 39 N. W. 628); but ordinarily the acts showing a change must be so open and manifest as to make the change of possession apparent and visible. The acts should clearly show the vendor's intention to part with the possession of the property, and to transfer it to the vendee. Such acts are required as will notify the public generally that there has been a change in the ownership of the property. In the language of Mr. Justice Field, in Allen v. Massey, 17 Wall. 351, 'the possession which the purchaser was required to take of the property sold, in order to render the sale valid under the statute, must be open, notorious, and unequivocal, such as would inform the public or those who were accustomed to deal with the party that the property had changed hands, and that the title had passed from the vendor to the pur-

the rule does not apply to property which is by law exempt from execution.⁷⁰

§ 395. **Tennessee.**—Retention of possession gives rise to a presumption that the sale was fraudulent, but the presumption may be overcome by establishing the *bona fides* of the transaction.⁷¹

chaser * * * In the case at bar the undisputed evidence shows that subsequent to February 6th when the sale from the National Union Company to the plaintiff is claimed to have been made, and up to June, when the warrant of attachment was served, the same manager and clerks remained in charge of the same store with the same stock of goods, and the sign of the National Union Company on the front window curtain; that the same stationery was used, with the name of the company printed thereon; that the advertisement in the paper, as late as June 29th, called particular attention to the fact of the 'National Union Company's' store; and that bills to that company were made out and paid by the manager without objection. The defendant, who was sheriff of the county, testified that he was a resident of the city of Mitchell, and was familiar with the store, both before and after February 6th; and that he never saw anything to indicate any change of the possession or ownership of the store; and that he did not know at the time he served his warrant of attachment that there had been any change in the ownership * * * There was, therefore, no evidence of any open or manifest change of possession, and no evidence of any continued change of possession."

⁷⁰ *Noyes v. Belding*, 5 S. Dak. 603, 622, 59 N. W. 1069.

⁷¹ *Callen v. Thompson*, 3 Yerg. 475, 24 Am. Dec. 587; *Young v. Pate*, 4 Yerg. 164; *Hickman v. Quinn*, 6

Yerg. 96; *Wiley v. Lashlee*, 8 Humph. 717; *Grubbs v. Greer*, 5 Cold. 160. The law was settled by *Callen v. Thompson*. Prior to this case the rule of constructive fraud seems to have prevailed under the early decision of *Ragan v. Kennedy*, 1 Overt. 91. In *Callen v. Thompson*, the plaintiff claimed slaves under an absolute bill of sale, and the defendant attacked the bill of sale as fraudulent because there had been no change of possession. In referring to the doctrine of constructive fraud as laid down in the case of *Edwards v. Harben*, 2 T. R. 587, Green, J., for the court says (pp. 476, 478): "The Supreme Court of the United States, in the case of *Hamilton v. Russell*, 1 Cranch, 309, following the case of *Edwards v. Harben*, decide the same principle. The intent of the Statute of Frauds, they say, is best promoted by this construction. The old Superior Court of this State, in *Ragan v. Kennedy*, 1 Overt. 91, intimates the same opinion. These cases have been pressed upon the court by the counsel for the defendant in error, with great force, as being authoritative upon this court. It is argued too, that the rule is salutary and just, and comports with the intent of the Statute of Frauds. This court cannot but feel great reluctance to dissent from these high authorities; but in the State of New York, where the courts have followed the English law probably more closely than in any other State of the Union, the authority of this rule has been shaken, and a different

In case of an execution sale, if the buyer is the execution creditor, the presumption of fraud arises. If a third party is the purchaser, there is no presumption.⁷²

§ 396. *Texas*.—Proof that a sale was *bona fide* is sufficient to rebut the presumption of fraud arising from the retention of possession.⁷³ There have been few decisions dealing with the ques-

one established. It has been there held, that where the possession does not accompany and follow the deed, it is only strong *prima facie* evidence of fraud. This was the doctrine in the case of *Beals v. Guernsey*, 8 Johns. 446, 5 Am. Dec. 348. * * * This rule, we think, comports best with the understanding and interest of society. It throws the *onus* of proof upon the vendee, and places it beyond the reach of probability, that cases of fraudulent sales, with this presumption against them, can be sustained before a jury. If the possession continue with the vendor, the presumption of fraud arises from this strong evidence of it; but it is a presumption which may be repelled by proof of fairness in the transaction, and a full and adequate consideration paid. We do not think that the danger of injury to creditors from the adoption of this rule would be considerable; and surely it would shock the common sense of mankind to say, that where a purchase had been fairly made, and a full consideration paid for the property, if the vendee venture to indulge a kind and benevolent feeling toward an unfortunate family, by permitting the property to remain a short time with the vendor, he shall not, in a contest with a creditor, be permitted to prove that the transaction was fair, but that the law will conclude him, and brand one of his best acts with the foul appellation of fraud. But it is said, let a condition be inserted in the deed. The

motive (in fair transactions) to leave the property in the possession of the vendor often arises from the situation of the family, brought to the notice of the vendee after the purchase and execution of the deed. Under these circumstances the purchaser yields to the influence of a generous and humane feeling, and it is enough for the security of creditors, to make his act a strong evidence of fraud, without saying by a positive rule, that although he was not guilty of fraud in fact, yet he shall be held guilty by a conclusion of law."

⁷² In case of *Floyd v. Goodwin*, 8 Yerg. 484, 491, 29 Am. Dec. 130, the execution creditor bought in the property and the sale was held to be *prima facie* fraudulent. The following charge was held correct. "A stranger to the record and proceedings may purchase any property, *bona fide*, and leave the possession with the execution debtor, or any other member of his family, without the slightest imputation of fraud, but it is otherwise with the plaintiffs in the execution, for if he purchases the property, and leaves it with the execution debtor, it lies upon him to show the judgment when thus confessed, a fair and honest one. An honest and fair purchaser may do what he pleases with his property, and leave the possession with the debtor or any one else, at his pleasure."

⁷³ The law was settled by the case of *Bryant v. Kelton*, 1 Tex. 415.

tion of what acts are sufficient to constitute a change of possession. In one case it was held that the mere change of the sign over a shop door was insufficient where the management of a stock of merchandise which had been sold to the seller's clerk remained the same after the sale as before.⁷⁴ Where the buyer and seller have concurrent possession, the same presumption arises as where there has been no change. In the language of Bell, J.: "Where the vendor of the property and the vendee live together, there should be the most indisputable evidence of good faith in the contract of sale, for from the very nature of things it is almost impossible to tell with whom the possession of the property does, in point of fact, remain."⁷⁵

Lipscomb, J., reached the conclusion stated in the text after an elaborate review of authorities and discussion of principle. Other cases to the same effect are *Morgan v. The Republic*, 2 Tex. 279; *McQuinnay v. Hitchcock*, 8 Tex. 33; *Converse & Co. v. McKee*, 14 Tex. 20; *Earle v. Thomas*, 14 Tex. 583; *Mills v. Walton*, 19 Tex. 271; *Gibson v. Hill*, 21 Tex. 225; *Thornton v. Tandy*, 39 Tex. 544; *Jacobs, Bernheim & Co. v. Crum*, 62 Tex. 401; *Hamburg v. Wood & Co.*, 66 Tex. 168, 18 S. W. 623; *Edwards v. Dickson*, 62 Tex. 613; *Peters Saddlery & Harness Co. v. Schoelkopf & Co.*, 71 Tex. 418, 9 S. W. 336; *Landman v. Glover (Tex.)*, 25 S. W. 994.

⁷⁴ *Stadtler v. Wood*, 24 Tex. 622.

⁷⁵ *Gibson v. Hill*, 23 Tex. 77, 82. In the case of *Traders' Nat. Bank v. Day*, 87 Tex. 101, 102, 103, horses were sold which were on a tract of land owned by the seller. Both he and the buyer lived on this land and kept their cattle there. The question was as to the correctness of the following instructions: "The court instructs the jury, that if they believe from the evidence that the horses claimed by J. W. Day to have been bought by him from E. S. Day

remained after said sale in the possession of E. S. Day, or in the concurrent possession of E. S. and J. W. Day, or that the possession remained after sale as before sale, then the sale was presumptively fraudulent; and unless the defendant has explained said possession so as to make it consistent with good faith and fair dealing, then you will find for plaintiff as to said horses." *Gaines, J.*, said: "At the time of the sale under consideration, both the seller and the purchaser had horses running at large upon an extensive pasture, the latter presumably having the right to maintain his horses there. Upon a sale by E. S. Day to J. W. Day of a portion of the former's stock, then running upon the pasture, the reasonable and probable result, under such circumstances, would be that the horses so sold would be left as they were before the sale. It follows, we think, that no presumption of fraud can be drawn from the mere fact of their so remaining, sufficient to have warranted the court in giving the instruction requested. It seems to us that the case would not have been materially different in this respect if the horses had been running at large upon an uninclosed range,

§ 397. **United States.**—The courts of the United States follow the law of the jurisdictions in which the property sold is situated.⁷⁶

§ 398. **Utah.**—The rule that retention of possession renders a

and had been left there after the sale was consummated. *Stadler v. Wood*, 24 Tex. 622, was a case of 'concurrent possession,' so called. The property in controversy in that case was a stock of merchandise, exposed daily to sale in the usual course of such business. Before the sale the vendee was the clerk of the vendor. After the sale they both continued to sell in the storehouse, there being no visible change in the powers and duties of the respective parties. The only outward circumstance to indicate a sale was a change in the sign which was placed over the door. That is a case essentially different from the one under consideration. We conclude that the charge requested would have encroached upon the province of the jury, and was properly refused; and we may add, that in view of our statute which prohibits the court from charging upon the weight of the evidence, we gravely doubt whether or not the cases cited in this opinion have not gone too far in upholding similar instructions."

⁷⁶Mr. Justice Shiras in delivering the opinion of the Supreme Court in the case of *Dooley v. Pease*, 180 U. S. 126, 128, 44 L. ed. 457, said: "It is conceded, or, if not conceded, we regard it as well established, that the policy of the law in Illinois will not permit the owner of personal property to sell it and still continue in possession of it, so as to exempt it from seizure or attachment at the suit of creditors of the vendor * * *. It is equally well established that the courts of the United States regard and follow the policy of the State law in cases of this kind.

'Any other rule,' said this court in *Green v. Van Buskirk*, 7 Wall. 139, 19 L. ed. 109, 'would destroy all safety in derivative titles and deny to a State the power to regulate its personal property within its limits.' In *Hervey v. R. I. Locomotive Works*, 93 U. S. 664, 671, 23 L. ed. 1003, it was said: 'It was decided by this court in *Green v. Van Buskirk*, 7 Wall. 139, 19 L. ed. 109, that the liability of property to be sold under legal process, issuing from the courts of the State where it is situated, must be determined by the law there, rather than of the jurisdiction where the owner lives. These decisions rest on the ground that every State has the right to regulate the transfer of property within its limits, and that whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides. He has no absolute right to have the transfer of property, lawful in that jurisdiction, respected in the courts of the State where it is found, and it is only on a principle of comity that it is ever allowed. But this principle yields when the laws and policy of the latter State conflict with those of the former.' * * * The policy of the law in Illinois will not permit the owner of personal property to sell it, either absolutely or conditionally, and still continue in possession of it. Possession is one of the strongest evidences of title to this class of property, and cannot be rightfully separated from the title, except in the manner pointed out by statute. The courts of Illinois say that to suffer without

sale constructively fraudulent prevails by force of the statute.⁷⁷ What amounts to a "reasonable time" in which there must be a change of possession depends upon the circumstances, and is ordinarily a question for the jury.⁷⁸ So, too, it is a question of

notice to the world the real ownership to be in one person, and the ostensible ownership in another, gives a false credit to the latter, and in this way works an injury to third persons * * *. Secret liens which treat the vendor of personal property, who has delivered possession of it to the purchaser, as the owner until payment of the purchase money cannot be maintained in Illinois. They are held to be constructively fraudulent as to creditors, and the property, so far as their rights are concerned, is considered as belonging to the purchaser holding the possession. *McCormick v. Hadden*, 37 Ill. 370; *Ketchum v. Watson*, 24 Ill. 591; *Pullman Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613."

"Rev. St. (1898), § 2473. "Every sale made by a vendor of goods or chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by a delivery within a reasonable time, and be followed by an actual and continued change of the possession of the things sold or assigned, shall be conclusive evidence of fraud as against the creditors of the vendor, or assignor, or subsequent purchasers in good faith. The word 'creditors' as used in this section, shall be construed to include all persons who shall be creditors of the vendor, or assignor, at any time while such goods and chattels shall remain in his possession or under his control."

"In the case of *White v. Pease*, 15 Utah, 170, 172, 173, the court said: "The plaintiff, who resided

in Beaver, claimed the property by virtue of an alleged bill of sale made to him by William H. and E. P. Kessler, September 15, 1896, at 4 o'clock P. M. That he took possession of the grain contained in three houses or bins on vendors' farm in Beaver Bottoms, some forty-five miles from Beaver, and retained possession thereof until about 9 o'clock in the forenoon of September 18th, when he returned to Beaver for the purpose of obtaining teams to draw the grain away, he having received permission to use the bins until he could draw the grain away. On arriving at Beaver, he was informed by the marshal that the grain had been levied upon by virtue of the execution referred to. The levy was made shortly after plaintiff left for Beaver, and the officer was informed, at the time of the levy, by Kessler that the plaintiff owned the grain. No one was left in possession of the grain at the time of the levy, unless it was Kessler, who resided on the ranch, which was located in a remote locality. * * * The grain in question was located in a remote locality, away from transportation. It was bulky and inconvenient to carry away without considerable time and preparation. The grain was in bins or granaries, of which the plaintiff had the possession. After plaintiff obtained the bill of sale and possession, he started to procure means to carry it away. Before the officer levied he was notified of the sale to plaintiff. Under the statute there must be a delivery within a reasonable time, and such delivery must be followed by an actual and

fact whether the evidence establishes a sufficient change of possession.⁷⁹ If there has been a satisfactory change of possession for a reasonable time, the buyer may after this appoint the seller to hold the property for him as his agent or employee. It was so held in a case where the buyer's possession seems to have lasted only one day.⁸⁰ The statute apparently does not apply to transfer made by a husband to his wife.⁸¹

§ 399. **Vermont.**—The rule that retention of possession renders a sale *per se* fraudulent as to creditors of the seller has been consistently followed since an early date.⁸² It makes no differ-

continued change of possession. A reasonable time should be allowed in which to make the delivery. What was a reasonable time, under all the circumstances of the case, and whether the transaction was fraudulent or not, was a question for the jury to consider under the facts shown."

⁷⁹ *Blish v. McCormick*, 15 Utah, 188, 49 Pac. 529.

⁸⁰ *Everett v. Taylor*, 14 Utah, 242, 244, 47 Pac. 75. Zane, C. J., said: "This section requires the sale to be accompanied with delivery within a reasonable time, and followed by an actual and continued change of possession, or with an understanding to that effect. The change of possession must be actual, not merely constructive or colorable. And the possession must be continuous in the purchaser, not merely a delivery and surrender back. * * * After such possession, the vendee may appoint the vendor to hold the property for him as his trustee or agent, or he may make him his employee. Such appointment or employment may be regarded as a suspicious circumstance, and may be considered by the jury, with all the other evidence, in determining whether the possession was taken and held in good faith."

⁸¹ This view is adopted by the Supreme Court in the case of *Farr v.*

Swigart, 13 Utah, 150, 157, 44 Pac. 711, because of the statute (§ 2528, Comp. Laws 1888) which confers upon a married woman the right to all property acquired by her by purchase or gift. The transfer in that case was gratuitous. It appears further that the wife was the owner of the barn in which the horse which was given to her was kept. Referring to counsel's contention that the transfer was void, the court said: "Such a doctrine would destroy the effects of the married woman statute, and compel the wife to leave her husband, and take her property with her, in order to be protected from an execution levied against her husband by a creditor who might afterward assert the illegality of the transfer to her because of there being no actual and continued change of possession."

⁸² *Durkee v. Mahoney*, 1 Aik. 116; *Mott v. McNeil*, 1 Aik. 162; *Weeks v. Wead*, 2 Aik. 64 (the court in this case reviews the authorities and says that the rule has been "uniformly acted on by the courts of this State for the last seventeen years"); *Beatrice v. Robin*, 2 Vt. 181; *Moore v. Kelley*, 5 Vt. 34, 26 Am. Dec. 283; *Fuller v. Sears*, 5 Vt. 527; *Merritt v. Miller*, 13 Vt. 416; *Rockwood v. Colamer*, 14 Vt. 141; *Hammond v. Plimpton*, 30 Vt. 333; *Chase v. Snow*, 48 Vt. 436, 52 Vt. 525.

ence that the bill of sale expressly provides for retention by the seller.⁸³ The change of possession need not take place immediately after the sale; it is enough if it is accomplished before there has been an attachment by creditors.⁸⁴ The change necessary in order to prevent a sale from being strictly fraudulent was defined by Redfield, J., as follows: "The change necessary is only one, which the creditors, upon reasonable inquiry, can ascertain — such a change of the possession, or such a divesting of the possession of the vendor, as any man, knowing the facts, which could be ascertained upon reasonable inquiry, would be bound to know and to understand was the result of a change of ownership — such an one as he could not reasonably misapprehend."⁸⁵ In a later case, Peck, J., used the following language: "I think it correct to say in reference to this question, that on the one hand the purchaser must see to it that he so conducts with the property as to indicate by the appearances to an observer a change in the possession, and on the other hand the creditors of the vendor are bound to see what others can see, and judge and act upon it with that prudence that is required of men in business affairs."⁸⁶ Whether or not there has been such a sufficient change is ordinarily a question for the jury.⁸⁷ There has been no sufficient change where after the sale the parties maintain a joint posses-

⁸³ Weeks v. Wead, 2 Aik. 64.

⁸⁴ Bennett, J., in delivering the opinion of the court in the case of Kendall v. Samson, 12 Vt. 515, 518 said: "Though upon the sale of a chattel, there may not have been such a change in the possession, as is necessary to protect it against the creditors of the vendor, yet, such change may, at any time, be perfected before an attachment intervenes. If the change does not immediately follow the sale, this would indeed be proper matter to go to the jury on the question of a fraudulent sale in fact, but it would be too much to hold that the change in possession could not be perfected, subsequently to the sale, so as to avoid the effect

of the principle applicable to sales, *fraudulent per se*, provided no attachment had intervened. The principle which pronounces a sale, which is in fact *bona fide* and upon sufficient consideration, fraudulent *per se*, against creditors, for the want of a sufficient change in the possession, is founded upon policy: but it is not to be extended beyond what sound policy dictates."

⁸⁵ Stephenson v. Clark, 20 Vt. 624, 627.

⁸⁶ Stanley v. Robbins, 36 Vt. 422, 438.

⁸⁷ Stephenson v. Clark, 20 Vt. 624; White v. Miller, 46 Vt. 65; Rothchild v. Rowe, 44 Vt. 389.

sion of the property; but the mere fact that the parties lived or worked together does not make the possession joint, unless an impartial observer would find it difficult to determine which had the chief control.⁸⁸ The fact that the buyer is the owner or lessee of the land on which the chattels sold are located may (in case the seller is not in actual possession, and the buyer has recorded his lease, or deed) be sufficient to dispense with the necessity of an actual change; but where the seller remains in actual possession, either exclusively or jointly with the buyer, the fact that the latter has title to the land is of no importance.⁸⁹ Where the prop-

⁸⁸ Hutchinson, C. J., in the case of *Allen v. Edgerton*, 3 Vt. 442, 443, said: "The instructions to the jury, about joint possession of vendor and vendee, were, that it must be considered a fraud in law which would avoid the sale as to creditors. Thus far it is all the defendant contends for. But his objections are urged to the after explanation that (supposing the sale *bona fide*), in order to render it thus void, the possession and use of the vendor must be of the same description, as that of a joint owner, in using, occupying, and disposing of the property. Now, it is not easy to perceive that anything short of this would furnish any evidence that he yet remained the owner. That is the reason why possession must be changed, to announce a change of ownership, and prevent the former owner from gaining a credit by his continued possession. His laboring about the factory or shop as an underworkman would not have the effect to give him a credit. In such case, an important inquiry is, who is at the head, controlling the business? If a candid observer would find it difficult to determine which of the two had the chief control, that, according to the charge, and according to our former decisions, would be deemed a joint possession." In *Stiles*

v. Shumway, 16 Vt. 435, a father sold cattle on his farm to his son who lived with him. Nothing occurred later to suggest to an observer that the father did not continue to be owner, and it was held that his creditors might attach. In *Murray v. Chadwick*, 52 Vt. 293, a sale was made by a boarder to the person who owned and was in general control of the premises. It was held that there had been a sufficient change since there was no doubt as to who had control.

⁸⁹ In the case of *Weeks v. Prescott*, 53 Vt. 57, 73, *Royce, J.*, said: "Where the purchaser of personal property acquires the title to the land upon which it is situate, he is considered so far in possession as to obviate any necessity for its removal to any other place; but where he permits the former owner to remain upon the premises, and control and manage the property as he did before making the sale, the acquisition of the title, and the constructive notice given by the record, have never been held sufficient to protect the property from attachment by the creditors of the vendor." The cases were reviewed in *Flanagan v. Wood*, 33 Vt. 332, 343, 344. In that case a prior execution was declared void, the court applying the same rule as is

erty sold is cumbrous and its removal impossible or extremely difficult, the rule requiring an actual change of possession is re-

applied in the case of an ordinary sale. Aldis, J., said: "It is also claimed by the plaintiff that the lease changed the possession of the property on the farm. This leads us to inquire how far the actual or constructive possession of land may dispense with a removal of personal property situate upon it, in case of sale or attachment. A deed or lease of land conveys the legal *right* of possession, but does not necessarily change the possession from the grantor to the grantee. This consideration should be borne in mind in examining those cases where the change of possession of personal property is sought to be established, not by any actual taking, but by construction through possession of the land on which it is situate. 1. If the grantee take actual and exclusive possession of the land the personal property on it upon purchase is of course in his possession, and no removal is necessary. This principle is too obvious to require a citation of authorities. *Burrows v. Stebbins*, 26 Vt. 659, was really such a case; and so upon one view is *Wilson v. Hooper*, 12 Vt. 653, 36 Am. Dec. 366. 2. If the grantor buy land not in the possession of another, though he do not take actual possession, still possession by construction follows the right; and if he buy personal property situate on the land, by his constructive possession of the land he also acquires constructive possession of the personalty, and no removal is necessary. *Wilson v. Hooper*, 12 Vt. 653, 36 Am. Dec. 366. This applies to all wild or unoccupied land, and to land left vacant by the grantor. 3. If one sell personal property situate on the land of a third person, who agrees to keep it or allows it to

remain on his land for the benefit of the vendee, the vendor after that having no ostensible occupancy of the land or control of the property, such property is held to be in the possession of a third person, and no removal is necessary. *Merritt v. Miller*, 13 Vt. 416; *Potter v. Washburn*, 13 Vt. 558, 37 Am. Dec. 615. 4. But, where the land sold or leased remains in the actual possession of the vendor or lessor, there no constructive possession of the personal property on it can be raised for the aid of the vendee or lessee against such actual possession; for this would make the constructive possession more potential than the actual and apparent one. So where the vendor and vendee, or the lessor and lessee remain in the joint possession of the land, the same rule as to change of possession of personalty applies as in the joint possession of personal property alone, viz.: that if the possession of the vendee or lessee is apparently that of a joint owner, and there is no actual and exclusive possession of the personal property by the vendee, the personal property on the land will be deemed to be in their joint possession also, and a sale or attachment of it without removal will be void. This is recognized in *Stephenson v. Clark*, 20 Vt. 624, though the case was remanded because the evidence tending to show actual possession by the vendee was not left to the jury. *Mills v. Warner*, 19 Vt. 609, 47 Am. Dec. 711; *Stiles v. Shumway*, 16 Vt. 435. The recent case of *Parker v. Kendrick*, 29 Vt. 388, is an authority to the same point." In the case of *Judd v. Langdon*, 5 Vt. 231, the buyer of two colts purchased the land on which the seller lived, but he failed to record

laxed.⁹⁰ In the case of a sale of timber "in the trees standing," no change of possession of the timber after it is cut is required, both because of the impracticability of the removal and because, as the trees are cut, they become and are in the buyer's possession, and as movable property they were never owned or possessed by the seller.⁹¹ If after the buyer has continued in exclusive and open possession for a sufficient time for the creditors of the seller to be presumed to have notice of it, he permits the seller to take possession of the property, it is held that this does not render the sale fraudulent.⁹² Occasional lendings of the property to the

the deed until after a creditor of the seller had attached. Shortly after the sale the seller left the premises and requested a man who had fed the colts for him to continue to do so for the buyer who he said would pay him. His instructions were carried out. It was held by the court that the seller's creditor had the right to attach.

⁹⁰ In the case of *Sanborn v. Kirtledge*, 20 Vt. 632, 639, 50 Am. Dec. 58, there was a sale of logs which were on a frozen river. Davis, J., said: "We think, situated as these logs were on the ice of a river and on the land of strangers, and considering the cumbersome character of the property, no actual removal was necessary, to render the sale valid against the creditors of the vendor—especially if personal notice were carried home to such creditor. The case of *Merritt v. Miller*, 13 Vt. 416, substantially establishes such doctrine." In the case of *Hutchins v. Gilchrist*, 23 Vt. 82, 87; the logs sold were on land owned by a third person, and there was only a constructive possession in any one. It was held that no actual removal or marking of the logs was necessary. Bennett, J., said: "It is said by Prentiss, J., in *Barney v. Brown*, 2 Vt. 374, 377, 19 Am. Dec. 720, that 'in all the cases, where

sales, not fraudulent in fact, have been adjudged void as against creditors, the vendor continued in the use, or possession of the property and the apparent ownership remained with him.' So far, the reason of the rule requires us to go, and no farther. What will constitute a sufficient change in the possession must be a question, which will vary with circumstances; and what may have been said by judges on this subject should be taken with reference to the case then before them, in relation to the character and situation of the property at the time of the sale." The case of *Birge v. Edgerton*, 28 Vt. 291, is to the same effect. In *Kingsley v. White*, 57 Vt. 565, 568, logs were sold which were on low wet land and it was impossible to move them, so as to have them of any value until the earth was frozen, and it was held that a removal of the property was unnecessary to perfect the buyer's title.

⁹¹ *Fitch v. Burk*, 38 Vt. 683; *Sterling v. Baldwin*, 42 Vt. 306.

⁹² *Dewey v. Thrall*, 13 Vt. 281. Possession of the buyer in this case had continued for almost six years. In the case of *Weeks v. Wead*, 2 Aik. 64, the buyer had possession of the horse sold for eight or ten days after the sale; during part of which time

seller for temporary purposes will not in themselves render the sale void where the seller's possession gives no impression of false credit; and in such a case, although the seller's creditors attach while he is in possession, their claims will not prevail.⁹³ But a mere delivery will not be sufficient if the seller is put back into possession and continues to appear to be owner. This rule has been held to apply even where the agent of the buyer, contrary to the principal's orders, allowed the seller to retake possession after the delivery.⁹⁴ The general rule was held to apply where the seller, apparently on his own account, had exchanged the property sold for other property, the property which he had received in exchange being held liable to execution at the suit of his creditors. "We do not decide," said the court, "how this might be, had the exchange been made by the plaintiff herself, or by some third person acting as her agent; but here it was made by the debtor, for the convenience and advantage of his own business, and for aught that appears, in his own name and ostensibly on his own account."⁹⁵ Where the buyer negotiated the trade in such

the seller received the benefit of its services, but for the next ten months the seller was allowed to use it. The sale was generally known of in the community where the parties lived, but was not known of where the creditor lived. It was held that the jury should have been instructed that the sale was fraudulent as a matter of law.

⁹³ *Farnsworth v. Shepard*, 6 Vt. 521.

⁹⁴ In *Morris v. Hyde*, 8 Vt 352, 356, 30 Am. Dec. 475, the court said: "It is true, as a general rule, that a party is not to be made responsible for any positive act of another, unless done by his authority or direction, express or implied. But it is also true, that where an act is necessary to consummate or perfect the right or title of a party, and such act is omitted, through the neglect or disobedience of an agent, the party who commits his rights to the fidelity of such agent must bear the conse-

quences. In this case, it was the duty of the plaintiffs to see that their purchase was followed by a sufficient change of possession, and if they intrust the business to an agent, they are responsible for the agent's fidelity." In the case of *Lynde v. Melvin*, 11 Vt. 683, 34 Am. Dec. 717, the seller's bailee who had possession of the property under a contract with the seller (which gave him a right to keep it for a stated period), was notified of the sale when it was made or shortly afterward; and before the bailment period had elapsed the bailee, without the buyer's consent, let the seller resume possession. It was held that the doctrine of *Lynde & Morris v. Melvin* (quoted above) did not apply, since the buyer had no right to interrupt the possession of the bailee.

⁹⁵ *Mills v. Warner*, 19 Vt. 609, 613, 47 Am. Dec. 711.

a case, it was held that the newly-acquired property in the possession of the sellers was not liable to execution by his creditors.⁹⁶ The general rule requiring a change of possession applies whenever the property sold is situated within the State, and the fact that in the jurisdiction where the contract of sale was made no such rule applies is immaterial.⁹⁷ Where the goods sold are not in the actual control of the seller, but are in the possession of his bailee, who is notified of the sale by the buyer, and consents to hold the property for him, no other change is necessary.⁹⁸ Notice by the seller will not be sufficient;⁹⁹ and if the third person in possession is a mere naked bailee, even if the notice is given by the buyer, the sale will not be good as against creditors if the bailee refuses to hold the property for him. It has been said, however, that consent to become bailee for the buyer in the latter case might be inferred from the silence of the third party.¹

⁹⁶ *Caswell v. Jones*, 65 Vt. 457, 26 Atl. 529, 20 L. R. A. 503, 36 Am. St. Rep. 879. It was held in another case where the seller had retained possession of the horse sold, and had resold it under directions from the buyer, purchasing for him another horse, that the newly-acquired horse was not liable to attachment by his creditors. *Ridout v. Burton*, 27 Vt. 383. In the case of *Lyndon v. Belden*, 14 Vt. 423, although the point was not decided, a doubt was expressed as to whether the foal of a mare which had been *in esse* at the time of the sale of its mother should be treated as subject to the rule.

⁹⁷ *Rice v. Courtis*, 32 Vt. 460, 78 Am. Dec. 597. Here the conveyance was an assignment for the benefit of creditors and the court applied the same rule as is applied in the case of sales.

⁹⁸ *Barney v. Brown*, 2 Vt. 374, 377, 19 Am. Dec. 720. The following cases are to the same effect: *Spaulding v. Austin*, 2 Vt. 555; *Harding v. Janes*, 4 Vt. 462; *Pierce v. Chipman*, 8 Vt. 334; *Willard v. Lull*, 17 Vt. 412;

Marshall v. Town, 28 Vt. 14; *Wilder v. Stafford*, 30 Vt. 399 (here the buyer purchased the interests of both parties to a conditional sale and left the conditional vendee in possession); *Flanagan v. Wood*, 33 Vt. 332.

⁹⁹ *Judd v. Langdon*, 5 Vt. 231; *Whitney v. Lynde*, 16 Vt. 579. The reason for this distinction is given by the court in the case of *Pierce v. Chipman*, 8 Vt. 334, 339. It is there said that the seller "may have given him (the bailee) a wrong account from sinister motive," and that his "*ex parte* account was entitled to no credit."

¹ This question was discussed in the case of *Rice v. Courtis*, 32 Vt. 460, 469, 78 Am. Dec. 597, where the transfer was in the form of a general assignment. Redfield, C. J., said: "The proof in this case shows merely notice to a third party, in whose possession the assignee had placed the goods, as to that portion of them at New Haven. This would be all that is required by the English law to effect a change of possession. Chitty, *Contracts*, 412*a*. But in this State

It has also been suggested that where the person in possession has a right of possession in himself (as where he holds under a lease for a stated period), his consent to hold for the buyer is not necessary.² The exception as to property in the possession of a bailee does not apply to a case where a mere servant of the seller has possession, for his possession is in law that of his master.³ A transfer of the possession from the seller to a third person is as effectual as where the buyer takes possession for himself.⁴ But it has been held in one case, at least, that the third person must understand that there has been a transfer of the title and that he holds for the buyer.⁵ The general rule does not apply to cases

something more is required. It seems to be indispensable, in order to defeat the right of attachment that the vendee should, in such case, make the person having the goods in his possession his bailee; that he should consent to hold the goods for him. This might be inferred, undoubtedly, from the silence of the bailee, if he was requested to keep them for the vendee. But nothing of that appears in the present case."

²In the case of *Wooley v. Edson*, 35 Vt. 214, 221, the court said: "But when the person having possession has a right of possession in himself, and is not a mere naked bailee, the purchaser has no choice; all he can do is to give him notice, and if the person in possession declines to enter into any stipulation with him as to keeping the property for him, and stands upon his own rights under his contract, the purchaser cannot take away the property, but must leave it in his possession. In such case it would seem that mere notice should be enough. But it is not necessary to decide this, for the defendants are not in a position to assert any peculiar rights of a creditor for want of a change of possession."

³*Sleeper v. Pollard*, 28 Vt. 709, 67 Am. Dec. 741.

⁴*Bailey v. Quint*, 22 Vt. 474. Here the person who is put in possession knew that the seller had been the owner and did not know of the sale to the buyer. This decision was followed in the case of *Pettingill v. Elkins*, 50 Vt. 431. As the next note shows, however, the cases are really in confusion on this point.

⁵In the case of *Hildreth v. Fitts*, 53 Vt. 684, 688, 689, the court said: "The officer, when about to attach property in the apparent possession of a person other than the defendant in the writ, is both bound to observe and inquire. He is to observe the fact that it is in the apparent possession of such third person, and to inquire whether such apparent possession by such third person is in his own right, or the right of some person other than the defendant in the writ. The apparent possession of such third person would indicate *prima facie* that he was the owner. Inquiry might reveal that his apparent possession was the actual possession of some other than himself, possibly the defendant in the writ. The purchaser, to protect himself against an attachment of the property bought in the debt of the vendor, if he place the property in the apparent possession of a third person,

of sale on execution, both because of the notoriety attending such transactions and of the fact that the law will not impute fraud to its own officers.⁶ And it makes no difference that the execution creditor is the purchaser.⁷ The case of property exempt by law from execution furnishes another exception to the rule.⁸ The fact that the creditor who attaches the property had full notice of the sale does not make the transaction valid as to him.⁹ The

must leave it there, under such circumstances that the attaching officer can by inquiry learn whose possession his apparent possession is. * * * From the nature of the duty of the officer, and from the duty of the purchaser to effect a change in the possession of the property purchased from the vendor to himself, the third person, having the control of the property purchased, must understand that he holds the control for, and that his possession thereof is the possession of the purchaser. Otherwise there is no apparent, open change of possession, available to the creditor, or the officer making the attachment." In *Wing & Son v. Peabody*, 57 Vt. 19, a bailee in possession with notice of the sale put another person into possession and falsely informed him that the seller was the owner of the property. When the officer representing the seller's creditor inquired of the later bailee, he was told that the seller was the owner of the property. It was held that the buyer should prevail over the creditor. The court did not refer to the case of *Hildreth v. Fitts*.

⁶In the case of *Boardman v. Keeler*, 1 Aik. 158, 162, 15 Am. Dec. 670, *Hutchinson, J.*, said: "Were this subject newly started, I should, for one, be disposed to apply the same rule to sheriff's sales. The reason is alike in both cases, except the notoriety attending the latter. This notoriety has introduced an exception in their favor. This was de-

cided in the case of *Kidd v. Rawlinson*, 2 B. & P. 59., and has been followed by other cases, and must now be treated as settled law."

⁷*Gates v. Gaines*, 10 Vt. 346. The mere fact that the sheriff conducts a sale does not bring it within the exceptional rule as to execution sale unless the sale is authorized by the law and the proceedings conform to the requirements of the statutes. *Batchelder v. Carter*, 2 Vt. 168, 19 Am. Dec. 707.

⁸*Jewett v. Guyer*, 38 Vt. 209. In the case of *Foster v. McGregor*, 11 Vt. 595, 596, 34 Am. Dec. 713, the court said: "Creditors could have no claim upon this cow, as a means of satisfying their debts, and it is idle to talk about acquiring a false credit from the possession of property which is exempt from attachment and execution. No principle of policy requires a change in the possession of such property."

⁹In the early case of *Weeks v. Wead*, 2 Aik. 64, it appeared that the attaching creditor received notice of the buyer's claim the day before the levy. Notwithstanding this, the sale was held to be fraudulent, the court taking no notice of this point. In the case of *Hutchins v. Gilchrist*, 23 Vt. 82, 89, there was evidence of notice to the attaching creditor but it was not clear whether it had been given before or after the attachment. The court held that it was immaterial, saying: "Though, the attaching creditor had notice of the sale,

rule does not extend beyond the case of creditors, and it has been accordingly held that retention of possession has no effect as against the State when it by execution seeks to satisfy the obligation of the seller to pay his taxes.¹⁰

§ 400. **Virginia.**—During the first half of the last century the rule of fraud *per se* prevailed,¹¹ but the tendency was to create exceptions,¹² and the language of one or two of the judges cast considerable doubt upon the general question.¹³ Finally, in 1848, the old cases were overruled and the rule was established permitting the presumption of fraud created by retention of possession to be rebutted by proof of the *bona fides* of the transaction.¹⁴ The

yet I do not deem that important. If the sale were otherwise, a *fraud* in law, it was but a notice of a sale *void* as to him, and it could not have the effect to make it good. It has often been decided in this State, that notice of a sale *per se fraudulent* cannot change its character."

¹⁰ *Daniels v. Nelson*, 41 Vt. 161, 98 Am. Dec. 577.

¹¹ *Alexander v. Deneale*, 2 Munf. 341; *Williamson v. Farley*, Gilm. 15; *Shields v. Anderson*, 3 Leigh, 729; *Lewis v. Adams*, 6 Leigh, 320. In *McKinley v. Ensell*, 2 Gratt. 333, it was held that the sale could not be attacked by creditors if the buyer took possession before execution was levied.

¹² In the case of *Mason v. Bond & Co.*, 9 Leigh, 181, 33 Am. Dec. 243, however, it was held that the doctrine of fraud *per se* applied, although a third person was in possession, if the seller had the right to take possession immediately.

¹³ Carr, J., entirely repudiated the doctrine of constructive fraud in the opinion which he delivered in the cases of *Land v. Jeffries*, 5 Rand. 211, 216; *Claytor v. Anthony*, 6 Rand. 285, 296, and *Sydnor v. Gee*, 4 Leigh, 535. Tucker, J., president of the court in the case of *Sydnor v.*

Gee, took the view that where there was a change of possession or delivery at the time of the sale, although it was only momentary, that it would be sufficient to take the case outside of the rule of constructive fraud and to allow the presumption of fraud to be rebutted by proof of good faith. In what seems to be the earliest reported case dealing squarely with the subject the rule adopted was that the retention of possession made only a *prima facie* case of fraud. *Hardaway v. Manson*, 2 Munf. 230.

¹⁴ This was accomplished by the case of *Davis v. Turner*, 4 Gratt. 432. There had been a sale of sleighs and immediately afterward the seller resumed possession under a *bona fide* contract of hire. The judges delivered their opinions *seriatim* and concluded after a full review of the authorities that the case of *Edwards v. Harben* had been discredited. Cabell, P., in his opinion said (470, 471): "As the case of *Edwards v. Harben* * * * has been thus repudiated in England, and declared not to be law; and as the decisions of our own court on this subject were founded solely on the authority of that case, it becomes manifestly proper for us now to determine

fact that the seller is retained by the buyer as agent to manage and sell the goods purchased does not necessarily prove the change of possession insufficient.¹⁵ It has been held that the registering of a bill of sale is no evidence to rebut the presumption of fraud which arises from retention of possession.¹⁶

§ 401. **Washington.**— By statute¹⁷ no bill of sale of personal property of which the seller has remained in possession is valid against existing creditors unless it is recorded within ten days of the sale. The words “no bill of sale” have been construed to mean “no sale” and accordingly the execution and recording of such an instrument is essential to give validity to all sales where there is no change of possession.¹⁸ If the bill of sale is

whether that case ought still to be regarded as authoritative evidence of the law, or whether it should, as in England, be repudiated and abandoned. After much deliberation, I am entirely satisfied as to the correctness of the modern decisions of the English courts, of which I have given extracts; and that there is no such rule known to the common law as that which was supposed to be established by the case of *Edwards v. Harben*. And, apart from all authority, I am of opinion that there is no good reason for such a rule.” The general rule thus established was applied in the cases of *Forkner v. Stuart*, 6 Gratt. 197; *Benjamin v. Madden*, 94 Va. 66, 26 S. E. 392, and *King v. Levy*, 22 S. E. 492. In *King v. Levy*, there was a transfer by a bill of sale of a stock of merchandise, and the vendor was left in possession. The court said: “The mere circumstance of the possession of chattels amounts to no more than that it is *prima facie* evidence of property in the possession, until a title, not fraudulent, is shown to be in some other than the one in possession.”

¹⁵ *King v. Levy*, 22 S. E. 492; *McKinley v. Ensell*, 2 Gratt. 233. In

the latter case the buyer had removed the goods to another shop after the sale, put up his own sign and opened new books in his own name.

¹⁶ *Curd v. Miller's Exrs.*, 7 Gratt. 185.

¹⁷ *Ballinger's Annot. Codes and St.* (1897), Vol. 1, § 4578. “No bill of sale for the transfer of personal property shall be valid, as against existing creditors or innocent purchasers, where the property is left in the possession of the vendor, unless the said bill of sale be recorded in the auditor's office of the county in which the property is situated, within ten days after such sale shall be made.”

¹⁸ *Hoyt, J.*, in delivering the opinion of the court in the case of *Whiting Mfg. Co. v. Gephart*, 6 Wash. 615, 616, 34 Pac. 161, said: “If the construction contended for by it be adopted, a sale not evidenced by a memorandum in writing would be good without any condition whatever, while one thus evidenced would only be good upon condition that the memorandum so evincing the sale should be recorded as required by the statute. The language used, when taken in connection with

recorded after the time fixed by the statute has elapsed, such recording will render the sale valid as to creditors who have not levied in the meantime.¹⁹ And where the goods have been removed to another State before the creation of the claim of the creditor attacking the sale, the Washington statute will not invalidate the sale.²⁰ The change of possession necessary to take a case outside of the provisions of the statute must be "open and notorious."²¹

§ 402. **West Virginia.**—The rule established in Virginia by the case of *Davis v. Turner*,²² to the effect that retention of possession renders a sale only *prima facie* fraudulent as to the seller's creditors, has been consistently followed.²³ To rebut the presumption of fraud it has been said that it must be shown by clear proof that a fair price was paid by the buyer, and that the seller was not left in possession to enable him after the sale to enjoy an interest in the property.²⁴ It cannot be said that there has

the other provisions of the statute relating to the same subject, is not such as to lead us to believe that the Legislature intended such a condition of things. The construction which we have above suggested does no violence to the language of the section, excepting that we construe the clause, 'no bill of sale,' as though it read 'no sale,' which we think it is necessary that we should do in order that the evident intent of the Legislature should have force."

¹⁹ *Sayward v. Nunan*, 6 Wash. 87, 89, 32 Pac. 1022. Here there was a transfer evidenced by a bill of sale which was not recorded until the expiration of fourteen days. The attacking creditor did not levy until six months later. Scott, J., for the court, said: "The failure to record the bill of sale within ten days would only protect such parties as had obtained intervening rights after its execution and before the time it was filed for record. *Crippen v. Fletcher*, 56 Mich. 336, 23 N. W. 56. The respondents' rights under said execu-

tion levies did not accrue until some time after the instrument was recorded."

²⁰ *Greenwood v. Corbin*, 48 Wash. 357, 93 Pac. 433.

²¹ In the case of *Sayward v. Nunan*, 6 Wash. 87, 89, 32 Pac. 1022, a boom of logs in a lumber camp was transferred by a bill of sale. (It was in dispute whether the transfer was a sale or mortgage.) In discussing the question as to what would constitute a sufficient change of possession, although this was not necessary for a decision of the case, the court said: "There was no change of possession in fact, especially such an open and notorious change of possession as is required in such a case. *Steele v. Benham*, 84 N. Y. 634; *Siedenbach v. Riley*, 111 N. Y. 560, 19 N. E. 275."

²² 4 Gratt. 422.

²³ *Bindley v. Martin*, 28 W. Va. 773; *Bartles & Dillon v. Dodd*, 56 W. Va. 383, 49 S. E. 414.

²⁴ *Bindley v. Martin*, 28 W. Va. 773, 795.

been no change of possession merely because the grantor remains in physical control of the property as employee of the grantee.²⁵ If possession be taken before creditors assert their right to levy, it validates the transaction.²⁶ If a bill of sale was given, the fact that it was recorded will apparently have no effect to prevent the presumption of fraud from arising.²⁷

§ 403. **Wisconsin.** — By statute²⁸ the rule was adopted at an early date that retention of possession renders a sale presumptively fraudulent against the seller's creditors, the presumption being rebuttable by proof that the transaction was entered into in good faith.²⁹ The rule has been held not to apply to a transfer of

²⁵ *Harden v. Wagner*, 22 W. Va. 356. The transfer in this case was in the form of an assignment for creditors.

²⁶ *Poling v. Flanagan*, 41 W. Va. 191, 23 S. E. 685. Here the transfer was a mortgage of lumber.

²⁷ This was recognized in *dicta* in the case of *Poling v. Flanagan*, 41 W. Va. 191, 23 S. E. 685, and *Curtin v. Isaacsen*, 36 W. Va. 391, 15 S. E. 171.

²⁸ St., Vol. 1, §§ 2310, 2311, 2312. "Every sale made by a vendor, of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor or the creditors of the person making such assignment or subsequent purchasers in good faith; and shall be conclusive evidence of fraud unless it shall be made to appear on the part of the persons claiming under such sale or assignment that the same was made in good faith and without any intent to defraud such creditors or purchasers." "The term 'Creditors,' as

used in the last section, shall be construed to include all persons who shall be creditors of the vendor or assignor at any time whilst such goods and chattels shall remain in his possession or under his control." "Nothing contained in the two last sections shall be construed to apply to contracts of bottomry or respondentia, nor to assignments or hypothecations of vessels or goods at sea or in foreign ports, or within this state; provided the assignee or mortgagee shall take possession of such ship, vessels or goods as soon as may be after the arrival thereof within this state."

²⁹ This general rule is applied in the following cases: *Sterling v. Ripley*, 3 Pinn. 155; *Whitney v. Brunette*, 3 Wis. 621; *Mayer v. Webster*, 18 Wis. 393; *Bullis v. Borden*, 21 Wis. 136; *Williams v. Porter*, 41 Wis. 422; *Norwegian Plow Co. v. Hanthorn*, 71 Wis. 529, 37 N. W. 825; *Cook v. Van Horne*, 76 Wis. 520, 44 N. W. 767; *Barr v. Church*, 82 Wis. 382, 52 N. W. 591. In *Smith v. Welch*, 10 Wis. 91, the court held that the retention of possession where the goods in question were so mingled with the seller's goods in his shop as to be indistinguishable from his, should have

choses in action.³⁰ The change of possession necessary to prevent the presumption of fraud from arising must be actual, and this requirement is not met where the seller retains possession as the buyer's agent,³¹ nor where the seller or buyer have possession jointly.³² The delivery and change of possession must be such "that those familiar with the situation would naturally draw the inference of a change of ownership."³³ It is not necessary that

been considered as tending to show fraud in fact, though it did not necessarily render the sale fraudulent.

³⁰ *Livingston v. Littell*, 15 Wis. 218. This was a case of a negotiable promissory note.

³¹ *Paine, J.*, delivering the opinion of the court in the case of *Grant v. Lewis*, 14 Wis. 487, 490, 80 Am. Dec. 785, said: "All the witnesses who testified on the subject stated that Ammon was left in the actual possession of the property sold. It is true the plaintiff offered evidence tending to show that he continued in such possession as the plaintiff's agent. But even if that were really so, and the sale made in good faith, yet that is not such an 'actual' change of possession as the statute contemplates, in order to rebut the presumption of fraud. It means such a change that the vendor ceases to possess the goods in any capacity whatever. There may undoubtedly be an honest sale, and the vendor left in possession in good faith as the vendee's agent. But it looks so much the other way on the face of it, without explanation, that the statute makes the mere fact of the continued possession of the vendor presumptive evidence of fraud, and conclusive unless the purchaser shows by satisfactory evidence that there was really no intent to defraud, that burden being thrown upon him." The later case of *Manufacturers'*

Bank of Milwaukee v. Rugee, 59 Wis. 221, 18 N. W. 251, is to the same effect. In *Menzies v. Dodd*, 19 Wis. 343, 349, the owner of stacks of wheat mortgaged them successively to different persons. The first mortgagee received no actual delivery, the mortgagor merely saying that he gave him possession. *Dixon, C. J.*, said: "It must be the same clear, unequivocal, and exclusive change of possession as is required by the fifth section of the Statute of Frauds, and under that section I know of no decisions making an exception in favor of ponderous or bulky articles. Here there was no actual change of possession. The stacks of wheat remained upon the premises of Mrs. Bishop and in her possession and control, after the alleged conversation, the same as before. Nothing passed between her, or her agent, and the plaintiff, but mere words. The plaintiff had exercised no dominion over the property, or right of possession, nor had Mrs. Bishop assented to any, previous to the execution of the mortgage to the defendant. On the other hand she continued to assert her title and right of possession. Her mortgage to the defendant was such an assertion. For these reasons I am of opinion that the mortgage of the plaintiff is void as against the defendant."

³² *Osen v. Sherman*, 27 Wis. 501.

³³ *Missinskie v. McMurdo*, 107 Wis. 578, 583, 83 N. W. 758.

the change be made instantaneously. It was held in a case where there was a transfer of a stock of goods that a delay from Saturday night to Monday morning need not be such a delay as to prevent there being an "immediate" change within the meaning of the statute. "Immediate," said the court, "means within a reasonable time in view of the particular facts."³⁴ The rule was laid down by the court in one case that the change of possession must be "actual, open, unequivocal, exclusive, and continuous."³⁵ Evidence that full consideration was paid for the property is sufficient to rebut the presumption of fraud.³⁶ The rule that proof of the *bona fides* of the transaction will rebut the transaction of fraud is not altered by the statute regulating sale of merchandise in bulk,³⁷ and even though the requirements of the statute are not followed, it is open to the buyer to show there was no fraud in fact.³⁸

§ 404. **Wyoming.**—It is not clear that any rule as yet has been definitely adopted. In one case where sheep were mortgaged an attaching creditor sought to treat the transfer as invalid because of the lack of change of possession. The sheep in question had strayed from the herd and it was practically impossible to take possession for several days. The court held that the mortgagee prevailed over the creditor.³⁹

³⁴ *Richardson v. End*, 43 Wis. 316, 318. The transfer in this case was by way of mortgage.

³⁵ *Schneider v. Kraby*, 97 Wis. 519, 521, 73 N. W. 61 (a mortgage case).

³⁶ *Densmore Commission Co. v. Shong*, 98 Wis. 380, 74 N. W. 114; *Griswold v. Nichols*, 117 Wis. 267, 94 N. W. 33, and 126 Wis. 401, 105 N. W. 815.

³⁷ Laws 1901, c. 463.

³⁸ *Fisher v. Herrman*, 118 Wis. 424, 95 N. W. 392.

³⁹ *Kinney & Co. v. First Natl. Bank*, 10 Wyo. 115, 122, 67 Pac. 471, 98 Am. St. Rep. 972. Corn, J., for the court, said: "The well-established rule is that it is enough if the delivery be such as the situation of the property admits. And when chattels

are so situated that there can be no immediate delivery, the law requires none; and it is sufficient if the vendee without laches takes possession in a reasonable time after he has an opportunity to do so. *Benjamin, Sales* (Bennett's ed.), 659; *Ricker v. Cross*, 5 N. H. 570, 22 Am. Dec. 480. The rule is illustrated by the sale of a ship at sea or its cargo. If possession is taken within a reasonable time after their arrival it is sufficient. In *Ricker v. Cross*, *supra*, a debtor transferred to the plaintiffs certain personal property, including a chaise and harness, for their benefit as creditors. The chaise and harness were in possession, at a distance, of a person who had hired them, but the remainder was deliv-

ered in the name of the whole. An attachment was levied upon them while in the possession of the hirer on his way to the place where he hired them. It was held that the plaintiffs were entitled to hold them against the officer. We think the facts bring this case quite clearly within the rule. There was an attempt upon the part of Murray to deliver, and of the bank to receive, possession of all the property on the day appointed for the transfer. The small number which had become mixed with the Draper herd were re-

claimed a few days afterward. Gildersleeve testifies that he made inquiries at once in regard to the missing part of the herd, and on March 25th sent out two men, who searched for them about a week, and the search was then discontinued, principally on account of stormy weather. When they were found and levied upon by plaintiff in error the bank notified plaintiff in error that they were its property and at the sale gave formal public notice of the fact and demanded possession of them."

CHAPTER XII.

DOCUMENTS OF TITLE.

Section 405. Forms of documents of title.

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407. Legislation in the United States in regard to the negotiability of documents of title.

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443. Forged and altered documents.

444. Time during which documents of title are valid.

§ 405. **Forms of documents of title.**—The phrase “document of title” is borrowed from the English Sale of Goods Act, and in that act was borrowed from the English Factors’ Act of 1889. In the Factors’ Act the term was defined as follows: “The expression ‘document of title’ shall include any bill of lading, dock warrant, warehouse-keeper’s certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize either by indorsement or delivery, the possessor of the document to transfer or receive goods thereby represented.” And this definition has been substantially copied in section 76 of the Sales Act.¹ All documents of title have this in common, that they are receipts of a bailee, or orders upon a bailee. A different name is given in popular speech to the document when it is issued by a carrier and when it is issued by a warehouseman, but in substance the nature of the document is the same in both cases. In an earlier portion of the book² the effect of the form of a bill of lading as indicating a transfer of title from buyer to seller, on the creation of the bailment, has already been considered. It remains to consider the use of documents of title as a means of transferring goods after the

¹The phrase has not been often used in American decisions, but is not wholly novel. The Fri, 154 Fed. Rep. 333, 83 C. C. A. 205.

²*Supra*, § 231 *et seq.*

documents have been issued. The practice of selling goods in transit by delivery of the bill of lading is an old one.³ In the present century receipts of warehousemen have been freely used in the same way, and in England dock warrants and wharfinger's receipts and delivery orders of various kinds have also been used. In this country documents of title other than bills of lading and warehouse receipts are not common, still there are instances of the use of documents in other forms as representatives of goods,⁴ and doubtless if any form of document was used in commerce as a symbol of the goods, the law would recognize the mercantile custom

³ *Evans v. Marlett*, [1697] 1 Ld. Raym. 271, Holt, C. J., there said: "The consignee of a bill of lading has such a property as that he may assign it over. And Shower said that it had been adjudged so in the Exchequer." The numerous cases cited in the following notes sufficiently illustrate a continuation of the practice here alluded to.

⁴ In *Gibson v. Stevens*, 8 How. 384, 12 L. ed. 1123, the documents in question were two bills for goods sold. To one the sellers had added a receipt stating that they held the goods mentioned therein in store; the other was a mere receipted bill. Upon these documents the purchasers indorsed orders for the delivery of the goods, and obtained advances on the faith of the documents. Chief Justice Taney said: "Delivery of the evidence of title and the orders indorsed upon them was equivalent, in the then situation of the property, to the delivery of the property itself. This mode of transfer and delivery has been sanctioned in analogous cases by the courts of justice in England and this country." In *National Newark Banking Co. v. Delaware, L. & W. R. R. Co.*, 70 N. J. L. 774, 58 Atl. 311, 66 L. R. A. 595, 103 Am. St. Rep. 825, cars of grain had been consigned to A. Prior to their arrival he had contracted to sell them

to different purchasers, and surrendered the bills of lading to the freight agent at the point of destination. On surrender of the bills of lading, he presented orders to the agent directing delivery of the cars to the several purchasers, "or ourselves or order, on presentation of this order." Upon these orders the local freight agent stamped the words "Car to be delivered on this order same as B. of L., B. of L. taken up at Newport." A. indorsed such delivery orders to the plaintiff to secure advances. Subsequently in conformity with written instructions, and without demanding the surrender of the delivery orders from A., the railroad agent delivered the cars to the purchasers. The court held that the plaintiff acquired a good title and that the defendant was liable for delivering the plaintiff's goods to others. The court said: "The contract between Archer and the purchaser was an executory contract, and not a present bargain and sale. The subsequent arrangement with the bank passed title to the grain. Whether it was an absolute title, or by way of pledge, or by way of mortgage, is, we think, not material to the present case. The arrangement with the bank, by whatever name it may be called, was consummated by the delivery to the bank of the certified orders."

if the goods themselves were in such a situation as not to be readily delivered.⁵ The theory upon which property may be transferred by such documents has not been altogether clear. The view which probably has the support of the greater number of decisions is that the document represents the goods, and the delivery of the document is, in effect, a delivery of the goods. What may be called the mercantile view, however, treats the documents as analogous to a bill of exchange, or promissory note, of which the bailee is the drawee or maker; and the rights of a holder of the document are, under this view, to be determined according to the terms of the instrument. In the decision of most cases it will make no difference which of these views is adopted; but as the ensuing discussion will show, there are cases where the distinction is vital. In the provisions of this act, the mercantile view is consistently carried out. As will appear, this view has the support of custom, of some decisions, and of a considerable amount of statutory regulation in a number of States. It is essential in order to constitute a paper a document of title that by general custom such papers should have been regarded as the equivalent of the goods. And even this should not be enough to make a paper a negotiable document of title. For this purpose the possession of the paper should, in fact, involve control over the goods, as possession of an order bill of lading, or order warehouse receipt does, because the carrier or warehouseman will not deliver the goods without the surrender of the document. There are a number of cases involving the effect of informal papers of various kinds.^{5a} A document of title,

⁵ "The rule is not confined to the usages of any particular commerce, but applies to every case where the thing sold is, from its character or situation at the time, incapable of actual delivery." *Gibson v. Stevens*, 8 How. 384, 400, 12 L. ed. 1123.

^{5a} *Sinsheimer v. Whitely*, 111 Cal. 378, 43 Pac. 1109, 52 Am. St. Rep. 192 (transfer of weighing tags which merely stated the weight of a certain number of sacks of beans was held not to pass title

to the property represented); *Peoria, etc., Ry. Co. v. Buckley*, 114 Ill. 337, 2 N. E. 179 (a warehouseman was held liable for delivering to the holder of a sampler's ticket); *Cathcart v. Snow*, 64 Iowa, 584, 21 N. W. 94 (scale tickets were held not equivalent to warehouse receipts, and the purchase of them gave no title to the plaintiff). See also *Geilfuss v. Corrigan*, 95 Wis. 651, 70 N. W. 306, 37 L. R. A. 166, 60 Am. St. Rep. 143.

though it should not be written with lead pencil or other fugitive substance, is none the less valid if so written.⁶

§ 406. What is a negotiable document of title—Provisions of the Sales Act.—

Sec. 27. DEFINITION OF NEGOTIABLE DOCUMENT OF TITLE.—A document of title in which it is stated that the goods referred to therein will be delivered to the bearer, or to the order of any person named in such document is a negotiable document of title.

This section and the ensuing thirteen sections are based neither on the English Sale of Goods Act nor, so far as their language and details are concerned, on any legislation in this country. The object of these sections, however, is identical with that to be found in various statutes in regard to bills of lading and warehouse receipts which have been passed in the United States. At common law a contract right was not assignable, and in spite of statutes permitting the assignee of a chose in action to sue in his own name, it is still essentially true that choses in action are not assignable; that is, the assignee must enforce his claim as the representative of the assignor, even though not in his name; and the limits of the assignee's rights are fixed by those of the assignor. In the law of property, as distinguished from contracts, on the other hand, the owner can sometimes transfer a larger right than he himself had. If the seller of goods has a legal title, he can transfer that legal title to a *bona fide* purchaser free from any equities which might exist against his own title.⁷ It is the peculiarity of negotiable paper that, though contractual in its nature, it is governed by the rule controlling transfers of property, not the rule governing the assignment of choses in action. Negotiability really means this quality of assignability free from equities. The further peculiarity of bills of exchange and promissory notes—that a thief or finder, or other person who has nothing but possession, may, under some circumstances, transfer a good title, is not a necessary attribute of negotiable paper as such. It would be improper for the law to make every obligation negotiable without the assent of the obligor,

⁶ Main v. Jarrett, 83 Ark. 426, 104 S. W. 163, 119 Am. St. Rep. 144.

⁷ See ~~infra~~, § 348.

for it would be enlarging the terms of his obligation. The attribute of negotiability is, therefore, confined to obligations in which the obligor expressly agrees to be bound not simply to the promisee but to an assignee of the promisee or to the bearer of the document. Where the document is in this form, the law, in regarding the obligation as negotiable, is merely carrying out the terms of the agreement made by the parties, for the obligor has expressly promised to pay not only to the promisee, but to any one the promisee may name. Such a nominee, therefore, sues not only as assignee of the original promisee, but also by virtue of a direct promise made by the maker of the instrument to himself under the description of any person named by the promisee. Similarly, where the instrument is payable to bearer, it is enough that the holder is the bearer. Our law might well have adopted the broad rule that wherever any promise was made to "order" or "bearer," an indorsee or bearer was within the terms of the promise and, therefore, acquired a direct, original right against the promisor; but such was not the doctrine of the common law. The general rule that choses in action are not assignable did not yield to the intention of the parties as indicated by the form of the promise. Only where the promise was in the form of a bill of exchange or promissory note, and to some extent in the case of covenants running with the land, were exceptions allowed. Accordingly, a bill of lading, however made out, is, under the common-law rule, a contract solely with the consignor; and even though the title to the goods was allowed to pass by the transfer of the bill of lading, the contract of the carrier was subject to the rule that choses in action are not assignable.⁸ The use of a bill of lading as a symbol of property, however, is another matter. The general theory of the common law seems to be that the symbol may be dealt with in the same manner and with the same effect as the goods of which it is the symbol. What may be called the mercantile theory, as distinguished from the common-law view, is based on an analogy between bills of lading and similar documents, and bills of exchange. By the mercantile theory both the contract and the ownership of the goods are transferable in the same way that a bill of exchange is transferable; and, furthermore, the form of the bill of lading or

⁸ See *infra*, § 426.

receipt indicates, by the naming of the consignee or person to whom the goods are to be delivered, the ownership of the goods. The difficulties in the law of documents of title are generally due to a conflict between mercantile custom and the common law, and the satisfactory development of the law is impossible without a recognition by the law of the validity of mercantile custom. The dealings of the mercantile community are based on their custom, and if it be urged that the community should take legal advice and learn in what particulars the common law holds their custom ineffectual, the answer is that the rules of the common law are not such as to make it safe to give full faith and credit to bills of lading and similar documents; and unless such faith and credit can be given them, and banks and merchants take them safely, common prudence will require restriction of the dealings with such documents, a result greatly to be deprecated from a commercial and economic standpoint.⁹ In some respects the rule of the common law has so great support from decisions that a complete victory is impossible without legislation. Such legislation has been attempted by some States prior to the Sales Act, but not with sufficient detail to produce a wholly satisfactory result.¹⁰ Warehouse receipts are more modern than bills of lading as commercial documents, and did not receive the same recognition as representatives of the goods that bills of lading early acquired.¹¹ In England,

* "In all mercantile transactions one great point to be kept uniformly in view is to make the circulation and negotiation of property as quick, as easy, and as certain as possible." Quoted in *Millhiser Mfg. Co. v. Gallego Mills Co.*, 101 Va. 579, 602, 44 S. E. 760, from the opinion of Buller, J., in *Lickbarrow v. Mason*, 2 T. R. 63.

⁹ See the following section.

¹¹ In *Blackburn, Sale* (2d ed.), 415, 418, it is said: "Those documents are generally written contracts by which the holder of the indorsed document is rendered the person to whom the holder of the goods is to deliver them, and in so far they greatly resemble bills of lading; but they differ

from them in this respect, that when goods are at sea the purchaser who takes the bill of lading has done all that is possible in order to take possession of the goods, as there is a physical obstacle to his seeking out the master or the ship, and requiring him to attorn to his rights; but when the goods are on land there is no reason why the person who receives a delivery order or dock warrant should not at once lodge it with the bailee, and so take actual or constructive possession of the goods. There is, therefore, a very sufficient reason why the custom of merchants should make the transfer of the bill of lading equivalent to an actual delivery of possession, and yet not give such

however, by the Factors' Act of 1889, warehouse receipts and delivery orders have, as documents of title, been put upon the same footing as bills of lading. In this country the general use of warehouse receipts in commercial communities would, perhaps, without the aid of statute, lead to similar recognition,¹² but there has been considerable legislation passed with a view to making this clear, a reference to which will now be made.

§ 407. **Legislation in the United States in regard to the negotiability of documents of title.**—The only qualities of bills of lading, warehouse receipts, and similar documents which can be considered in this connection, are those which affect the rights of a transferee. Upon this point the most completed legislation is contained in the Warehouse Receipts Act, prepared for the Commissioners of Uniform State Legislation and already passed in a number of States.¹³ This law contains provisions identical with those of the Sales Act in regard to the transfer of documents of title, except that in the Warehouse Receipts Act the provisions are confined to documents of title of a single class—warehouse receipts.¹⁴ Other legislation, however, exists—more commonly in regard to warehouse receipts than in regard to bills of lading. In some States they are expressly declared to be negotiable.¹⁵ The

an effect to the transfer of documents of title to goods on shore. Besides this substantial difference between them there is the more technical one that bills of lading are ancient mercantile documents, which may be subject to the law merchant, whilst the other class of documents are of modern invention, and no custom of merchants relating to them has ever been established." After reviewing the authorities then existing, the learned author concluded by saying: "It is, therefore, submitted that the indorsement of a delivery order or dock warrant has not, independently of the Factors' Acts, any effect beyond that of a *token of an authority to receive possession.*" See also *McEwan v. Smith*, 2 H. L. G. 309; *Griffiths v. Perry*, 1 E. & E. 680; *San-*

ders v. MacLean, 11 Q. B. D. 327, 341.

¹² See *Millhiser Mfg. Co. v. Gallego Mills Co.*, 101 Va. 579, 44 S. E. 760.

¹³ This act was first recommended for passage by the commissioners in the autumn of 1906. In the first six months of 1907, it was passed in Iowa, Illinois, New Jersey, New York, Massachusetts, Connecticut. In 1908 it was passed in Rhode Island, Virginia, Ohio, and Louisiana.

¹⁴ Sections 27 to 40 of the Sales Act, with the exception of section 30, are contained in the Warehouse Receipts Act with the single alteration that instead of documents of title warehouse receipts only are dealt with.

¹⁵ Alabama, Code (1896), § 4222; Arkansas, S. & H. Dig. (1894), § 509;

statutes of other States add that such documents shall be negotiable in the same manner as bills of exchange, and in some cases to the same extent.¹⁶ In other States it is simply provided that the transferee acquires the ownership in the property represented by the receipt.¹⁷ Probably for the reason that bills of lading received a fuller recognition at common law, there has been less legislation in regard to them; there has, however, been some.¹⁸ It is the evident intent of all this legislation to make the transfer of rights by warehouse receipts and bills of lading as complete as possible, but many courts have manifested a great reluctance to give the statutes the meaning which it seems hard to doubt the Legislatures which passed them intended. The Supreme Court of the United States,¹⁹ in dealing with the statutes of Missouri and Pennsylvania, held that a statute making bills of lading negotiable in the same manner as bills of exchange and promissory notes are negotiable could not properly be construed as putting bills of lading in all respects

California, Civil Code (1901), § 1858b; Delaware, Laws of Delaware, Vol. 19, c. 177, § 1; Indiana, Homer's Annot. St. (1901), §§ 6538, 6543; Minnesota, Gen. St. (1878), c. 124, § 17; Nebraska, Comp. St. (1901), §§ 5356, 5395; Oregon, Hill's Annot. Laws (1892), § 4205; Pennsylvania, Acts of 1866, Sept. 24; Wisconsin, Rev. St. (1898), §§ 1676, 1678, 4425.

¹⁶ Kansas, Gen. St. (1901), § 1141; Kentucky, St. of 1899, § 4770; Louisiana, Laws of 1822, No. 102, p. 155 *et seq.*; Maryland, Pub. Gen. Laws, Art. 14, § 1; Missouri, Rev. St. (1899), § 744k; Tennessee, Code of 1884, § 2796; Texas, Supplement to Sayle's Civ. St. (1902), Tit. 108a, § 7; Washington, Ballinger's Codes (1897), § 3598.

¹⁷ Colorado, Laws of 1891, p. 279, § 2; Connecticut, Gen. St. (1902), § 4924; Maine, Rev. St. (1883), c. 31, § 4; Massachusetts, Rev. Laws (1902), c. 69, § 5; Oklahoma, Laws of 1899, c. 27, § 19; South Carolina, Code of 1902, § 1720; Virginia, Code, § 1791, as amended by Acts of 1891-2,

p. 362. Of these States Connecticut, Massachusetts, and Virginia have now enacted the Warehouse Receipt Law.

¹⁸ In Arkansas, S. & H. Dig. (1894), § 512, adopts in regard to bills of lading the same statutory provision that exists in regard to warehouse receipts that they shall be negotiable. So in Louisiana, Acts of 1868, p. 194, No. 150; Maryland, Pub. Gen. Laws, Art. 14, § 1; Minnesota, Gen. St. (1878), c. 124, § 17; Missouri, Rev. St. (1889), § 744k; Pennsylvania, Act of 1866, Sept. 24; Washington, Ballinger's Code (1897), § 3598. In Wisconsin it is simply provided that the transferee of such a document unless the words "not negotiable" are written thereon, shall become the owner of the goods. Rev. St. (1898), §§ 4194, 4425, as amended by Laws of 1899, c. 146. In regard to the constitutionality of such legislation, see *Arkansas Southern Ry. Co. v. German Nat. Bank*, 77 Ark. 482, 92 S. W. 522.

¹⁹ *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. ed. 892.

on the footing of instruments which are the representatives of money. So in Alabama, Arkansas, Minnesota, Missouri, Washington, and Wisconsin the courts have taken a similar view.²⁰ In Louisiana and Maryland, however, the courts have given effect to what must be deemed the intent of their Legislatures, and held bills of lading as completely negotiable as bills of exchange.²¹ As the nature and effect of a contract is governed by the law of the place where it is made, the scope of the statutes under consideration must, it seems, be confined to documents issued within these

²⁰ *Barnum Grain Co. v. Great Northern Ry. Co.*, 102 Minn. 147, 112 N. W. 1030, 1049. In *National Bank of Commerce v. Chicago, B. & N. Ry. Co.*, 44 Minn. 224-236, 46 N. W. 342, 9 L. R. A. 263, 20 Am. St. Rep. 566, it was held that this statute did not make bills of lading negotiable in the sense of the law merchant. "The statute," said the court, "was not intended to totally change the character of bills of lading, and put them on the footing of bills of exchange, and charge the negotiation of them with the consequences which attend or follow the negotiation of bills or notes. On the contrary, we think the sole object of the statute was to prescribe the mode of transferring or assigning bills of lading, and to provide that such transfer and delivery of these symbols of property should, for certain purposes, be equivalent to an actual transfer and delivery of the property itself. *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. ed. 892; *Bank v. Hurt*, 99 Ala. 130, 12 So. 568, 19 L. R. A. 701; *Jasper Trust Co. v. Kansas City, etc., R. R.*, 99 Ala. 416, 14 So. 546, 42 Am. St. Rep. 75; *Turner v. Israel*, 64 Ark. 244, 41 S. W. 806. See also *St. Louis, etc., Ry. Co. v. Citizens' Bank*, Ark., 112 S. W. 154; *First Bank v. Mt. Pleasant Milling Co.*, 103 Iowa, 518, 522, 72 N. W. 689; *Dean v.*

Driggs, 137 N. Y. 274, 33 N. E. 326, 19 L. R. A. 302, 33 Am. St. Rep. 721; *Yarwood v. Happy*, 18 Wash. 246, 51 Pac. 461; *Hale v. Milwaukee Dock Co.*, 29 Wis. 482, 9 Am. Rep. 603 (compare *Price v. Wisconsin Ins. Co.*, 43 Wis. 267).

²¹ *Hardie v. Vicksburg, etc., Ry. Co.*, 118 La. 254; *Tiedeman v. Knox*, 53 Md. 612. In Louisiana the view of the court has been subject to some change. See *Delgado v. Wilbur*, 25 La. Ann. 82; *Hunt v. Mississippi Central R.*, 29 La. Ann. 446; *Lal-lande v. His Creditors*, 42 La. Ann. 705, 7 So. 895. But in the case of *Hardie v. Vicksburg, etc., Ry. Co.*, *supra*, the court fully accepted the doctrine of negotiability and quoted with approval the words of Justice Spencer in his dissenting opinion in *Hunt v. Mississippi Central R.*, *supra*: "The law of 1868 was enacted in the interest of commerce; it created one of the most important branches of our credit; it secures the most legitimate transaction; it sanctioned, legalized, and protected a fair, but imperfect custom, which perished before its adoption; and it is by far more wise and more equitable than the vacillating and doubtful jurisprudence of other States." See also *Garoutte v. Williamson*, 108 Cal. 135, 140, 41 Pac. 35, 413; *Bank v. Capital Elevator Co.*, 9 Kan. App. 144, 58 Pac. 483.

States, and cannot extend to documents merely negotiated or transferred within them.²²

§ 408. Negotiation of documents of title by delivery —Provisions of the Sales Act.—

Sec. 28. NEGOTIATION OF NEGOTIABLE DOCUMENTS BY DELIVERY.—A negotiable document of title may be negotiated by delivery.

(a.) Where by the terms of the document the carrier, warehouseman, or other bailee issuing the same undertakes to deliver the goods to the bearer, or

(b.) Where by the terms of the document the carrier, warehouseman, or other bailee issuing the same undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the document has indorsed it in blank or to bearer.

Where by the terms of a negotiable document of title the goods are deliverable to bearer or where a negotiable document of title has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the document shall thereafter be negotiated only by the indorsement of such indorsee.

This provision is intended to carry out the same policy as that shown by the legislation referred to in the previous section and follows the analogy of the law governing bills of exchange and promissory notes. Documents of title are not often made to bearer, and it is probably not desirable that they should be. There are, however, cases in the books which show that the practice is not unknown.²³ There are also statutory provisions in some States

²² *National Bank of Bristol v. Baltimore & Ohio R.*, 99 Md. 661, 59 Atl. 134, 105 Am. St. Rep. 321. See also *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. ed. 892.

²³ *Puckett v. Reed*, 31 Ark. 131, relates to a receipt "running to the holder"; *Smith v. Pickett*, 7 Ga. 104, 50 Am. Dec. 383, relates to a warehouse receipt made out to A., "or bearer." So in *Alabama State Bank v. Barnes*, 82 Ala. 607, 2 So. 349; *Erie & Pacific Despatch v. St. Louis Compress Co.*, 6 Mo. App. 172. In

Jones v. Brewer, 79 Ala. 545, the bill of lading contained the addition "deliver to bearer." In *Allen v. Williams*, 12 Pick. 297, a bill of lading ran to a specified consignee "or bearer." In *Furman v. Union Pacific Ry. Co.*, 106 N. Y. 579, the name of the consignee was left blank, and the court said the bill of lading must be produced in order to justify delivery by the carrier. So in *Garden Grove Bank v. Humeston, etc., R. R. Co.*, 67 Iowa, 526, 25 N. W. 761.

that bills of lading running to bearer may be transferred by delivery.²⁴ But the common statutory provision that a bill of lading or a warehouse receipt shall be negotiable by indorsement has been held to require indorsement even of documents running to bearer.²⁵ Under the Sales Act it is clear that delivery alone of a document of title made out to bearer would be sufficient. A bill of lading may also, like a bill of exchange, be made out to a fictitious person. Presumably the analogy of bills and notes would be followed and the document would be held to run to bearer, although a more accurate analysis would treat such a document as running to the person intended by the consignor to be designated as consignee under the fictitious name. Generally this would be the consignor himself.²⁶

§ 409. **Negotiation of documents of title by indorsement.**—

Sec. 29. NEGOTIATION OF NEGOTIABLE DOCUMENTS BY INDORSEMENT.—A negotiable document of title may be negotiated by the indorsement of the person to whose order the goods are by the terms of the document deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner.

The remarks in the previous sections are again applicable, and the analogy with bills of exchange and promissory notes is still noticeable.

§ 410. **How far intent to transfer title is necessary.**—The sections of the Sales Act in the two preceding sections provide for the way in which negotiable documents of title may be negotiated;

²⁴ California Civil Code (1903), § 2128; Montana Civil Code (1895), § 2832; S. Dak. Civil Code (1903), § 1553.

²⁵ *Erie & Pacific Despatch v. St. Louis Compress Co.*, 6 Mo. App. 172.

²⁶ In *Gabarron v. Kreeft*, L. R. 10 Ex. 274, a bill of lading was taken by the shipper in the name of a fictitious person, and later the shipper

indorsed the fictitious name on the document and pledged it with the plaintiff. The plaintiff was held entitled to recover the goods from the defendant to whom the shipper had contracted to sell the goods and who had paid the price for them. See also *Farquharson v. King*, [1902] A. C. 325.

that is, for the way in which a complete title to them may be transferred. But it does not follow from these provisions that the mere fact of indorsement or delivery necessarily operates as a transfer of title. Aside from statute it is evident that, at least so far as the immediate parties are concerned, title will pass only if the seller intends it shall, and the buyer agrees to accept it. Even in the case of bills of exchange and promissory notes, the same might be said, for making a note or an indorsement to B. will not of itself make B. owner of the obligation. Apart from statute, the rule in regard to documents of title is clearly stated. "Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods."²⁷ By intent must be understood here, as always in contractual law, an intent made manifest, not a secret intent.²⁸ Though the title cannot be said to pass unless there is such an intent to pass it, yet if a bill of lading or other documents of title given by law similar effect is delivered by the owner after indorsement in blank, or is indorsed by the person appearing to be owner, the delivery or indorsement is itself an act which, without more, unless explained, implies an intent to transfer title. Whether bills of lading are ever properly called negotiable or not, there can be little doubt that

²⁷ Bowen, L. J., in *Sanders v. Maclean*, 11 Q. B. D. 327. So in *The Carlos F. Rosés*, 177 U. S. 655, 665, 20 S. Ct. 803, 43 L. ed. 929, the court said: "Bills of lading stand as the substitute and representative of the goods described therein, and while quasi-negotiable instruments are not negotiable in the full sense in which that term is applied to bills and notes. The transfer of the bill passes to the transferee the transferor's title to the goods described, and the presumption as to ownership arising from the bill may be explained or rebutted by other evidence showing where the real ownership lies. A pledgee to whom a bill of lading is given as security gets the legal title

to the goods and the right of possession only if such is the intention of the parties, and that intention is open to explanation. Inquiry into the transaction in which the bill originated is not precluded because it came into the hands of persons who may have innocently paid value for it. *Pollard v. Vinton*, 105 U. S. 7, 26 L. ed. 998; *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. ed. 892; *Low v. De Wolf*, 8 Pick. 101."

²⁸ "If the vendor intends to retain the right to dispose of the goods while they are in course of transportation, he must manifest that intention at the time of their delivery to the carrier. It is not the secret purpose, but the intention as dis-

the indorsement and delivery of such documents is commonly understood by merchants as importing a transfer of title (not necessarily an obligation of guarantee) in the same way as the indorsement and delivery of a bill of exchange. If nothing appears to control the effect of these circumstances, the law should give effect to the manifestation of intent indicated by them without further evidence. Moreover, strong evidence should be required even in an action between the original parties if an attempt is made to show that their intent was other than which their acts plainly indicated.²⁹ And if a subsequent purchaser has paid value for such a document on the faith of the intent apparently shown by the delivery and indorsement, he should be protected.³⁰

§ 411. Documents of title marked "not negotiable"—Provisions of the Sales Act.—

Sec. 30. NEGOTIABLE DOCUMENTS OF TITLE MARKED "NOT NEGOTIABLE."—If a document of title which contains an undertaking by a carrier, warehouseman, or other bailee to deliver the goods to the bearer, to a specified person or order, or to the order of a specified person, or which contains words of like import, has placed upon it the words "not negotiable," "non-negotiable" or the like, such a document may nevertheless be negotiated by the holder and is a negotiable document of title within the meaning of this act. But nothing in this act contained shall be construed as limiting, or defining the effect upon the obligations of the carrier, warehouseman, or other bailee issuing a document of title of placing thereon the words "not negotiable," "non-negotiable," or the like.

As the mercantile community is not as fully instructed in regard to the legal nature and effect of bills of lading and warehouse receipts as in regard to bills of exchange and promissory notes, many Legislatures have thought it advisable to endeavor to prevent confusion by enacting, in effect, that unless documents of title were plainly marked "not negotiable" they should be regarded as

closed by the vendor's acts and declarations at the time, which governs." *Wigton v. Bowley*, 130 Mass. 252.

²⁹ See *supra*, § 291, a discussion of the analogous question of how far the

presumption that the consignee is owner of the goods may be controlled by a contrary intention.

³⁰ See *supra*, §§ 292, 407, and *infra*, § 436.

negotiable, instead of requiring the taker of such a document to observe at his peril whether the document contained a promise negotiable in terms; that is, made to "order" or to "bearer."³¹ In a few of these States it has also been made a criminal offense for a carrier to deliver goods, for which a bill of lading has been issued, without requiring the surrender of the bill, unless the bill is marked "not negotiable." To avoid the possibility of incurring the liability upon a negotiable bill of lading when a non-negotiable or straight bill was intended, and especially to avoid penal liability under the criminal statutes above referred to, it became an almost universal practice to stamp or print upon all bills of lading, whether running to order or not, the words "not negotiable." This practice has not been usual with warehousemen, but the Sales Act is so drawn as to cover the case of warehouse receipts should warehousemen adopt a practice similar to that of carriers. While the practice of the carriers in this respect is a mischievous one and might well be prohibited by statute, it seemed inadvisable in an act relating to sale of goods to attempt such a regulation. This section of the Sales Act, therefore, in effect, merely nullifies, so far as concerns negotiation, the words "not negotiable" when put upon a document of title running to "order" or "bearer," but does not concern itself with the effect of those words upon the obligation of the bailee issuing the document. In the forms of bill of lading recommended by the Interstate Commerce Commission in 1908 for the future use of the carriers under its supervision, the use of the words "not negotiable" on order bills was purposely discontinued, and it is to be hoped that hereafter bills of lading of this sort will no longer be common. The effect of them must, however, be considered. In order to bring out more fully the force of the section of the Sales Act under consideration, it is desirable to consider the legal situation, aside from statutory

³¹Such laws in regard to warehouse receipts are in force in Alabama, California, Colorado, Connecticut, Delaware, Georgia, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, Wisconsin. Section 7 of the Uniform

Warehouse Receipts Act (see *supra*, § 407) provides that as against the warehouseman a holder of a receipt may regard it as negotiable unless marked "not negotiable." Similar provisions in regard to bills of lading exist in Missouri, Pennsylvania, and South Dakota.

regulation, of a document of title negotiable in form but with the words "not negotiable" upon it.

§ 412. **Legal effect of a negotiable document of title when marked "not negotiable."**—The words "not negotiable," when stamped upon a bill of lading in which the goods are to be delivered to "order" or to "bearer," are a direct contradiction of the terms of the bill, as those terms are understood by the mercantile world. It is, accordingly, a difficult problem to decide what is the effect of such a document. The matter may be considered, first, as affecting the carrier's obligation; and, second, as affecting the rights acquired by the transfer of the document. The most important distinction, so far as the carrier is concerned, between an order bill and a straight bill, is that the carrier is obliged to take up the former before delivering the goods, while he is under no such obligation in regard to the latter.³² As to this matter, the words "not negotiable," when marked upon the bill, seem to have no effect in the case of the bills of lading which have been in common use; for such bills state in terms that if the word "order" is written thereon, before or after the name of the party to whose order the property is consigned, the surrender of the bill of lading properly indorsed shall be required before delivery of the property at destination. Accordingly, it is held that the carrier is liable to the holder of an order bill of lading if the goods are delivered to the consignee without surrender of the bill, even though the latter is marked "not negotiable."³³ To some extent the carrier's obligations must vary with the rights of transferees of the bill of lading. If a transfer of the bill is only partially effectual, the transferee acquires only a limited right against the carrier; but so far as the transferee's right is limited, it may be assumed that the transferor retains, if not for his own benefit, then as trustee for the transferee, so much of the carrier's obligation as the transfer failed to carry to the transferee of the document. Accordingly, the only material effect on the obligation of the carrier produced by marking "not negotiable" upon an order bill, is that which has led carriers to adopt the

³² See *supra*, § 285.

³³ *Merchants' Bank v. Baltimore, etc., Steamboat Co.*, 102 Md. 573, 63 Atl. 108; *Chesapeake Steamship Co. v. Merchants' Bank*, 102 Md. 589, 63

Atl. 113; *Barnum Grain Co. v. Great Northern Ry. Co.*, 102 Minn. 147, 112 N. W. 1030, 1049; *Midland Bank v. Missouri, Kansas & Texas Ry. Co.*, 62 Mo. App. 531.

practice, namely, the avoidance of all possibility of incurring penal liability under statutes which make it an offense for a carrier to deliver goods without taking up the bill of lading unless the bill states in terms that it is "not negotiable."³⁴ The danger of the practice is because of the possible effect between transferor and transferee. What this effect is has not yet been fully settled; but it is at least clear that a new uncertainty is added to the law governing transfers of bills of lading. The Supreme Court of Maryland has held that the words "not negotiable" have their full effect and deprive an order bill of lading of any qualities of negotiability it might otherwise possess.³⁵ On the other hand, in Missouri it has been held that the only effect of the addition of the words "not negotiable" is to make inapplicable a local statute declaring bills of lading negotiable, and to leave the document subject to the rules of the common law, and, therefore, with any qualities of negotiability which the common law allowed to bills of lading.³⁶

§ 413. Transfer of nonnegotiable documents—Provisions of the Sales Act.—

Sec. 31. TRANSFER OF NON-NEGOTIABLE DOCUMENTS.—A document of title which is not in such form that it can be negotiated by delivery may be transferred by the holder by

³⁴ See *Mairs v. Baltimore, etc., R. Co.*, 73 N. Y. App. Div. 265.

³⁵ In *National Bank of Bristol v. Baltimore & Ohio R. R.*, 99 Md. 661, 675, 59 Atl. 134, 105 Am. St. Rep. 321, the court said: "By the common law a bill of lading was not, in an unrestricted sense, a negotiable instrument like a promissory note, but was, as this court has repeatedly stated, *quasi*-negotiable only. *Baltimore & Ohio R. R. Co. v. Wilkens*, 44 Md. 11, 22 Am. Rep. 26. But even that restricted common-law negotiability may be limited and still further qualified by the insertion of appropriate terms wholly destroying all negotiability, and it seems to be generally agreed that such a result may be accomplished by simply stamping or printing across the face

of the instrument the words 'not negotiable,' as was done in this instance." This doctrine was reiterated in *Merchants' Bank v. Baltimore, etc., Steamboat Co.*, 102 Md. 573, 579, 63 Atl. 108, though the court in both cases held that while such bills of lading were "not negotiable" they could be transferred and the transfer carried with it certain rights to the transferee.

³⁶ *Midland Bank v. Missouri, Kansas & Texas Ry. Co.*, 62 Mo. App. 531. The same view was taken in Minnesota in regard to a bill of lading upon which was stamped "not negotiable unless delivery is to be made to the consignee, or order." *Barnum Grain Co. v. Great Northern Ry. Co.*, 102 Minn. 147, 112 N. W. 1030.

delivery to a purchaser or donee. A non-negotiable receipt cannot be negotiated and the indorsement of such a receipt gives the transferee no additional right.

The Sales Act distinguishes between the terms "negotiation" and "transfer," the former word being applied only to documents negotiable in form while nonnegotiable documents may simply be transferred. Subsequent sections show the distinction in legal effect between negotiation of a document and the mere transfer. The section devoted to transfers covers two distinct kinds of cases; first, transfers of documents originally made out to order but not properly indorsed at the time of transfer; and, second, straight bills of lading and similar documents in which the bailee's promise is merely to a specified person. The grounds for denying to these two kinds of transfers the incidents of negotiation are somewhat different. In the first kind of case, the document itself is in the fullest sense a symbol of the goods, possession of which controls possession of the goods, but by the very terms of the document the holder is not a promisee of the bailee; since the holder is not the "order of" the person to whom the document was originally made out and, consequently, is not enabled to enforce the bailee's promise. In the second type of case, the document is not properly a symbol of the goods according to the usages of modern American business. As has been seen already,³⁷ a carrier may deliver goods billed straight without demanding from the consignee the surrender of the bill of lading. A similar usage prevails among warehousemen as to their receipts. It is obviously idle to speak of a document as a symbol of the goods when it is wholly unnecessary for acquiring possession of the goods. A buyer or pledgee who obtains such a document while goods are in transit is obtaining no real security, and it is desirable to make this clear and to force upon the community full recognition of the fact that documents of title unless negotiable in form are not the proper subjects for commercial dealings. This is already recognized in commercial centers where dealings in documents of title are so large as to educate the mercantile community; but since the important distinction in practice between documents running to order and others seems quite modern, it is not surprising to find that many and dis-

³⁷ *Supra*, § 235.

astrous mistakes are made, especially in communities where dealings with documents of title are not active.³⁸

§ 414. Who has power to negotiate a document of title—Provision of the Sales Act.—

Sec. 32. WHO MAY NEGOTIATE A DOCUMENT.—

A negotiable document of title may be negotiated —

(a.) By the owner thereof, or

³⁸ In *Wigton v. Bowley*, 130 Mass. 252, the plaintiff in fulfillment of an order of one Fenno shipped to him from Michigan to Boston a carload of corn, taking a straight bill of lading, naming Fenno as consignee. The bill of lading with a bill of exchange drawn on the buyer, as he had instructed, the plaintiff sent to a Boston bank with instructions to deliver the bill of lading on acceptance of the bill of exchange. On the arrival of the corn, Fenno gave an order on the railroad for the delivery of it to the defendant who paid Fenno full price. Fenno failed immediately afterward and the bank returned the bill of lading and bill of exchange to the plaintiff. Evidence was introduced of a local custom by which goods billed straight were delivered by the railroads in Boston without production of the bills of lading. The court held that judgment for the defendants should be affirmed; that the property in the flour was transferred when it was delivered for transportation; saying, "The receipt given by the railroad, sometimes called the shipping receipt, or bill of lading, was taken in his name. These facts sufficiently show that the plaintiffs did not intend to retain their hold on the property, after it was taken by the carrier, as security for the payment of the price. * * * In the case at bar, the fact that the shipping receipt was not delivered to Fenno, but was sent with the draft to a bank in Boston,

is not conclusive evidence, as against the rights of the consignee, that the plaintiffs intended not to part with the title. It was no part of the contract of sale. It was given in the name of Fenno, and could not be transferred by the plaintiffs so as to change title in the property without his indorsement. What passed between the plaintiffs and the bank in Boston, not communicated to Fenno, cannot affect his rights." A case substantially identical in its facts is *Freeman v. Kraemer*, 63 Minn. 242, 246, 65 N. W. 455. The decision of the case, however, was opposite; the court saying, "It clearly and conclusively appears from the evidence that the sale or contemplated sale from plaintiff to Stevenson was to be a cash transaction. No indicia of ownership were given to Stevenson. On the contrary, the bills of lading were forwarded by plaintiff, with the drafts attached to them, in such a manner as to make the intended delivery of the bills to Stevenson concurrent with the payment of the drafts for the purchase price of the property. From the circumstances, it conclusively appears that plaintiff did not intend to vest the title to the property in Stevenson until the goods were paid for." But the same court in a later decision, *Bank of Litchfield v. Elliott*, 83 Minn. 469, 86 N. W. 454, upheld a finding in favor of the consignee and against a bank which had advanced money to the consignor on a straight bill of lading.

(b.) By any person to whom the possession or custody of the document has been entrusted by the owner, if, by the terms of the document the bailee issuing the document undertakes to deliver the goods to the order of the person to whom the possession or custody of the document has been entrusted, or if at the time of such entrusting the document is in such form that it may be negotiated by delivery.

It will be noticed that this provision does not give a power to negotiate documents of title equal to that allowed by law in the case of bills of exchange and promissory notes. While any person intrusted with the possession or custody of a negotiable document of title running to bearer, or indorsed in blank, or to the order of the person to whom the possession or custody has been intrusted, has been given the power of negotiating the document, irrespective of the terms of the trust or agency upon which his possession may be held, neither a thief nor a finder is within the terms of the section. The full effect of the section, and the extent to which it departs from the rules of the common law, may better be considered at length in connection with a later section of the act.³⁹

§ 415. Rights acquired by negotiation — Provisions of the Sales Act.—

Sec. 33. RIGHTS OF PERSON TO WHOM DOCUMENT HAS BEEN NEGOTIATED.— A person to whom a negotiable document of title has been duly negotiated acquires thereby,

(a.) Such title to the goods as the person negotiating the document to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the person to whose order the goods were to be delivered by the terms of the document had or had ability to convey to a purchaser in good faith for value, and

The court in referring to its previous decision said: "The real question after all is, who is the real owner of the property, and in this case this question depended upon the proof of the intent of the shipper, to be gathered from the facts above stated, existing at the time of shipment." See also *Taylor v. Turner*, 87 Ill. 296; *Lake Shore, etc., Ry. Co. v.*

National Live Stock Bank, 178 Ill. 506, 53 N. E. 326, and *infra*, § 427. As a bank or other purchaser can never be certain what was the intention of the shipper at the time of shipment, it is evidently an extremely hazardous thing to advance money upon the transfer of a straight bill of lading.

³⁹ Section 38.

(b.) The direct obligation of the bailee issuing the document to hold possession of the goods for him according to the terms of the document as fully as if such bailee had contracted directly with him.

How far this section of the Sales Act qualifies the existing rules of the common law will best be seen by an examination of the following sections.

§ 416. **When sale of document of title cannot transfer property to the buyer.**— However fully the mercantile conception of documents of title may be adopted, there must be some cases where the sale of the document cannot carry with it the sale of the goods for which the document was supposed to be issued. A bill of lading or warehouse receipt, unlike a bill of exchange or promissory note, is supposed to relate to specific things. It is one of the requirements of a bill of exchange that it should be a promise to pay generally and not out of a particular fund. It is the essence of a bill of lading or warehouse receipt that it should relate to specified goods only. The reason of the rule in regard to bills of exchange is presumably that the nonexistence of a particular fund on which an order was made would destroy the value of the bill. Similarly if there are, in fact, no goods behind a document of title, the value of the document is destroyed. This distinction between documents of title and bills of exchange is believed to be the one really essential difference which must always distinguish the two. It is a difference which has nothing to do with negotiability. And, if this difference is borne in mind, the many analogies between the two kinds of instruments may safely be regarded. There are four kinds of cases where the holder of a document of title may find that there are no goods behind the document which he holds, though the document was genuine and properly negotiated to him. First. The bailee may never have received any goods and may have issued the document fraudulently, with no expectation of receiving goods, or improvidently, expecting later to receive the goods. Second. The depositor of the goods may have had no title to them. Third. The goods may have been destroyed after their receipt by the bailee, [but prior to the negotiation of the document of title.] Fourth. The document may be "spent," that is, the goods may have been delivered by the bailee prior to the time of the negotiation of the document. These cases must be separately considered.

§ 417. **Rights of a buyer of a document where the bailee never received any goods.**—It is evident that if no goods have been received by the bailee, the purchaser can get none. But sometimes, though no goods were received when the document was issued, goods have been later received and appropriated to the contract of bailment. If it is clear that the goods were received on account of the document previously issued, title will pass by estoppel to the holder of the document.⁴⁰ On a similar principle, if two documents are issued for the same goods, while the second document gives a buyer of it no title to goods, a subsequent acquisition and cancellation of the first document by the bailee who issued the documents will inure to the benefit of the holder of the second, who will then become owner of the goods.⁴¹ The difficulty that the document represented no goods when it was issued may arise, not simply when no such goods as the document described were in existence, but also, even when they were in existence, provided they were not in the possession of the bailee who issued the receipt. If the goods were obviously at a distance, it is clear that a bill of lading issued by a carrier for them cannot properly be called a symbol of the goods. The rule is the same for a warehouseman, but more difficult questions have arisen in regard to warehousemen than in regard to carriers. An attempt is sometimes made by a manufacturer or owner of large quantities of goods to establish a warehouse for these goods on his own premises and obtain warehouse receipts for the goods from one called a warehouseman, who has been given more or less complete control of the goods, although perhaps an employee of their owner. In this way the owner of the goods is enabled to secure sometimes a double credit—that based upon his goods and that based upon warehouse receipts issued for the same goods. If a fraud is attempted, that in itself would invalidate the transaction as against any who were parties to or cognizant of the fraud. But even a purchaser for value of ware-

⁴⁰ The *Idaho*, 93 U. S. 575, 23 L. ed. 978; *Rowley v. Bigelow*, 12 Pick. 307, 23 Am. Dec. 607; *Frazier v. Hilliard*, 2 Strob. 309. Compare *Bryans v. Nix*, 4 M. & W. 775. And see *supra*, §§ 130, 131. But not unless the goods were received on ac-

count of the document. *Jackson v. Hale*, 14 How. 525, 14 L. ed. 315; *Smith v. Missouri Pacific Ry. Co.*, 74 Mo. App. 48, 56.

⁴¹ *Block v. Oliver*, 19 Ky. L. Rep. 1278.

house receipts issued in this way will not obtain a valid right to property by means of the warehouse receipts unless they were issued by one in the actual possession of the property.⁴² A less

⁴² *Re Rodgers*, 125 Fed. Rep. 169, 60 C. C. A. 567. This case involved the question of the validity of a pledge of warehouse receipts made by a bankrupt prior to his bankruptcy. The opinion of the court upon this portion of the case is as follows: "The bankrupt was largely engaged in purchasing seed upon credit, storing the property purchased in his warehouse. He occupied the premises as a place of business, maintaining an office there, with clerks to assist in the management of the business, and with porters to handle the seed. The premises were subject to a rental of \$250 a month. He arranged with the storage company, which had no warehouse of its own, that it would issue warehouse receipts or warrants to the bankrupt for property upon the bankrupt's premises for a certain small charge per month upon the value of the property covered by the receipts. He executed a lease of the premises to the storage company, to continue so long as the bankrupt should desire, and so long as property remained thereon for which warrants or receipts had been issued; and this without any payment of rent by the storage company, the rental in fact being paid by the bankrupt. The storage company neither required, nor was it given, any key to the premises. The bankrupt remained in possession of the premises as before the agreement, continuing to contract his business there as he had formerly done. There were certain signs placed upon the different floors of the building, indicating that the storage company controlled the premises. These were small and obscure signs, not likely to

attract attention, and most of them hidden behind the piles of bags of seed. No sign was displayed upon the exterior of the building indicating any proprietorship of the storage company; or giving notice to the world that any other than the bankrupt had possession and control. There was no open, notorious manifestation of a change of possession, none was intended, and there was none in fact. Upon each pile of bags of seed for which the warehouse receipts or warrants were issued there was placed a small tag, which might be discovered on careful search. The bankrupt substantially treated this property as his own, at times going through the forms prescribed by the storage company, and, whenever he found it necessary, ignoring them. We do not find that the storage company had knowledge of this action of the bankrupt, but it certainly knew that it was possible under the circumstances for the bankrupt to do with the property as he would, since it was left within his control. It is difficult for us to look upon this transaction as a warehousing of property. The storage company assumed no liability to the bankrupt, and assumed only such responsibility as the law imposes upon it with respect to those advancing money upon the faith of its warehouse warrants or receipts. The name of the company is in itself, under the circumstances, a false pretense. It did not store property. It had no premises upon which to store property. The bankrupt stored the property. The bankrupt paid the rental of the premises. It is true that an agent of the storage company occasionally visited the premises and

elaborate method of committing the same fraud is for a warehouseman to issue receipts to himself for property which he pur-

inspected the property in a sort of a way, but exercised no supervision or control that would prevent the bankrupt from doing with it as his will might dictate or his financial necessities might require. We cannot but regard this arrangement as a subterfuge, a mere device to enable the bankrupt to hypothecate the warehouse warrants or receipts, and so to raise money upon secret liens upon property in his possession and under his control. The written agreement indicates this. It is somewhat startling to learn that a warehouse company should store goods of this character for another upon the premises of that other, taking compensation as for storage, not related to the cost of storage, or to the expense of receiving and delivering the property, not according to the space occupied by the property, but according to the value of the property. The fact here is patent that the storage company assumed to the bankrupt no liability, and that the sole purpose was to issue warehouse warrants or receipts, making such inspection only as, in its judgment, would protect it from liability to third persons by reason of the issue of its warrants. To uphold such a scheme would permit every merchant in the State, notwithstanding the declared policy of the State to the contrary, to have possession of large stocks, thereby inducing credit, and to cover them with secret liens, thereby deceiving creditors. It would, in effect, permit such merchant to pledge his entire stock without change of possession, without record of it, and without notice to the world. Such a scheme is disapproved by the law of the State of Illinois, which in this instance

we are bound to uphold, however specious may be the device or however attractive may be the form by which it is cloaked. Such a scheme within the State of Illinois is constructively fraudulent as to creditors, and voidable by creditors. Nor can we uphold this transaction as a pledge of the property to the bank and to H. W. Rogers & Bro. Actual or symbolical possession of personal property in the pledgee is essential to its pledge. It is true that when the actual delivery is to a carrier or warehouseman, and bill of lading or warehouse receipt is given therefor, the transfer of the instrument and its delivery to the pledgee is regarded in the law as delivery of possession to the pledgee of the property represented by the instrument; but it is a necessary condition to the existence of such symbolic possession by the pledgee that the property itself be in the possession of some person other than the pledgor. Two different persons cannot be in the actual adverse possession of the same property or premises at the same time, and, as we find the actual possession and actual control of the property in dispute to have been in the bankrupt, the transfer of these warehouse receipts to *bona fide* holders for value, even without notice of the fact, cannot constitute a valid pledge of the goods, as the storage company had not possession and control of the goods." See also *Union Trust Co. v. Trumbull*, 137 Ill. 146, 27 N. E. 24; *Yenni v. McNamee*, 45 N. Y. 614; *Peoples' Bank v. Gayley*, 92 Pa. St. 518. Compare *Bush v. Export Storage Co.*, 136 Fed. Rep. 918.

ports to hold as a warehouseman. In such a case it has been held that the form of the document should put a purchaser upon inquiry;⁴³ and an innocent purchaser of the goods has been preferred to a prior pledgee of such receipts,⁴⁴ and according to the weight of authority a receipt issued by the owner of goods, in his possession, is not a warehouse receipt.⁴⁵

§ 418. **Liability of bailee upon a document when no goods received.**— Though the holder of a document of title may find that owing to its improper issue he has obtained a piece of paper which does not represent any goods, he may, nevertheless, be entitled to enforce a claim against the bailee issuing the document, either on the ground that the document amounts to a contract by the issuer to deliver goods therein described or that it amounts to a representation that such goods were received on which the holder justifiably relied in purchasing the document. At least if the document is negotiable in form, and if by statute the bailee's contractual obligations are made negotiable, both these arguments are sound. A document is both a receipt and a contract. If the promise is to "order," or "bearer," and this promise is by statute

⁴³ *Bank of New York Association v. American Dock Co.*, 143 N. Y. 559, 38 N. E. 713; *Corn Exchange Bank v. American Dock Co.*, 149 N. Y. 174, 43 N. E. 915. See also *Hanover Nat. Bank v. American Dock Co.*, 148 N. Y. 612, 43 N. E. 72, 51 Am. St. Rep. 721.

⁴⁴ *National Exchange Bank v. Graniteville Mfg. Co.*, 79 Ga. 22, 3 S. E. 411; *Western, etc., R. R. Co. v. Ohio Valley Banking Co.*, 107 Ga. 512, 33 S. E. 821. In this case warehouseman who was also a factor issued a warehouse receipt to himself for cotton stored with him as a factor. He pledged the receipt and then sold the cotton to another person; the latter was held entitled to retain it.

⁴⁵ *Adams v. Merchants' Nat. Bank*, 2 Fed. Rep. 174; s. c., 9 Biss. 396; *Sexton v. Graham*, 53 Iowa, 181, 4 N. W. 1090; *Valley Nat. Bank v. Frank*,

12 Mo. App. 460; *Conrad v. Fisher*, 37 Mo. App. 352, 8 L. R. A. 147; *Yenni v. McNamee*, 45 N. Y. 614; *Farmers' Bank v. Lang*, 87 N. Y. 209; *Thorne v. First Nat. Bank*, 37 Ohio St. 254; *Tradesmen's Nat. Bank v. Kent Mfg. Co.*, 186 Pa. St. 556, 40 Atl. 1018, 65 Am. St. Rep. 876; *Moors v. Jagode*, 195 Pa. St. 163, 45 Atl. 723. But the law is otherwise in some States. *Alabama State Bank v. Barnes*, 82 Ala. 607, 2 So. 349; *Greenbaum Bros. v. Megibben*, 10 Bush, 419; *Cochran v. Ripy*, 13 Bush, 495; *Ferguson v. Northern Bank*, 14 Bush, 555, 29 Am. Rep. 418; *National Exchange Bank v. Wilder*, 34 Minn. 149, 24 N. W. 699. See also *Broadwell v. Howard*, 77 Ill. 305; *Bank v. Capital Elevator Co.*, 9 Kans. App. 144, 58 Pac. 483; *Merchants' Bank v. Hibbard*, 48 Mich. 118, 11 N. W. 834, 42 Am. Rep. 465.

made negotiable, the holder of the document should be able to claim performance of the promise. Even apart from any legislation the doctrine of estoppel should be applicable. The common use of documents of title for transferring property makes it incumbent upon those who issue such documents to know that the statements contained therein are likely to be relied upon. If they are, therefore, relied on to the detriment of a purchaser, the bailee should not be permitted to deny their truth. This reasoning is not seriously disputed,⁴⁶ but in two important classes of cases distinctions are attempted. Documents of title, especially bills of lading, are generally issued, not by bailees themselves, but by subordinate agents. These agents, it is urged, have not authority to bind the principals whom they represent by the issue of documents when goods have not been received. Again, where some goods have been received, but not goods corresponding with the description in the document, the bailee is held excused on the ground that it was impossible for him to know the nature of the goods which he received. These cases will be presently discussed, but before passing to them a distinction should be noted between cases where the bailee represents an existing fact, as that goods have been received, and cases where the bailee merely promises some future perform-

⁴⁶ *Gillett v. Hill*, 2 C. & M. 530, an order on a bailee, accepted by him, for twenty sacks of flour, was held to estop him from asserting that he had not received the goods. So in *Knights v. Wiffen*, L. R. 5 Q. B. 360; *Coventry v. Great Eastern Ry. Co.*, 11 Q. B. D. 776; *McNeil v. Hill*, Woolw. C. C. 96; *Adams v. Gorham*, 6 Cal. 68; *Goodwin v. Scannell*, 6 Cal. 541; *Maynard v. Insurance Co.*, 34 Cal. 48, 91 Am. Dec. 672; *Relyea v. New Haven Rolling Mill Co.*, 42 Conn. 579; *Planters' Rice Mill Co. v. Olmstead*, 78 Ga. 586, 3 S. E. 647; *Planters' Rice Mill Co. v. Merchants' Nat. Bank*, 78 Ga. 574, 3 S. E. 327; *Livingston v. Anderson*, 2 Ga. App. 274, 58 S. E. 505; *Block v. Oliver*, 19 Ky. L. Rep. 1278; *Star Compress Co. v. Meridian Cot-*

ton Co., 87 Miss. 228, 39 So. 417; *Smith v. Missouri Pacific Ry. Co.*, 74 Mo. App. 48, 55. See also *Hoffman v. Schoyer*, 143 Ill. 598, 28 N. E. 823; *Farmer v. Gregory*, 78 Ky. 475; *Taylor v. Farmer*, 81 Ky. 458; *Fletcher v. Gt. Western Elevator Co.*, 12 S. Dak. 613, 82 N. W. 184; *Stewart v. Phoenix Ins. Co.*, 9 Lea, 104, and cases cited in the following section. This is the universal rule of the civil law. The provision of the French Commercial Code to this effect, Art. 283, is copied in Belgium, Holland, Italy, Spain, Mexico, and many Central and South American countries. The law of Germany is the same. 34 Reichsgericht, 79; 46 Reichsgericht, 7; Schaps, Seerecht, p. 515.

ance. In the latter case there can be no estoppel, and any liability of bailee must depend upon the law of contracts.⁴⁷

§ 419. **Documents issued by a bailee's agent when goods have not been received.**—It was decided in England in the middle of the nineteenth century that the master of a ship who signed a bill of lading for goods which had never been received was not to be regarded as the agent of the owner in so doing, so as to make the latter responsible.⁴⁸ This decision was immediately followed by an act of Parliament,⁴⁹ which makes clear the right of a holder for valuable consideration of such a bill of lading as against the master or other person signing the bill, unless the holder of the bill had notice that the goods had not been taken on board. It was provided, however, that the master or other person signing the bill might exonerate himself by showing that it was caused without any default on his part and wholly by the fraud of the shipper, the holder, or some person under whom the plaintiff claims. This statute does not cast any liability upon the shipowner, but only makes the bill conclusive against the person who signed the document.⁵⁰ As far as the shipowner or other principal of the agent issuing the document is concerned, the law of the first decision has been consistently followed in England,⁵¹ and in Scotland⁵² and Canada⁵³ likewise. In the United States the question has given rise to great difference of opinion. Most of the American cases relate to bills of lading issued by station agents of railroads, but there seems no ground to take any valid distinction if the document in question was issued by an agent whose duty it was to issue such documents when goods were actually received. The Supreme

⁴⁷ *Hollins v. Hubbard*, 165 N. Y. 534, 59 N. E. 317.

⁴⁸ *Grant v. Norway*, 10 C. B. 665. The court said: "It is not contended that the captain had any real authority to sign bills of lading, unless the goods had been shipped. Nor can we discover any ground upon which a party taking a bill of lading by indorsement would be justified in assuming that he had any authority to sign such bills, whether the goods were on board or not."

⁴⁹ 18 & 19 Vict., c. 111, § 3.

⁵⁰ *Jessel v. Bath*, L. R. 2 Ex. 267. See also *Brown v. Powell Coal Co.*, L. R. 10 C. P. 562; *Valieri v. Boyland*, L. R. 1 C. P. 382; *Cox v. Bruce*, 18 Q. B. D. 147 (C. A.).

⁵¹ *Coleman v. Riches*, 16 C. B. 104; *McLean v. Fleming*, L. R. 2 H. L. Sc. 128; *Brown v. Powell Coal Co.*, L. R. 10 C. P. 562; *George Whitechurch, Lim. v. Cavanagh*, [1902] A. C. 117.

⁵² *Denholm v. Halmor*, 25 Sc. L. Rep. 112.

⁵³ *Erb v. Great Western Ry. Co.*, 5 Duval, 179.

Court of the United States has followed the English law,⁵⁴ as have the courts of Arkansas,⁵⁵ Illinois,⁵⁶ Louisiana,⁵⁷ Maryland,⁵⁸ Massachusetts,⁵⁹ Minnesota,⁶⁰ Mississippi,⁶¹ Missouri,⁶² North Carolina,⁶³ Ohio,⁶⁴ Oregon,⁶⁵ Washington.⁶⁶ Other decisions, however, in opposition to the authorities just referred to sustain the doctrine that, as against a purchaser for value of a bill of lading, the principal is estopped to deny the statement in the bill of lading that goods have been received and cannot escape by denying the authority of its agent to issue bills without receipt of the goods. This is the law of Alabama,⁶⁷ Connecticut,⁶⁸ Kansas,⁶⁹ Nebraska,⁷⁰

⁵⁴ *Schooner Freeman v. Buckingham*, 18 How. 182, 15 L. ed. 341; *The Lady Franklin*, 8 Wall. 325, 19 L. ed. 455; *Pollard v. Vinton*, 105 U. S. 7, 26 L. ed. 998; *Friedlander v. Texas*, etc., Ry. Co., 130 U. S. 416, 9 S. Ct. 570, 32 L. ed. 991; *Missouri Pac. Ry. Co. v. McFadden*, 154 U. S. 155, 14 S. Ct. 990, 38 L. ed. 944. So the lower Federal courts: *The Joseph Grant*, 1 Biss. 193; *The Loon*, 7 Blatchf. 244; *Robinson v. Memphis & Charleston Ry. Co.*, 9 Fed. Rep. 129, 16 Fed. Rep. 57; *The Asphodel-Murray v. National Cordage Co.*, 53 Fed. Rep. 835; *The Isola di Procida*, 124 Fed. Rep. 942; *Clark v. Clyde S. S. Co.*, 148 Fed. Rep. 243.

⁵⁵ *Martin v. Railway Co.*, 55 Ark. 510, 19 S. W. 314; *St. Louis*, etc., Ry. Co. v. *Citizens' Bank*, Ark., 112 S. W. 154.

⁵⁶ *Lake Shore*, etc., Ry. Co. v. *National Live Stock Bank*, 178 Ill. 506, 521, 53 N. E. 326; *Tibbits v. Rock Island*, etc., Ry. Co., 49 Ill. App. 567. Compare *St. Louis*, etc., Ry. Co. v. *Larned*, 103 Ill. 293.

⁵⁷ *Fellows v. The Powell*, 16 La. Ann. 316, 79 Am. Dec. 581; *Hunt v. Mississippi Central Ry. Co.*, 29 La. Ann. 446; *Henderson v. Louisville*, etc., Ry. Co., 116 La. 1047, 114 Am. St. Rep. 582.

⁵⁸ *Baltimore & O. R. R. Co. v.*

Wilkens, 44 Md. 11, 22 Am. Rep. 26; *Lazard v. Merchants'*, etc., Transportation Co., 78 Md. 1, 26 Atl. 897.

⁵⁹ *Sears v. Wingate*, 3 Allen, 103.

⁶⁰ *National Bank of Commerce v. Chicago*, etc., Ry. Co., 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566.

⁶¹ *Hazard v. Illinois Central R. R. Co.*, 67 Miss. 32, 7 So. 280.

⁶² *Louisiana Bank v. Laveille*, 52 Mo. 380.

⁶³ *Williams v. Wilmington*, etc., R. R. Co., 93 N. C. 42.

⁶⁴ *Dean v. King*, 22 Ohio St. 118.

⁶⁵ *Anderson v. Portland Flouring Mills Co.*, 37 Or. 483, 60 Pac. 839, 50 L. R. A. 235, 82 Am. St. Rep. 771.

⁶⁶ *Roy v. Northern Pacific Ry. Co.*, 42 Wash. 572, 85 Pac. 53, 6 L. R. A. (N. S.) 302.

⁶⁷ *Jasper Trust Co. v. K. C.*, etc., R. R. Co., 99 Ala. 416, 14 So. 546, 42 Am. St. Rep. 75.

⁶⁸ *Relyea v. New Haven Rolling Mill Co.*, 42 Conn. 579.

⁶⁹ *Wichita Bank v. Atchison*, etc., Ry. Co., 20 Kans. 519; *St. Louis*, etc., Ry. Co. v. *Adams*, 4 Kans. App. 305; *Bank v. Capital Elevator Co.*, 9 Kans. App. 144, 58 Pac. 483 (warehouse receipt).

⁷⁰ *Sioux City*, etc., Ry. Co. v. *First National Bank of Fremont*, 10 Neb. 556, 7 N. W. 311, 35 Am. Rep. 488.

New York,⁷¹ Pennsylvania,⁷² Tennessee.⁷³ The latter view, though opposed to the weight of authority, commends itself both on the ground of principle and because of its practical effect. Where an agent is intrusted with the responsibility of issuing documents the function of which is to circulate in the community, the principal should no more be allowed to escape responsibility on the ground that the agent was only authorized to do his work correctly than a street railway should be allowed to escape liability for an accident on the ground that its servants were only authorized to run the car carefully. From a practical standpoint it is obvious that the purchaser of a bill of lading can frequently have no other information as to whether the goods have been received by the ~~purchaser~~ than that which the document itself gives him. He cannot protect himself against the fraud. Even if he should undertake the inquiry whether goods had been received, the natural person of whom to make the inquiry would be the station agent who has already stated on the bill of lading that the goods were received. While the carrier also cannot in every case protect himself, yet it may confidently be expected that more care will be exercised in the choice of agents and fewer mistakes will happen if the carrier is liable for the consequences than if the public has to suffer, while the carrier escapes responsibility. In countries where the civil law prevails, the carrier would generally, if not universally, be held liable.⁷⁴ And in the United States statutes have been passed in a few States with the apparent purpose of making the bailee liable under the circumstances in question. Such statutes have been enacted in Alabama,⁷⁵ Maryland,⁷⁶ and Mississippi.⁷⁷ There

⁷¹ *Armour v. Michigan Central Ry.*, 65 N. Y. 111, 22 Am. Rep. 603; *Bank of Batavia v. N. Y., etc., Ry. Co.*, 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440; *Brooke v. N. Y., etc., Ry.*, 108 Pa. St. 529, 1 Atl. 206.

⁷² *Brooke v. N. Y., etc., Ry.*, 108 Pa. St. 529, 1 Atl. 206, 56 Am. Rep. 235. This case involved a decision as to the law of New York where the circumstances giving rise to the litigation arose. The discussion of the court makes it tolerably plain, however, that the court would reach

the same result if the Pennsylvania law were involved.

⁷³ *Watson v. Memphis, etc., Ry. Co.*, 9 Heisk. 255.

⁷⁴ See *Denholm v. Halmor*, 25 Sc. L. Rep. 112, and authorities cited *supra*, § 418, note 46.

⁷⁵ Code (1886), § 1179, construed in *Jasper Trust Co. v. K. C., etc., R. R. Co.*, 99 Ala. 416, 42 Am. St. Rep. 75.

⁷⁶ Code (1885), Art. 14.

⁷⁷ Code (1892), § 4299, construed in *The Guiding Star*, 62 Fed. Rep. 407, 10 C. C. A. 454.

are also statutes in many States making it a criminal offense for any agent of a carrier or warehouseman to issue documents of title when the goods have not been received; but such statutes have no effect upon the civil rights of the holder of the document.⁷⁸

§ 420. *Liability of bailee for misdescription.*—Where goods have been received by a carrier or warehouseman, and they are misdescribed in the document, it may be supposed either that the misdescription is in regard to matters which the bailee might, by the exercise of reasonable diligence, have discovered, or the contrary may be supposed. It may also be supposed either that the document was issued by the bailee himself or by an agent having authority to bind his principal, or the contrary may be supposed. So far as the authority of the agent is concerned, there seems no reason to distinguish the case from that discussed in the preceding section. If an agent cannot bind his principal by issuing a bill of lading when no goods have been received, it is hard to see how the principal can be bound by the issuing of a bill of lading when no such goods as those described therein have been received.⁷⁹ Let it be supposed, however, that the document was issued by the bailee himself or in jurisdictions where the principal is bound by the acts of the agent issuing the document. Under these circumstances, in England, it is probable that the bailee would be estopped to deny that it had received such goods as the document described if a purchaser had bought the document relying upon its terms.⁸⁰

⁷⁸ Arkansas, S. & H. Dig. (1894), § 508; Louisiana, Rev. Laws, § 2481; Maryland, Code (1888), Art. 14; Pub. Gen. Laws, Art. 14, § 6; Missouri, Rev. St., § 5052; Montana, Penal Code (1895), § 1020; Nebraska, Comp. St. (1899), § 6795; New York, Penal Code, § 629; North Dakota, Laws 1895, § 7450; Pennsylvania, Pub. Laws (1863), § 2; Br. Purdon's Dig. (1894), 165; South Dakota, Penal Code (1903), § 696; Wisconsin, Sanb. & Ber. Annot. St. (1889), § 4424.

⁷⁹ See the reasoning in *St. Louis, etc., Ry. Co. v. Knight*, 122 U. S. 79, 7 S. Ct. 1132, 30 L. ed. 1077.

⁸⁰ *Gillett v. Hill*, 2 C. & M. 530 (in this case the bailee had accepted an order for twenty sacks of flour and was held estopped to deny that he had that number of sacks); *Coventry v. Great Eastern Ry. Co.*, 11 Q. B. D. 776 (the defendant issued two delivery orders for the same wheat, with nothing to show that the orders were duplicates. The defendant was held liable on each to a *bona fide* purchaser). See also *Knights v. Wiffen*, L. R. 5 Q. B. 660; *Sears v. Wingate*, 3 Allen, 103, and cases in the following notes.

In this country this distinction has been taken: As to facts which the bailee could not have verified there will be no estoppel.⁸¹ But statements in a document of matters which are within the bailee's knowledge will estop him if the document is bought by a purchaser in reliance upon the statements.⁸² The bills of lading in general use in this country contain an express provision that the contents of packages received are unknown. This protects the carrier from liability.⁸³ Warehousemen also generally protect themselves by inserting before the description of the goods the words "said to contain" and unless the bailee thus qualifies his description it seems right that the buyer of the document should be able to hold him to the accuracy of his statements. Unless a bailee is able to verify his assertions he should not make them, and it can hardly be said that a statement of the contents of packages is so obviously a matter as to which the bailee can have no knowledge that no

⁸¹ *Hale v. Milwaukee Dock Co.*, 23 Wis. 276, 99 Am. Dec. 169. In this case a warehouseman issued receipts for barrels of "mess pork." The barrels contained salt, but the warehouseman was held not liable to a purchaser of the receipt. In *Dean v. Driggs*, 137 N. Y. 274, 33 N. E. 326, 19 L. R. A. 302, 33 Am. St. Rep. 721, a warehouseman issued receipts for barrels of "Portland cement" and these receipts were pledged. It was held that the warehouseman did not warrant the contents of the barrels. See also *Insurance Co. v. Kiger*, 103 U. S. 352, 26 L. ed. 433; *Richards v. Doe*, 100 Mass. 524. It is still more evident that the statement in a bill of lading that goods have been received from the consignor is no representation of his right to ship them and imposes no liability on the carrier in favor of a third person. *National Bank of Commerce v. Chicago, etc., R. Co.*, 44 Minn. 224, 46 N. W. 342, 20 Am. St. Rep. 566, 9 L. R. A. 263.

⁸² *First Nat. Bank v. Dean*, 137 N. Y. 110, 32 N. E. 1108. In this

case a receipt for brandy stated that the warehouse in which it was stored was "free," which meant that the government tax on liquors stored therein had been paid. The warehouseman was held bound to deliver to a purchaser of the receipt the brandy free of tax, though in fact it had not been paid. See also *Bradstreet v. Heran*, 2 Blatchf. 116; *Rel-yea v. New Haven Rolling Mill Co.*, 42 Conn. 579; *Ensel v. Levy*, 46 Ohio St. 255, 19 N. E. 597. Compare *Robson v. Swart*, 14 Minn. 371, 100 Am. Dec. 238.

⁸³ *Miller v. Hannibal, etc., R. R. Co.*, 90 N. Y. 430, 43 Am. Rep. 179. A bill of lading read "following packages, contents and value unknown. Thirty barrels of eggs." The carrier was held not liable to a pledgee of the bill of lading, although the packages contained sawdust and not eggs. See also *St. Louis, etc., Ry. Co. v. Knight*, 122 U. S. 79, 30 L. ed. 1077; *Shepherd v. Naylor*, 5 Gray, 591; *Kelley v. Bowker*, 11 Gray, 428, 71 Am. Dec. 725.

purchaser should be justified in relying upon his statements, especially if the document is negotiable in form. Accordingly, in the Uniform Warehouse Receipts Act, the warehouseman is made liable for such statements as he may make.⁸⁴ The fact that goods actually received are misdescribed will not prevent the document issued for them from being a symbol of the goods actually received.⁸⁵

§ 421. **Lack of title in the depositor of the goods.**—As a general proposition it needs no argument to show that a bailor having no title to goods cannot, by depositing them with the warehouseman, or carrier, and receiving a document of title in return, whatever its form, give a good title to a purchaser of the document, however innocent the purchaser may be.⁸⁶ The only qualification to this

⁸⁴ "Section 20. *Liability for non-existence or misdescription of goods.*

—A warehouseman shall be liable to the holder of a receipt for damages caused by the nonexistence of the goods or by the failure of the goods to correspond with the description thereof in the receipt at the time of its issue. If, however, the goods are described in a receipt merely by a statement of marks or labels upon them, or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind, or that packages containing the goods are said to contain goods of a certain kind, or by words of like purport, such statements, if true, shall not make liable the warehouseman issuing the receipt, although the goods are not of the kind which the marks or labels upon them indicate, or of the kind they were said to be by the depositor." This statute was passed during the first six months of 1907 in States of Iowa, Illinois, New Jersey, New York, Massachusetts, and Connecticut; and in 1908 in Virginia, Rhode Island, Ohio, and Louisiana.

⁸⁵ *Herrick v. Barnes*, 78 Minn. 475, 81 N. W. 526. The action was be-

tween the original parties to the transaction.

⁸⁶ *Ogle v. Atkinson*, 5 Taunt. 759 (in this case one who had bought goods with the plaintiff's money shipped them on the plaintiff's ship. Thereafter he persuaded the captain to give him a bill of lading to blank, or order. This bill of lading he transferred. It was held, nevertheless, the plaintiff was entitled to the goods. The title passed when they were put on the ship and the subsequent taking of a bill of lading could not destroy this title); *Insurance Co. v. Kiger*, 103 U. S. 352, 26 L. ed. 433 (a factor in possession of cotton deposited it in a warehouse and took receipts which he pledged with the plaintiff. The case arose in Louisiana where no Factors' Act exists to protect pledges made by factors, and the court held that even though a statute existed making warehouse receipts negotiable "in the same manner and to the same extent" as bills of exchange, the plaintiff got no title). Similar in their facts were *Commercial Bank v. Hurt*, 99 Ala. 130, 12 So. 568, 19 L. R. A. 701, 42 Am. St. Rep. 38; *Commercial Bank v. Lee*, 99 Ala. 493, 12 So. 572, 19

principle is that if the depositor of the goods, though he had no title, had ability or capacity to transfer a title to a purchaser for value, either by virtue of actual authority or because the owner had allowed a situation to arise which would estop him from asserting his title to the goods, the same reason should protect a purchaser of the document of title that would protect a purchaser of the goods.⁸⁷ The carrier or warehouseman issuing the document

L. R. A. 705; and the same principle was involved in *Evansville, etc., v. R. R. Co. v. Erwin*, 84 Ind. 457; *Dickson v. Chaffe*, 34 La. Ann. 1133; *Saltus v. Everett*, 20 Wend. 267, 32 Am. Dec. 541; *Brower v. Peabody*, 13 N. Y. 121; *Dows v. Kidder*, 84 N. Y. 121; *Moors v. Kidder*, 106 N. Y. 32, 12 N. E. 818. See also *Henderson v. Williams*, [1895] 1 Q. B. 521; *Farquharson v. King*, [1902] A. C. 325.

⁸⁷ In *Pollard v. Reardon*, 65 Fed. Rep. 848, 21 U. S. App. 639, 13 C. C. A. 171, the owner of hides gave a bill of sale of them "loaded, or about to be loaded" to Pollard for security for an advance. Afterward he gave another bill of sale to Reardon for another advance, and later still, when the hides had been completely loaded and a bill of lading given for them, he indorsed this to Reardon. The court held Reardon had the better title because when Pollard took the bill of sale he knew that a bill of lading would issue clothing the holder with indicia of ownership, and was, therefore, estopped to claim against the holder of the bill. It will be observed that in this case prior to the issue of the bill, and prior to the shipment of at least part of the goods, a bill of sale had been given for value. The title, therefore, passed to Pollard, and the shipper had no title. Nevertheless, he conveyed a good title by the indorsement of the bill of lading. In *Moors v. Kidder*, 106 N. Y. 32,

12 N. E. 818, the defendants held, as agents for Baring Bros., bills of lading in which Baring Bros. were named as consignees, and upon which they had advanced money. On the arrival of the goods at their destination, Swain, for whose account the transaction had been entered into, requested the defendant to let him take the bill of lading to have the goods entered at the custom house for the account of Baring Bros. The bills of lading were surrendered to him indorsed in blank, and he signed a trust receipt, in which he acknowledged that he held the bill of lading for this purpose only. Instead of entering the goods for Baring Bros. he entered them for his own brokers, and obtained a warehouse receipt for them, upon which he obtained an advance from the plaintiffs. The defendant was given judgment, but had the bill of lading or the goods been surrendered to Swain for other than a single special purpose, it is submitted that the case should be decided otherwise. In *Dows v. Kidder*, 84 N. Y. 121, the owner of goods intrusted them to a buyer for the very purpose of enabling him to get a bill of lading for them in his own name, which he did; and fraudulently disposed of it to the defendants. Had the defendants not received notice of the plaintiff's claim before parting with full value, it seems they should have been protected.

does not by so doing warrant the title of the depositor; the only assertion in the document is that the goods have been received from the bailor, not that he is the owner of them.⁸⁸ Therefore, if the bailor has no title to the goods, and the bailee delivers them to the rightful owner, he will not be liable thereafter to the bailor or to a purchaser from him. Indeed, if the bailee has not actually delivered them to the rightful owner, but a demand for them has been made by the latter, the bailee may set up this demand in defense to an action by the bailor.⁸⁹ This protection of the bailee is necessary, for, when demand is made by the true owner, the bailee would obviously be guilty of conversion if he delivered the goods to the bailor, or for any reason refused to deliver the goods to the owner. The protection thus accorded to the bailee seems in conflict, however, with the statement commonly made that the bailee cannot deny the bailor's title; and, indeed, if the latter maxim is taken literally, there is a conflict. In truth the maxim is too broadly stated in the early cases, and has sometimes been repeated in recent times without qualifications that are necessary. It is true that the bailee cannot set up title in himself. His acceptance of the bailment precludes him from taking this stand.⁹⁰

⁸⁸ In *Insurance Co. v. Kiger*, 103 U. S. 352, 26 L. ed. 433, a factor who had pledged warehouse receipts for his principal's cotton with the plaintiff had become bankrupt and the property was taken on behalf of the principal from the warehouseman by legal process. The question was raised whether the warehouseman was liable on his receipt, this being, in terms, a promise to redeliver to the order of the factor, that is, to the insurance company, since a statute made the receipt negotiable. But the court held that the warehouseman satisfied his liability by setting up that the cotton had been taken by judicial process. To the same effect is *State Nat. Bank v. Bryant*, 49 La. Ann. 467, 22 So. 89. A bailee may of course assume a larger obligation by contract. If a warehouseman, for instance, absolutely con-

tracts to deliver goods to a purchaser of them, he will be liable for failure to do so. *Henderson v. Williams*, [1895] 1 Q. B. 521 (C. A.). But American courts would probably be slow to construe a promise of a bailee to amount to more than a promise to turn over such right as the depositor had.

⁸⁹ *Thorne v. Tilbury*, 3 H. & N. 534; *Biddle v. Bond*, 6 B. & S. 225; *Ross v. Edwards*, 73 L. T. 100; *European, etc., Mail Co. v. Royal Mail Co.*, 30 L. J. C. P. 247; *Rogers v. Lambert*, [1891] 1 Q. B. 318; *Wetherly v. Straus*, 93 Cal. 283, 28 Pac. 1045.

⁹⁰ *Simpson v. Wrenn*, 50 Ill. 222, 99 Am. Dec. 511; *Thompson v. Williams*, 30 Kans. 114, 1 Pac. 47; *Osgood v. Nichols*, 5 Gray. 420; *Pulliam v. Burlingame*, 81 Mo. 111, 51 Am. Rep. 229; *Hampton v. Swisher*, 4 N. J. L. 73.

Nor can he set up in an action at law the title of a third person without authority of the latter. For could he do this successfully he might do so merely for the purpose of defeating the bailor's claim, in order that he himself might retain the goods, not as agent for the true owner, but for his own benefit.⁹¹ It is sometimes said that the bailee should never volunteer a dispute of his bailor's title,⁹² but this statement is not wholly correct. If a bailee knows goods are stolen, or that the bailor is acting adversely to a clearly valid right, even though the true owner has as yet made no demand for them, the bailee will be liable to him for conversion if delivery is made to the bailor.⁹³ In case, therefore, that the bailee knows of an adverse claim, he will deliver to the bailor at his peril. The bailee must, for his own protection, choose one of two courses. First, he may satisfy himself of the validity of one of the two claims and obtain authority from the owner of the claim to refuse delivery to all other claimants. In such a case he may plead at law to an action by any but the rightful owner the title of the latter. If this title can be proved, a perfect defense is established.⁹⁴ Second, if no actual adverse claim has been made, but the bailee knows of the existence of an adverse right, or if the bailee cannot determine which of two claimants has the better title, and neither claimant will give a bond indemnifying the bailee from all damage caused by delivering to him, the only course open to the bailee is to file a bill of interpleader against the several possible owners, praying a temporary injunction against actions against himself until the true ownership of the goods is determined.⁹⁵ It may be added that a bailee who redelivers the goods

⁹¹ *Stonard v. Dunkin*, 2 Campb. 344; *Holl v. Griffin*, 10 Bing. 246; *Betteley v. Reed*, 4 Q. B. 511; *Moses v. Taylor*, 6 Mackey, 255; *Sinclair v. Murphy*, 14 Mich. 392; *Sherwood v. Neal*, 41 Mo. App. 416; *Aubrey v. Fiske*, 36 N. Y. 47; *Colbath v. Hofer*, 43 Or. 366, 73 Pac. 10; *McCafferty v. Brady*, 19 W. N. C. 553, 9 Atl. 37; *Burton v. Wilkinson*, 18 Vt. 186, 46 Am. Dec. 145. The principle was held inapplicable where the bailor's defect in title was due to an assign-

ment subsequent to the bailment. *Roberts v. Noyes*, 76 Me. 590.

⁹² *Schouler, Bailments* (1905), § 44, note.

⁹³ *Towne v. St. Anthony Elev. Co.*, 8 N. Dak. 200, 77 N. W. 608. In this case the issue of documents of title to a bailor who, as the bailee knew, had no title, was held to be a conversion.

⁹⁴ See cases cited *supra*, note 89.

⁹⁵ *Hatfield v. McWhorter*, 40 Ga. 269; *Lawson v. Terminal Warehouse*

to the bailor, or upon his order, in ignorance of his lack of title, is protected against subsequent claims of the rightful owner.⁹⁶

§ 422. **Destruction of goods prior to negotiation of document.**—If the goods have been destroyed after their receipt by the carrier or warehouseman, but prior to a negotiation of the document of title, it is evident that the person to whom the document is negotiated cannot acquire any goods by his purchase. Unless the bargain specifically threw upon him the risk of past loss, the buyer will not, however, bear the risk but will be able to recover any money paid by him for the bill of lading. The question is covered by what has been said of the risk of loss where goods are sold without the use of documents of title,⁹⁷ for it is immaterial what means of transferring title be used; it is enough that the parties were bargaining in regard to goods on the assumption that they were then in existence when in fact they were not.

§ 423. **"Spent" documents can transfer no title.**—The reason why documents of title may safely be used as symbols, or representations of the goods for which they were issued, is because the possession of a document insures to the holder the control of the goods. If the goods have been delivered up by the bailee, this is no longer true. It may be supposed that the goods have been delivered either to the person at that time entitled to receive them, and the document of title, not having been canceled by the bailee, subsequently gets into circulation, or, on the other hand, it may be supposed that the delivery by the bailee was made to one having no right to the goods. The rights of the parties in these two cases may be different and they must be separately considered. In the first place it is clear that the fact that goods have arrived at their

Co., 70 Hun, 281; *Ball v. Liney*, 48 N. Y. 6, 8 Am. Rep. 511; *Bechtel v. Shaefer*, 117 Pa. St. 555, 11 Atl. 889; *De Zouche v. Garrison*, 140 Pa. St. 430, 21 Atl. 450. It is true that the right to bring such a bill of interpleader has been denied (*Crawshay v. Thornton*, 2 Mylne & C. 1); but that case has been criticised, and the Common Law Procedure Act of 1860, § 12, has been held to overthrow it (*Attenborough v. The London, etc., Dock Co.*, 3 C. P. D.

450). And in this country, either by virtue of statute or otherwise, interpleader would doubtless be generally allowed. See cases cited in this section, *passim*.

⁹⁶ *Nelson v. Iverson*, 17 Ala. 216; *Powell v. Robinson*, 76 Ala. 423; *Dickinson v. Chaffe*, 34 La. Ann. 1133; *Nanson v. Jacob*, 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531.

⁹⁷ Sections 7 and 8 of the Sales Act. See *supra*, §§ 300-309.

destination will not make a bill of lading ineffectual as a symbol of the goods. As long as the bailee still has possession, and is under a duty to demand the surrender of the document before surrender of the goods, the document is unquestionably valid.⁹⁸ A much broader statement of the law than this has been made. It has been laid down by high authority that until there has been delivery of possession of the goods to the person entitled to them, a bill of lading remains in force.⁹⁹ It may be doubted whether this does not go too far.¹ If goods are absolutely surrendered by a bailee so that he has no longer any control over them, the subsequent delivery of a document of title previously issued cannot give to the buyer of it any actual control of the goods, or anything which can fairly be called delivery. If the delivery by the bailee was wrongful, doubtless the rightful holder of the document is not deprived of his title,² and he may, in spite of the wrongful delivery of the bailee, transfer that title to another;³ but it seems imma-

⁹⁸ *Barber v. Meyerstein*, L. R. 4 H. L. 317. In this case the goods in question had been landed on a "public sufferance wharf." By the statute creating these wharves goods might be landed thereon and still be subject to the lien of the master of the ship, and a wharfinger is by the statute required to detain the goods on notice of the master until the freight is paid. The court held that bills of lading for cotton thus landed but subject to a "stop" of the master of the vessel were effectual means of transferring title to the cotton. And in the Exchequer Chamber, Mr. Baron Martin said of bills of lading: "Their force does not become extinguished until possession, or what is equivalent in law to possession, has been taken on the part of the person having a right to demand it."

⁹⁹ See the extract quoted in the preceding note from *Barber v. Meyerstein*, L. R. 4 H. L. 317. The statements in this case are quoted with approval in *Hieskell v. Farmers' Nat.*

Bank, 89 Pa. St. 155, 73 Am. Rep. 745.

¹ The decision of *Barber v. Meyerstein*, *supra*, before the court did not require so extended a statement, and any criticism upon the statement is aimed, not at the decision of the case, but at the possible application of the statement to cases which it may be the court did not have in mind.

² *Hieskell v. Farmers' Nat. Bank*, 89 Pa. St. 155, 73 Am. Rep. 745.

³ *Doliff v. Robbins*, 83 Minn. 498, 86 N. W. 772, 85 Am. St. Rep. 466. The facts in this case were as follows: W. was engaged in operating a public warehouse for the receipt and storage of grain, at which he received a large quantity of wheat from different persons and issued to them therefor the usual storage receipts. Subsequently he shipped the wheat, without the knowledge or consent of the ticket-holders, to defendants, who were commission merchants, and the same was sold by them, and the proceeds applied to the payment of an indebtedness due

terial whether such a subsequent transfer of title is made by the indorsement of the document of title, or by a bill of sale, or (aside from the Statute of Frauds) orally. A sale by any of these methods would transfer title, but would not operate as a delivery. Therefore, assuming delivery to be essential to perfect a buyer's right against third persons,⁴ a subsequent purchaser of the goods by means of a bill of sale would, if he obtained actual possession of the goods, have a complete title to them, which could not be defeated by the claim of a prior indorsee of the document of title who took the document after the bailee had delivered the goods; whereas while goods are still in the hands of a carrier or other bailee whose receipts are given by law equal force, an indorsement of a negotiable bill of lading or receipt will give to the indorser a title which cannot be defeated by the claim of a prior vendee under a bill of sale, at least if made while the goods were in transit, since the delivery of the document is in this case, in legal and in practical effect, a delivery of the goods.⁵ If it be supposed that the delivery of the goods by the bailee which issued the document was made to the person at that time entitled to receive the goods, it is abundantly clear that a subsequent indorsement of the docu-

them from W. Thereafter the ticket-holders sold, indorsed, and transferred their several tickets to plaintiff, who demanded of W. and defendants the return and possession of the wheat, which was refused. Held, that the defendants were liable to the plaintiff for the conversion. The court said: "The general rule of law with reference to storage tickets of this character, whether issued pursuant to some statutory requirement or otherwise, is that the sale of the tickets by indorsement and delivery operates as a transfer to the indorsee or purchaser of the legal title to the commodity represented thereby, and the warehouseman becomes liable to the indorsee to the same extent as to the original holder. And in case of such indorsement and transfer the indorsee may maintain an action against the warehouseman for injury to the property, whether the injury

occurred before or after the transfer of the ticket. *Sargent v. Central Warehouse Co.*, 15 Ill. App. 553.

* * * There can be no doubt that a transfer by indorsement and delivery of storage tickets of this kind passes to the indorsee or purchaser not only the title to the wheat evidenced thereby, but all rights and remedies possessed by the holder at the time of such transfer, as well. And we hold, without further remark, that the transfer of the storage tickets in question to plaintiff conferred upon him title thereof to the wheat, and every right and remedy which the holders thereof possessed at the time of the transfer."

⁴ See section 25 of the Sales Act, and *supra*, § 349 *et seq.*

⁵ *Nathan v. Giles*, 5 Taunt. 558; *Pollard v. Reardon*, 65 Fed. Rep. 848, 21 U. S. App. 639, 13 C. C. A. 171.

ment, which the bailee negligently failed to take up, can only transfer such title to the goods as the indorser had at the time. If, therefore, the person receiving delivery from the bailee, and being then the owner of the goods, sells and delivers the goods, a subsequent indorsement and sale of the document can transfer no right to the purchaser.⁶

§ 424. **Liability of bailee for failure to take up negotiable documents of title.**—It is a fundamental principle in the law of bailments that a bailee who makes a misdelivery of the goods is liable to the person to whom delivery rightfully should have been made. Accordingly, though a carrier delivers goods to the consignee named in the bill of lading, the carrier is liable for conversion if the bill of lading was negotiable in form and had, prior to the delivery of the goods, been indorsed to a third person.⁷ The obligation of the carrier was to deliver not to the consignee, but to the order of the consignee; that is, the holder of the bill of lading. Moreover the obligation, imposed alike by custom, by the language

⁶ *Anchor Mill Co. v. Burlington*, etc., Ry. Co., 102 Iowa, 262, 71 N. W. 255; *National Commercial Bank v. Lackawanna Transportation Co.*, 59 N. Y. App. Div. 270, 69 N. Y. Suppl. 396; *affd.*, without opinion, 172 N. Y. 596, 64 N. E. 1123. The facts of these cases are stated *infra*, note 8. See also *Doherty v. Merchants' Nat. Bank*, 21 Ky. L. Rep. 628, 52 S. W. 832.

⁷ *Tishomingo Sav. Inst. v. Johnson*, *Nesbitt & Co.*, 146 Ala. 691, 40 So. 503; *St. Louis, etc., Ry. Co. v. Citizens' Bank*, Ark. , 112 S. W. 154; *Boatmen's Sav. Bank v. Western, etc., R. R. Co.*, 81 Ga. 221, 7 S. E. 125; *Western, etc., R. R. Co. v. Ohio Valley Banking Co.*, 107 Ga. 512, 33 S. E. 821; *Douglas v. People's Bank*, 86 Ky. 176, 5 S. W. 420, 9 Am. St. Rep. 276; *First Nat. Bank v. Northern R. Co.*, 58 N. H. 203; *National Newark Banking Co. v. Delaware, etc., R. R. Co.*, 70 N. J. L. 774, 58 Atl. 311, 66 L. R. A. 595; *First Nat. Bank v. New York Central R. R.*

Co., 85 Hun, 160; *Pennsylvania R. Co. v. Stern*, 119 Pa. St. 24, 12 Atl. 756, 4 Am. St. Rep. 626. See also *Seaboard Air Line Ry. Co. v. Phillips*, Md. , 70 Atl. 232; *Commercial Bank v. Pfeiffer*, 108 N. Y. 242, 15 N. E. 311; *First Nat. Bank v. Northern Pacific Ry. Co.*, 28 Wash. 439, 68 Pac. 965. See further, § 285. So if delivery is made to one to whom the shipper orally agreed delivery should be made. *Garden Grove Bank v. Ilumeston, etc., Ry. Co.*, 67 Iowa, 526, 25 N. W. 761. But where the indorsee authorized the consignee to reship the goods the indorsee, though retaining an order bill of lading, was held debarred by its conduct from holding the carrier liable. *National Bank of Phoenixville v. Phila., etc., Ry. Co.*, 163 Pa. St. 467, 30 Atl. 228. Like a carrier a warehouseman will be liable if he delivers goods to the depositor, when an order receipt is outstanding. *Babcock v. People's Savings Bank*, 118 Ind. 212, 20 N. E. 732.

in the bills of lading in general use, and in many jurisdictions by statutes governing the use of bills of lading and warehouse receipts, to take up documents of title negotiable in form before surrendering the goods for which they were issued, makes a bailee liable to a purchaser of such a document even though the bailee has previously delivered the goods to the person who was at the time the rightful holder of the document; because the bailee's failure to require the surrender of the document has enabled the holder to defraud the subsequent purchaser.⁸ If, however, a carrier deliver

⁸ *Walters v. Western R. R. Co.*, 56 Fed. Rep. 369; *Hardie v. Vicksburg, etc., Ry. Co.*, 118 La. 254 (but see *Adams v. Steamer Trent*, 19 La. Ann. 262); *Merchants' Bank v. Baltimore, etc., Steamboat Co.*, 102 Md. 573, 63 Atl. 108; *Chesapeake SS. Co. v. Merchants' Bank*, 102 Md. 589, 63 Atl. 113; *Ratzer v. Burlington, etc., R. R. Co.*, 64 Minn. 245, 66 N. W. 988, 58 Am. St. Rep. 530; *Union Pacific R. R. Co. v. Johnson*, 45 Neb. 57, 63 N. W. 144, 50 Am. St. Rep. 540. See, however, *Schlesinger v. West Shore R. R. Co.*, 88 Ill. App. 273, 276; *Anchor Mill Co. v. Burlington R. R. Co.*, 102 Iowa, 262, 71 N. W. 255. In the case last cited goods were delivered by a carrier at the point of destination on an order signed by the shipper to deliver the goods "without presentation of the bill of lading." The next day after a carload had been thus delivered the shipper, who had obtained a bill of lading naming itself as consignee, indorsed the bill for value as security to a bank. The case held that the purchaser who had received possession was entitled to the goods, and that the bank having taken the bill of lading after it had served the purpose of its existence gave no right to the goods. The decision seems sound, for at the time the goods were delivered they were owned by the shipper and were delivered under his directions to one to whom he had agreed to sell them. It

is submitted, however, that if the bill of lading was negotiable in form, that is, an order bill (the fact does not appear in the case), the carrier would be liable to the bank since its surrender of the goods without demanding the surrender of the bill of lading caused the fraud upon the bank. If the bill of lading was a straight bill, however, the railroad, under the custom prevailing in the United States, was justified in its action and the bank would acquire no right except against its fraudulent customer, the shipper. It was held in *National Commercial Bank v. Lackawanna Co.*, 59 N. Y. App. Div. 270, 69 N. Y. Suppl. 396; *affd.*, without opinion, 172 N. Y. 596, 64 N. E. 1123, that such a surrender of the goods to a holder of the bill of lading was not a conversion even though the carrier negligently failed to take up a negotiable bill of lading. Doubtless it is true that the surrender of the goods to the holder of the bill was not a conversion, but the failure to deliver goods on the demand of the subsequent purchaser of the bill of lading should render the carrier liable on the ground of estoppel for conversion. To be sure, there are no goods in the carrier's hand to deliver at the time of this subsequent demand, but the carrier has, by leaving the bill of lading outstanding, in effect, represented that the goods are still in its hands and should, there-

goods to one who is entitled to them, the carrier is not liable to another person who holds even a negotiable bill of lading for them without right.⁹ But it should be observed that if the document is negotiable in form the bailee will not be safe in making delivery even to the person to whom the goods and the document rightfully belong without the surrender of the document. For though he will not be liable to any one having knowledge of the right of the person to whom the goods were delivered, a subsequent purchaser for value of the document without notice could hold him liable.¹⁰ Where documents of title are not made out to order or bearer the only obligation of the bailee, unless he has notice of inconsistent rights, is to deliver the goods to the person named in the document as the one entitled to receive them.¹¹

§ 425. **What title is transferred by negotiation of negotiable document of title.**—In the preceding sections it has been considered in what cases it is possible for one who obtains the indorsement of a negotiable document of title, according to its tenor, nevertheless to fail in acquiring title to the goods for which the document purports to have been issued. The positive side of the question remains for consideration. Let it be supposed that none of the flaws considered in the preceding sections exist, what are the rights of a holder of the document? The answer to this question, according to what may be called the common-law theory of documents of title, is that the indorsee acquires such title by means of the document as the indorser could have given him by delivery of the goods. That the indorsee, unless the indorser manifest a contrary intention, acquires as much right as this is clear.¹²

fore, be estopped to show the prior delivery as an excuse for refusing to comply with the subsequent demand of a *bona fide* holder for value of the bill of lading.

⁹ Commercial Bank v. Chicago, etc., Ry. Co., 160 Ill. 401, 43 N. E. 756. In this case a bank held bills of lading to secure time drafts. The drafts were accepted by the drawee but the bills of lading were not surrendered; nevertheless the railroad delivered the goods to the drawee. The court held the railroad not liable

to the bank because the drawee on acceptance of the draft was entitled to receive the bills of lading. A similar case in regard to warehouse receipts is *Mortimore v. Ragsdale*, 62 Miss. 86.

¹⁰ See cases cited *supra*, note 8.

¹¹ See *supra*, § 285.

¹² This has always been regarded as settled by *Lickbarrow v. Mason*, 2 T. R. 63, 1 H. Bl. 357, 2 H. Bl. 211, 6 East, 20, note, 5 T. R. 683. See also *Walley v. Montgomery*, 3 East, 585; *Sewell v. Burdick*, L. R. 10

Even though the indorsement was a violation by the indorser of a duty to some other persons, according to what may be called the mercantile theory the indorsee may get a better title than the indorser had or than he could have given by a delivery of the goods.¹³ By that theory the form in which a negotiable document of title is taken is a representation of title and, therefore, one who bails his goods and takes a bill of lading or warehouse receipt to the order of another person is, in effect, making a representation that the title of the goods is in that person.¹⁴ This representation is immaterial in any dispute unless some one has bought or advanced money upon the document on the faith of the representation. In such a case a bailor should be estopped to deny the truth of his representation. Merchants and bankers undoubtedly look upon the form of the document as equivalent to a representation, whereas possession of the goods themselves is not, in itself, a representation or ground of estoppel.¹⁵ Accordingly, by the mercantile view, the indorsement of a document may transfer title when delivery of the goods could not.¹⁶ In the same way an indorsement of a

A. C. 74; *Gibson v. Stevens*, 8 How. 384, 12 L. ed. 1123; *Means v. Bank of Randall*, 146 U. S. 620, 13 S. Ct. 186, 36 L. ed. 1107; *Horr v. Barker*, 8 Cal. 603, 11 Cal. 393, 70 Am. Dec. 791; *Mears v. Waples*, 3 Houst. 581, 4 Houst. 62; *Burton v. Curryea*, 40 Ill. 320, 89 Am. Dec. 350; *Branson v. Heckler*, 22 Kans. 610; *Halsey v. Warden*, 25 Kans. 128; *Newcomb v. Cabell*, 10 Bush, 460, 469; *Winslow v. Norton*, 29 Me. 419, 50 Am. Dec. 601; *Lee v. Kimball*, 45 Me. 172; *Gregory v. Wandell*, 40 Mich. 432 (elevator receipts); *Conrad v. Fisher*, 37 Mo. App. 352, 8 L. R. A. 147 (warehouse receipts); *White Live Stock Co. v. Chicago, etc., R. R. Co.*, 87 Mo. App. 330; *Second National Bank v. Walbridge*, 19 Ohio St. 419; *Millhiser Mfg. Co. v. Gallego Mills Co.*, 101 Va. 579, 44 S. E. 760.

¹³ *Wait v. Baker*, 2 Ex. 1 (in this case the seller who had taken the bill of lading to his own order wrongfully refused to indorse it to the buyer, but indorsed it for an advance

to another person. The latter was held entitled to recovery from the buyer who obtained possession of the goods); *Gabarron v. Kreeft*, L. R. 10 Ex. 274 (here the shipper had contracted to sell all the ore in a certain mine, and payment had been made in advance by the buyer of a sum sufficient to pay for the shipment in question. In violation of his contract the shipper obtained a bill of lading from a fictitious person and indorsed the bill to secure an advance. The person making the advance was protected); *Pease v. Gloahec*, L. R. 1 P. C. 219; *Leask v. Scott*, 2 Q. B. D. 376.

¹⁴ See *supra*, § 282 *et seq.*

¹⁵ See *supra*, § 313.

¹⁶ *Munroe v. Philadelphia Warehouse Co.*, 75 Fed. Rep. 545 (see the facts of this case stated *infra*, § 437, note); *Commercial Bank v. Armsby Co.*, 120 Ga. 74, 47 S. E. 589 (see the facts of this case stated *supra*, § 292, note).

negotiable document of title and delivery of the document is a representation that the indorser has transferred title to the goods represented by the document, whereas a delivery of possession of the goods themselves would not amount to such a representation.

-- The mercantile theory would be most completely expressed by providing that the indorsee of a negotiable document of title acquires such title to the goods as not only the depositor or bailor but also the person to whose order the goods were made deliverable on the face of the document and any subsequent indorsee of the document had. The Sales Act in the section under consideration¹⁷ should be construed as meaning this in effect, since it provides that the indorsee acquires not only such a title to the goods as the person negotiating the document and the person to whose order the goods were to be delivered had, but also such title as these persons had ability to convey. These last words should be understood as intended to cover the case where the form of the document amounts to a representation of title in a particular person.¹⁸ In most cases the express provision of section 38 will make clear that the Sales Act enacts what has been called the mercantile view.

§ 426. **Negotiation of document transfers bailee's contractual obligation.**—The common law made no exception in regard to bills of lading to the rule that choses in action are not assignable.¹⁹ In England the law was changed by a statute in 1855,²⁰ which pro-

¹⁷ Section 33.

¹⁸ In the Uniform Warehouse Receipts Law the meaning is made very clear by the insertion of the words "depositor or" as italicized. Section 41. Rights of person to whom a receipt has been negotiated. A person to whom a negotiable receipt has been duly negotiated acquires thereby — (a.) Such title to the goods as the person negotiating the receipt to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the *depositor* or person to whose order the goods were to be delivered by the terms of the receipt had or

had ability to convey to a purchaser in good faith for value.

¹⁹ "A bill of lading is not a negotiable instrument in the ordinary sense of those words. An indorsement and delivery of it for value operates to transfer the title to the goods described in it, but not as an assignment of the contract except by force of some statute, as is now the case in England and some of the States here." *Cox v. Central Vermont R. R.*, 170 Mass. 129, 136, 49 N. E. 97; *Barnum Grain Co. v. Great Northern Ry. Co.*, 102 Minn. 147, 112 N. W. 1030.

²⁰ The Bills of Lading Act, 18 & 19 Vict., c. 111.

vided that not only the indorsee of a bill of lading but the consignee named in a bill of lading should "have transferred to, and vested in him all rights of suit and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself." This particular form of statute has not been copied in the United States, but the legislation previously referred to,²¹ attempting to make bills of lading "negotiable," should at least be construed as making the contractual obligation of the carrier transferable. The legislation in regard to warehouse receipts²² is doubtless, in many States, wide enough to reach this result.²³ In the absence of legislation the owner of the goods, however he became owner, whether by negotiation to him of a document of title or otherwise, is entitled to the usual remedies of an owner. If a carrier, for instance, injures or wrongfully refuses to deliver his goods to the owner, the latter may sue.²⁴ But it is sometimes desirable for the owner of goods to sue not by virtue of such ownership but upon the special contract which the bailee made with the bailor. In some cases without the aid of statute this result has been reached by regarding the owner of the goods as the real party in interest or the beneficiary for whose benefit the contract of bailment was made. This doctrine can of course be applied only in States which accept as a broad proposition that the beneficiary of a con-

²¹ *Supra*, § 407.

²² See *supra*, § 407.

²³ The Uniform Warehouse Receipts Act expressly provides, like the section of the Sales Act under consideration, that the negotiation of the document carries with it the direct obligation of the warehouseman who issued it, and such has been the construction placed upon the New York statute of 1858, c. 326, § 6. *Brooks v. Hanover Nat. Bank*, 26 Fed. Rep. 301; *Whitlock v. Hay*, 58 N. Y. 484. And the Georgia Code seems to have the same effect. *Askew v. Southern Ry. Co.*, Ga. App. 58 S. E. 242.

²⁴ *Dunlop v. Lambert*, 6 Cl. & Fin. 600; *Mobile, etc., Ry. Co. v. Williams*,

54 Ala. 168; *Dyer v. Great Northern R. R. Co.*, 51 Minn. 345, 53 N. W. 714, 38 Am. St. Rep. 506; *Harvey v. Terre Haute R. R. Co.*, 74 Mo. 538; *Shellenberg v. Fremont, etc., R. R. Co.*, 45 Neb. 487, 63 N. W. 859, 50 Am. St. Rep. 561; *Arnold v. Prout*, 51 N. H. 587; *Thompson v. Fargo*, 49 N. Y. 188, 10 Am. Rep. 342; *Arbuckle v. Thompson*, 37 Pa. St. 170. So where a warehouseman issued a receipt to the depositor, stating the goods were to be delivered to a specified third person, the latter was held entitled to bring trover or detinue against the warehouseman. *Magdeburg v. Uihlein*, 53 Wis. 165, 10 N. W. 363.

tract may sue upon it,²⁵ and even in such jurisdictions it is a step beyond the usual applications of the doctrine to regard an indorsee, even of an order bill of lading, as a beneficiary, since the indorsement is made after the contract of bailment. The logical rule is that, apart from statute, as the consignor or depositor is the person with whom the contract of bailment was made, he is, and remains, the proper plaintiff in any action upon the contract.²⁶ Where, however, the action sounds in tort or is for any other reason based on a right of property, not upon a special contract, ownership of the goods is essential for the plaintiff.²⁷ The English Bills of Lading Act, as its words quoted above show, not only enables the contractual obligations of a carrier to be transferred but also the contractual obligations of the consignee; that is, the indorsee is both given the rights and made subject to the liabilities of the original contract.²⁸ In the absence of statute it is clear that the contractual obligation of the consignor to the carrier cannot be transferred by the mere indorsement of a document of title. The consignor or depositor may be merely an agent and, if so, on the doctrines of agency the principal is liable. Also the indorsee of a document of title may render himself liable on the contractual obligations of the original depositor by entering into a novation or direct relation with the bailee, and this novation may include as

²⁵ Upon this matter see Wald's *Pollock, Contracts* (3d ed.), p. 228 *et seq.*

²⁶ *Dunlop v. Lambert*, 6 Cl. & Fin. 600; *Cantwell v. Pacific Exp. Co.*, 58 Ark. 487; s. c., 25 S. W. 503; *Illinois, etc., R. Co. v. Schwartz*, 13 Ill. App. 490; *Ohio, etc., R. Co. v. Emrich*, 24 Ill. App. 245; *Chicago, etc., R. Co. v. Shea*, 66 Ill. 471; *Blanchard v. Page*, 8 Gray, 281; *Finn v. Western R. Corp.*, 112 Mass. 524, 17 Am. Rep. 128; *Atchison v. Chicago, etc., Ry. Co.*, 80 Mo. 213; *Missouri Pacific R. Co. v. Smith*, 84 Tex. 348; s. c., 19 S. W. 509, 510; *Hooper v. Chicago, etc., R. Co.*, 27 Wis. 81, 9 Am. Rep. 439; note in 22 L. R. A. 415, 428 to *Ramsey, etc., Co. v. Kelsea*, 55 N. J. L. 320, 26 Atl. 907; *Swift v. Pacific Mail, etc., Co.*, 30 Am. & Eng.

R. Cas. 105, note. But see *Sweeney v. Waterhouse*, 39 Wash. 507.

²⁷ *Sargent v. Morris*, 3 B. & Ald. 277; *Dawes v. Peck*, 8 T. R. 330; *Blum, Frank & Co. v. The Caddo*, 1 Woods (U. S. C. C.), 64; *Pennsylvania Company v. Holderman*, 69 Ind. 18; *Wetzel v. Power*, 5 Mont. 214; *Green v. Clarke*, 12 N. Y. 343; *Krulder v. Ellison*, 47 N. Y. 36, 7 Am. Rep. 402; *Griffith v. Ingledew*, 6 S. & R. 429, 9 Am. Dec. 444.

²⁸ See *Sewell v. Burdick*, 10 A. C. 74, in which case it was held that one to whom a bill of lading had been indorsed as security was not one to whom the property in the goods passed within the meaning of the statutes, and, therefore, such an indorsee was not personally liable for freight.

part of its terms that the indorsee shall assume the liabilities of the depositor.²⁹ Aside from such cases the contractual rights of the bailee must be exercised against the original bailor without regard to who may have become the owner of the goods or the holder of the documents issued for them.³⁰ The Sales Act does not change the common law in this respect. Although the obligation of the carrier is transferred by indorsement the contractual rights of the carrier are not. The reason for this distinction is plain. A bailee who issues a document to A., or order, is in effect making a promise not simply to A. but to any indorsee of A., and a statute providing that an indorsee of A. has full contractual rights against the bailee is merely carrying out the intention of the parties, whereas the obligations of the depositor in regard to the payment of freight or other matters are not made to order. It should be noticed, however, that though the indorsee of a document of title does not become liable on the contract of the original depositor, he will frequently be unable to enforce his rights under the document unless he performs or causes to be performed such obligation. For the bailee, though he cannot sue the indorsee, will frequently be able to say "it was a condition of my obligation in regard to these goods that payment of freight or storage, or other performance, should be made, and until this is done, I am not bound to perform my promise."

²⁹ Thus it has been held that where an indorsee of a bill of lading received the property and the bill of lading contained a provision that the goods should be delivered to the consignee or his assigns, "he or they paying freight for the same" the acceptance of the goods indicated a promise by the indorsee to pay the freight. *Trask v. Duvall*, 4 Wash. C. C. 181. It may be questioned whether such words in a bill of lading amount to more than a condition justifying the carrier in refusing delivery of the goods without payment of freight—in other words, giving the carrier expressly a lien which would be waived by the delivery of the goods, without demanding pay-

ment. See further, *Dart v. Ensign*, 47 N. Y. 619; *Elwell v. Skiddy*, 77 N. Y. 282; *Ackerman v. Redfield*, 9 Hun, 378; *Bickford v. Kerr*, 18 L. C. Jur. Q. B. 169.

³⁰ Accordingly if goods are delivered to the consignee or indorsee of a bill of lading without payment of the freight the consignor may be sued for it. *Blanchard v. Page*, 8 Gray, 281, 286; *Wooster v. Tarr*, 8 Allen, 270, 85 Am. Dec. 707; *Gilson v. Madden*, 1 Lans. 172; *Jobbitt v. Goundry*, 29 Barb. 509; *Layng v. Stewart*, 1 W. & S. 222; *Collins v. Union Transportation Co.*, 10 Watts, 384. Compare *McEwen v. Railroad Co.*, 33 Ind. 368, 375, 5 Am. Rep. 216.

§ 427. Rights acquired by transfer of documents — Provision of the Sales Act.—

Sec. 34. RIGHTS OF PERSON TO WHOM DOCUMENT HAS BEEN TRANSFERRED.— A person to whom a document of title has been transferred, but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor.

If the document is non-negotiable such person also acquires the right to notify the bailee who issued the document of the transfer thereof, and thereby to acquire the direct obligation of such bailee to hold possession of the goods for him according to the terms of the document.

Prior to the notification of such bailee by the transferor or transferee of a non-negotiable document of title, the title of the transferee to the goods and the right to acquire the obligation of such bailee may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to such bailee by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

This section covers two distinct kinds of cases — first, transfers of non-negotiable documents of title. Such documents can, under the terms of the act, only be transferred, as distinguished from negotiated, and the provisions of this section in regard to them are in conformity with the general tenor of the act on this matter. The reasons for this have already been explained.³¹ The section covers also the case of documents of title negotiable in form but lacking an indorsement necessary for complete negotiation. Though in neither case does the transferee get a perfect and absolute right there is this difference between the two cases. Where the document is negotiable in form the mere possession of it protects the holder's rights, for the bailee who issued the document will not surrender the goods unless the document is surrendered. But the possession of even an indorsed non-negotiable document gives the holder no such protection.

§ 428. **Creditor's rights when document is transferred.**— Enough has been said in previous sections³² to indicate the limitation of

³¹ See *supra*, §§ 406, 413.

³² See *supra*, §§ 285, 406, 413.

the rights of a transferee of a non-negotiable document of title. The rights of a transferee without indorsement of a negotiable document of title are subject to similar limitation when indorsement is made, as it is by the Sales Act, an essential for the negotiation of documents of title in the same way that it is in regard to bills of exchange and promissory notes. But the possession of the negotiable document and the right given by section 35 of the Sales Act to obtain the necessary indorsement make the holder of even an unindorsed negotiable document secure. The rule provided by the last paragraph of section 34 of the Sales Act is a necessary consequence of the theory of documents of title adopted by that act, for where there is merely a transfer of a non-negotiable document of title the document does not control the possession of the goods, and is not, therefore, a symbol of them. Accordingly there is no delivery, and where delivery is necessary for the transfer of a title good against subsequent purchasers or creditors of the seller,³³ the rights of the transferee are inferior to those of the attaching creditor or the subsequent purchaser. This view has the support of excellent authority,³⁴ and is adopted by

³³ As to the rule of the Sales Act on this point, see sections 25, 26. The law aside from the Sales Act is discussed *supra*, §§ 350, 352 *et seq.*

³⁴ *Hallgarten v. Oldham*, 135 Mass. 1, 46 Am. Rep. 433. A creditor's levy on goods in a warehouse was in this case given priority over the right of an indorsee of a non-negotiable warehouse receipt. The court said: "It cannot be borne in mind too carefully that the only matter now under discussion is whether there has been a delivery in this sense, or dealings having the legal effect of such delivery, of the goods referred to in the warehouse receipt. Cases which turn on a question of property only, or in which delivery or its equivalent was not essential, whether because the question arose between the parties to the sale or mortgage, or because delivery was not necessary in that jurisdiction to complete the transaction as against third persons,

or for any other reason, are not precedents in point. Many such cases will be found which speak of documents as symbols of the goods. But that expression will not help us, unless it means that a transfer of the documents has the effect of a delivery of the goods as against an attaching creditor, who would be preferred unless the goods had changed hands. The question is, then, how the transfer of any document can have that effect. The goods are in the hands of a middleman, and they remain there. A true change of possession could only be brought to pass by his becoming the servant of the purchaser for the purpose of holding the goods, so that his custody should become the possession of his master. But this is not what happens, and it has been held that less would satisfy the law. A carrier, or the warehouseman in this case, is not the servant of either party, *quoad* the possession, but a

the paragraph of the Sales Act under consideration. But in regard to bills of lading a certain confusion exists, due presumably

bailee holding in his own name, and asserting a lien for his charges against all parties. He alone has possession of the goods, whether the document is transferred or not. But it has been held that the principle of the rule requiring a delivery is satisfied, although the letter of it is not, if the possessor of the goods becomes the purchaser's bailee. *Tuxworth v. Moore*, 9 Pick. 347, 20 Am. Dec. 479; *Russell v. O'Brien*, 127 Mass. 349, 354; *Dempsey v. Gardner*, 127 Mass. 381, 34 Am. Rep. 389. Now, it is obvious that a custodian cannot become the servant of another in respect of his custody except by his own agreement. And, *a fortiori*, when that custodian does not yield, but maintains his own possession, it is clear that his custody cannot inure to the benefit of another, as if it were the possession of that other, unless the bailee consents to hold for him subject to his own rights. The only way, therefore, in which a document can be a symbol of goods in a bailee's hands, for the purposes of delivery to a purchaser, is by showing his consent to become the purchaser's bailee. It may or may not be true that, if a warehouse receipt contains an undertaking to deliver to order, that undertaking is to be regarded as an offer by the warehouseman to any one who will take the receipt on the faith of it, and that it will make him warehouseman for the indorsee, without more, on ordinary principles of contract. That is the argument of Benjamin, *Sales* (2d ed.), 676 *et seq.*, criticising *Farina v. Home*, 16 M. & W. 119, and Blackburn, *Sales*, 297. But the criticism and the case agree in the assumption that the only way in which the indorsement of a document of title can have the effect

of a delivery is by making the custodian bailee for the holder of the document, and that he cannot be made so otherwise than by his consent. The necessity for notice, in those cases where notice is necessary, stands on the same ground. If the custodian has not assented in advance, he must assent subsequently; and the principle is the same whether an express acceptance of a delivery order be required, or it is held sufficient if he does not dissent when notified. *Boardman v. Spooner*, 13 Allen, 353, 357, 90 Am. Dec. 196. Compare instructions of Shaw, C. J., to the jury in *Carter v. Willard*, 19 Pick. 1, 3; *Bentall v. Burn*, 3 B. & C. 423." To the same effect as *Hallgarten v. Oldham* are *Inglis v. Robertson*, [1898] A. C. 616 (a decision based on Scotch law), and *Gill v. Frank*, 12 Or. 507, 8 Pac. 764, 53 Am. Rep. 378. In *Freiberg v. Steenbock*, 54 Minn. 509, 56 N. W. 175, the court held that after notice to the bailor, the transferee of a document of title was protected, the notice serving instead of delivery. The court seems to accept the principles laid down by the court in *Hallgarten v. Oldham*. See also *Commercial Nat. Bank v. Bemis*, 177 Mass. 95, 58 N. E. 476. Compare *Gibson v. Stevens*, 8 How. 384, 12 L. ed. 1123, and decisions in the following note. If the document of title in question is negotiable or *quasi-negotiable* by statute, or because of legal recognition of the custom of merchants in regard to documents running to order or bearer, the indorsee of the document in effect has received delivery of the goods, and, therefore, prevails over attaching creditors of the indorser. See *infra*, §§ 438, 439.

to the fact that while those documents have been used for centuries, the distinction in legal effect between bills of lading running to order and straight bills is comparatively modern. Until recently the practice seems to have been for the carrier to demand the surrender of all bills of lading before surrendering the goods. Accordingly a delivery of a straight bill, in effect, amounted to a delivery of the goods. Therefore, it might well be held that after even a straight bill of lading was transferred the transferor's creditors could not seize the goods.³⁵ But since the modern distinction between the effect of straight bills and order bills has been taken³⁶ it should follow as a necessary consequence that delivery of such a document is not equivalent to delivery of the goods, and at least wherever delivery is essential to protect goods from attachment by the seller's creditors, the latter should prevail.

§ 429. Indorsement of negotiable document may be compelled—Provisions of Sales Act.—

Sec. 35. TRANSFER OF NEGOTIABLE DOCUMENT WITHOUT INDORSEMENT.—Where a negotiable document of title is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the document unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made.

This provision is copied from a similar provision in the Negotiable Instruments Law,³⁷ and it is obvious that if indorsement is essential to a perfect title for a purchaser, he should have a right to compel one who has purported to transfer title to him to make that indorsement.

§ 430. Necessity of indorsing negotiable documents of title.—The Sales Act defining as it does the way in which documents of title may be negotiated³⁸ makes it necessary that the document should be indorsed in order to have a perfect title, unless the document

³⁵ *Lewis v. Springville Banking Co.*, 66 Ill. App. 63; *Green Bay Nat. Bank v. Dearborn*, 115 Mass. 219; *Forbes v. Boston & Lowell R. R. Co.*, 133 Mass. 154, 157; *Seward v. Miller*, 106 Va. 309, 55 S. E. 681.

³⁶ As to this see *supra*, § 285.

³⁷ Crawford, *Negotiable Instruments Law*, § 79.

³⁸ Sections 28, 29.

runs to bearer or is indorsed in blank, or to bearer. This follows the mercantile analogy to bills of exchange and promissory notes. It is opposed to the view that the delivery of the document itself, being a delivery of a symbol of the goods, is equivalent to a delivery of the goods without regard to indorsement. The law is in conflict in regard to the necessity of indorsement. In England it seems to be held that indorsement is essential in order to cut off the right of stoppage *in transitu*.³⁹ If indorsement is essential in order to destroy the seller's right of stoppage *in transitu*, it can only be on the theory that until such indorsement the buyer has not perfected his title to the goods,⁴⁰ and under statutes making warehouse receipts or bills of lading negotiable like bills of exchange, it seems that indorsement is an essential for the transfer of a perfect title.⁴¹ But apart from such statutes the prevailing view in the United States seems to be that indorsement is not essential to convey a perfect title.⁴² This is a failure of

³⁹ *Kemp v. Falk*, L. R. 7 A. C. 573. Lord Blackburn in that case said: "No sale, even if the sale had actually been made with payment, would put an end to the right of stoppage *in transitu* unless there were an indorsement of the bill of lading."

⁴⁰ See *Nathan v. Giles*, 5 Taunt. 558, 564, 575.

⁴¹ *Lehman v. Marshall*, 47 Ala. 362; *Jemison v. Birmingham, etc.*, R. R. Co., 125 Ala. 378, 28 So. 51. Compare *Weil v. Ponder*, 127 Ala. 296, 28 So. 656; *Garoutte v. Williamson*, 108 Cal. 135, 41 Pac. 35, 413; *Toner v. Citizens' State Bank*, 25 Ind. App. 29, 56 N. E. 731; *Erie & Pacific Despatch v. St. Louis Compress Co.*, 6 Mo. App. 172 (even though the document runs to bearer); *Fourth Nat. Bank v. St. Louis Compress Co.*, 11 Mo. App. 333.

⁴² *Tishomingo Sav. Inst. v. Johnson, Nesbitt & Co.*, 146 Ala. 691, 40 So. 503; *Glidden v. Lucas*, 7 Cal. 26; *Michigan Central R. R. Co. v. Phillips*, 60 Ill. 190; *Jefferson, etc., R. R.*

Co. v. Irvin, 46 Ind. 180; *Pettit v. First Nat. Bank of Memphis*, 4 Bush, 334; *First Nat. Bank of Green Bay v. Dearborn*, 115 Mass. 219, 15 Am. Rep. 92; *Allen v. Williams*, 12 Pick. 297; *Davenport Bank v. Homeyer*, 45 Mo. 145, 100 Am. Dec. 363; *Skilling v. Bollman*, 6 Mo. App. 76, 73 Mo. 665, 39 Am. Rep. 537; *Midland Bank v. Missouri, Kansas & Texas Ry. Co.*, 62 Mo. App. 531; *American Smelting Co. v. Markle Lead Works*, 102 Mo. App. 158, 168; *Marine Bank v. Wright*, 46 Barb. 45; *Bank of Rochester v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290; *City Bank v. Rome, etc.*, R. R. Co., 44 N. Y. 136; *Cayuga Bank v. Daniels*, 47 N. Y. 631; *Merchants' Bank v. Union R. R. Co.*, 69 N. Y. 373; *Becker v. Hallgarten*, 86 N. Y. 167; *Holmes v. German Security Bank*, 87 Pa. St. 525; *Holmes v. Bailey*, 92 Pa. St. 57; *Campbell v. Alford*, 57 Tex. 159; *National Bank v. Citizens' Bank* (Tex. Civ. App.), 93 S. W. 209. See also *Nathan v. Giles*, 5 Taunt. 558; *Fowler v. Meikleham*, 7 Lower Can. 367. But see

the courts to recognize mercantile custom. But though indorsement is necessary to complete negotiation, one who has received a negotiable document without indorsement is in all but technical legal title the owner of the goods, and he has the right to turn his equitable title to the goods into a legal title by compelling an indorsement of the document. Moreover, as the goods cannot be obtained from the bailee without the surrender of the document, he, in effect, controls the possession of them by having the possession of the document.

§ 431. Warranties implied when documents of title are sold—Provisions of Sales Act.—

SEC. 36. WARRANTIES ON SALE OF DOCUMENT.

—A person who for value negotiates or transfers a document of title by indorsement or delivery, including one who assigns for value a claim secured by a document of title unless a contrary intention appears, warrants:

- (a.) That the document is genuine.
- (b.) That he has a legal right to negotiate or transfer it.
- (c.) That he has knowledge of no fact which would impair the validity or worth of the document, and
- (d.) That he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a document of title the goods represented thereby.

Florida Central R. R. Co. *v.* Berry, 116 Ga. 19, 42 S. E. 371. The above cases relate to bills of lading, but the same rule was applied to warehouse receipts in St. Louis Nat. Bank *v.* Ross, 9 Mo. App. 399. In most of these cases it was not essential to decide upon the necessity of indorsement for the transfer of a perfect legal title and for symbolic delivery. Undoubtedly an equitable right is transferred, which will be superior to anything but the legal right of an indorsee of the document. Thus in Nathan *v.* Giles, 5 Taunt. 558, it is

made clear that a transfer by the owner of goods in transit other than by means of an indorsement of the bill of lading is valid except as against a subsequent indorsee of the bill. So in Shingleur-Johnson & Co. *v.* Canton Warehouse Co., 78 Miss. 875, 29 So. 770, 84 Am. St. Rep. 655, where a warehouse receipt contained the express provision that it was transferable only by indorsement and delivery, it was held that it might be transferred so as to transfer title to the property as between the parties without indorsement.

This section, excepting subsection (d.) follows the provisions of the Negotiable Instruments Law.⁴³

§ 432. **Implied warranties when documents of title are sold—Where Sales Act not in force.**—The provisions of the Sales Act in regard to warranties on the negotiation or transfer of a document of title for value probably express the existing law apart from statute. The matter seems to have been little considered, but the principles which govern the law of implied warranty in the sale of goods require that in the sale of a document of title there should be an implied warranty of the seller's title to the document, and that the document is what it purports to be. As to the title and quality of the goods represented by the document, the general law of implied warranty applies,⁴⁴ for it is immaterial whether the machinery of a document of title is used in making a sale of goods or not, so far as this question is concerned. It will be noticed that section 36 of the Sales Act expressly includes as a warrantor "one who assigns for value a claim secured by a document of title." Such a person, though the primary object of sale is a claim, also conveys the document of title securing the claim and receives a price based on the assumption that the security is what it purports to be. The existing law seems to warrant the provision.⁴⁵

§ 433. **The indorser of a document does not guarantee performance—Provisions of Sales Act.**—

Sec. 37. INDORSER NOT A GUARANTOR.—The indorsement of a document of title shall not make the indorser liable for any failure on the part of the bailee who issued the document or previous indorsers thereof to fulfill their respective obligations.

This section expresses mercantile understanding.

§ 434. **The indorser of a document does not guarantee performance when Sales Act not in force.**—Mercantile usage in regard to documents of title differs from that governing bills of exchange and promissory notes as to the effect of indorsement. The indorse-

⁴³ Crawford, Negotiable Instruments Law, § 115.

⁴⁵ Jones v. Huggefard, 3 Metc. 515; Ross v. Terry, 63 N. Y. 613.

⁴⁴ See Michel v. Ware, 3 Neb. 229; also § 216 and following.

ment of a bill of exchange has a double effect. It is, at the same time, a conveyance of the instrument and a contract by the indorser with the indorsee that on certain conditions the indorser will pay the bill if the party primarily liable fails to do so. The indorsement of a document of title seems generally to have been understood to amount to a conveyance merely by the indorser, not a contract of guaranty, and such is the law,⁴⁶ even though a local statute declares that bills of lading are negotiable like bills of exchange.⁴⁷ In Kentucky, however, warehouse receipts are made by statute negotiable like bills of exchange, and the indorser is held to incur a similar liability to that of the indorser of a bill of exchange.⁴⁸ In the Uniform Warehouse Receipts Act it is expressly provided, as in the Sales Act, that the indorser of a warehouse receipt does not thereby incur the liabilities of a guarantor.⁴⁹

§ 435. **No warranty implied from accepting payment of a debt.**—

Some modern American cases have held that a banker or other person who has discounted a bill of exchange with a bill of lading attached becomes liable to the drawee who pays the draft for the breach by the original seller of the goods (the drawer of the bill of exchange) of a warranty or contract in regard to them,⁵⁰ but influential courts have refused to accept the novel

⁴⁶ *Mida v. Geissmann*, 17 Ill. App. 207; *Maybee v. Tregent*, 47 Mich. 495, 11 N. W. 287.

⁴⁷ *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. ed. 892. It is true that it is provided by statute in Michigan (Comp. Laws [1897], c. 127, § 8), that the indorsement of a warehouse receipt "shall be deemed to be a warranty that the indorser has good title and lawful authority to sell the property named in such receipt." But this implied warranty arises properly because of the sale of the document, not because of the indorsement. Such liability bears no analogy to the liability of the indorser of a bill or note.

⁴⁸ *Greenbaum Bros. v. Megibben*, 10 Bush, 419; *Cochran & Rippe*, 13 Bush, 495; *Ferguson v. Northern Bank*, 14 Bush, 555, 29 Am. Rep. 418; *Green-*

baum v. Burnes, 13 Ky. L. Rep. 267.

⁴⁹ See *supra*, § 407, note, as to jurisdictions where this statute is in force.

⁵⁰ This doctrine was started by the case of *Landa v. Lattin*, 19 Tex. Civ. App. 246, 46 S. W. 48. It was followed in *Haas v. Citizens' Bank*, 144 Ala. 562, 39 So. 129, 1 L. R. A. (N. S.) 242, 113 Am. St. Rep. 61. (Compare *Bank of Guntersville*, Ala. , 46 So. 971); *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679 (overruled by *Mason v. Nelson*, N. C. , 62 S. E. 625); *Searles v. Smith Grain Co.*, 80 Miss. 688, 32 So. 287 (compare *Exchange Bank v. Searles*, 81 Miss. 169, 32 So. 314, where the bank was held not liable for failure to deliver other goods due from the drawee).

doctrine.⁵¹ The latter decisions are right, for the bank which collects from the drawee of the draft is not selling the draft or the bill of lading attached thereto to the drawee, nor is the bank making any representations in regard to the bill of lading or the goods behind it. It has bought a draft on the drawee with certain papers attached to it. It says, in effect, to the drawee: "Here is a draft upon you, will you pay it or not?" It is urged that the discounting bank when it takes the bill of lading as security becomes, in effect, the assignee of the contract between the shipper and the drawee of the draft. It is open to question whether the mere discount of a draft with the bill of lading attached amounts to an assignment of all rights of action to which the shipper is entitled under the contract with the drawee.⁵² But whether this be so or not, it is perfectly certain that the transaction does not import an agreement by the bank to assume all liabilities of the shipper upon his contract with the drawee. Therefore, even though the bill of lading be a forgery and without any validity whatever, a bank or other holder receiving payment from the drawee in due course is not liable to repay the money received.⁵³

§ 436. Fraud, mistake, and duress, do not impair negotiation—Provisions of Sales Act.—

⁵¹ *Tolerton & Stetson Co. v. Anglo-California Bank*, 112 Iowa, 706, 84 N. W. 930, 50 L. R. A. 777; *Hall v. Keller*, 64 Kans. 211, 67 Pac. 518, 62 L. R. A. 758, 91 Am. St. Rep. 209; *German-American Bank v. Craig*, 70 Neb. 41, 96 N. W. 1023; *Leonhardt v. Small*, 117 Tenn. 153, 96 S. W. 1051. And the case which started the doctrine has now been overruled by the decision of a higher court in its own State. *Blaisdell v. Citizens' Nat. Bank*, 96 Tex. 626, 75 S. W. 292, 97 Am. St. Rep. 944. And the Supreme Court of North Carolina has also overruled its decision of *Finch v. Gregg*, cited in the preceding note. *Mason v. Nelson*, N. C. , 62 S. E. 625.

⁵² Consider in this connection that a

sale of goods is held not to amount of an assignment of previous warranty of the goods. See *supra*, § 244.

⁵³ *Robinson v. Reynolds*, 2 Q. B. 196; *Thiedemann v. Goldschmidt*, 1 De G. F. & J. 4; *Baxter v. Chapman*, 29 L. T. R. 642; *Leather v. Simpson*, L. R. 11 Eq. 398; *Hoffman v. Milwaukee Bank*, 12 Wall. 181, 20 L. ed. 366; *Goetz v. Bank of Kansas City*, 119 U. S. 551, 7 S. Ct. 318, 30 L. ed. 515; *Young v. Lehman*, 63 Ala. 519; *First Bank v. Burkham*, 32 Mich. 328; *Nebraska Hay & Grain Co. v. First Nat. Bank*, Neb. , 110 N. W. 1019; *Craig v. Sibbett*, 15 Pa. St. 238; *Randolph v. Merchants' Bank*, 7 Baxt. 458; *Ulster Bank v. Synnott*, Ir. R. 5 Eq. 595.

Sec. 38. WHEN NEGOTIATION NOT IMPAIRED BY FRAUD, MISTAKE, OR DURESS.—The validity of the negotiation of a negotiable document of title is not impaired by the fact that the negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the document was induced by fraud, mistake, or duress to entrust the possession or custody thereof to such person, if the person to whom the document was negotiated or a person to whom the document was subsequently negotiated paid value therefor, without notice of the breach of duty, or fraud, mistake, or duress.

This section of the Sales Act merely elaborates section 32 (b.). As a change of the common law was intended, it seemed desirable to make this statement abundantly clear, especially as courts have shown an inclination to limit the effect of statutes aimed at making documents of title negotiable.⁵⁴

§ 437. **Effect of fraud, mistake, duress, or larceny upon negotiation.**—It has already been explained⁵⁵ that the form in which a negotiable document of title is taken is regarded by the custom of merchants as a representation or grant of title. Accordingly the delivery of an indorsed negotiable document of title or a negotiable document of title in which the person to whose custody the document is intrusted is named as the consignee or person to whom delivery of the goods is to be made, is more than a delivery of the goods themselves. This result has been reached in some cases.⁵⁶

⁵⁴ See *supra*, § 107.

⁵⁵ See *supra*, § 425.

⁵⁶ *Munroe v. Philadelphia Warehouse Company*, 75 Fed. Rep. 545. Goods were shipped under a bill of lading making them deliverable at Philadelphia to the order of the shippers. The plaintiffs advanced money on the goods, receiving indorsed bills of lading. They intrusted the indorsed documents to the proposed buyers, taking from them a "trust receipt" by which the latter agreed to hold the merchandise as property of the plaintiffs "on storage" "in trust." The proposed buyers wrongfully pledged the bills

of lading with the defendants' *bona fide* purchasers. It was held the plaintiffs could not recover. "He who gave to the wrongdoer the means of perpetrating the wrong must bear the consequences." In *Commercial Bank v. Armsby Co.*, 120 Ga. 74, 47 S. E. 589, goods were consigned to the order of the shipper who indorsed the bill of lading, and sent it to agents to distribute the goods. The indorsees, though mere agents for distributing, wrongfully pledged the bill. The court held the pledgee was entitled to hold the goods. In *Pease v. Gloahec*, L. R. 1 P. C. 219, A., through his agent, B., sold a lot of

What has been called the common-law view, however, which treats delivery of the document of title, whatever its form, as merely equivalent to the delivery of the goods, leads to a different result. For as mere delivery of possession of the goods themselves does not enable the person intrusted to transfer ownership, so it is held delivery of the document of title can have no greater result.⁵⁷ Several matters must be noticed in connection with this provision of the Sales Act. In the first place, it renders unsafe what has doubtless been a common practice of bankers who advance money on documents of title — the intrusting of the documents for a special purpose to the pledgor of them or the proposed buyer of the goods. This is done sometimes for the purpose of getting the goods from the carrier or through the custom house, or making

linseed cake to the firm of S. & T., and the cake was shipped under an order bill of lading. A. drew a draft for £427 against the shipment on S. & T. B. brought the bill of lading and draft around to S. & T. and one of the firm accepted the draft and took the bill of lading. He then returned the bill of lading to B. to hold as security against the acceptance. The other member of the firm of S. & T. thereafter obtained the bill of lading from B. upon the false representation that the firm had sold the linseed cake to C., who would accept a bill of exchange against the bill of lading. S. & T. then indorsed the bill of lading to the plaintiffs, bankers, to whom they were indebted, and who made further advances on the faith of it. The goods were stopped in transit, and were delivered by the carrier to B., the carrier taking A.'s indemnity. In an action by the plaintiff as indorsee of the bill of lading, judgment was given against the defendant, the carrier. See also *Pollard v. Reardon*, 65 Fed. Rep. 848, 21 U. S. App. 639, 13 C. C. A. 171; *National Bank of Bristol v. Baltimore, etc., R. Co.*, 99 Md. 661, 59 Atl. 134, 105 Am. St. Rep. 321. See also *supra*, § 292.

⁵⁷ *Fuentes v. Montis*, L. R. 3 C. P. 268 (in this case an agent of the plaintiff, intrusted as such, with documents of title, pledged the documents after revocation of his agency. The principal was held entitled to recover from the pledgee); *Stollenwerck v. Thacher*, 115 Mass. 224 (the plaintiff sent an indorsed bill of lading to a special agent with a draft attached, and the agent was instructed not to deliver the bill of lading to the drawee without payment of the draft. The agent did so, however, and the drawee pledged the bill of lading with the defendant. The principal was allowed to recover). This case was approved in *Dows v. National Exchange Bank*, 91 U. S. 618, 23 L. ed. 214, and *Hieskell v. Farmers' Nat. Bank*, 89 Pa. St. 155, 33 Am. Rep. 745, where, however, the facts did not involve quite the same question. It should be noticed that under the English Factors' Act of 1889, if either goods or documents of title are intrusted to the possession of the buyer, a purchaser for value from the buyer will be protected. *Cahn v. Pockett's Channel Co.*, [1899] 1 Q. B. 643.

arrangements for storing them, or for selling them. A trust receipt is usually signed and this seems to have been effectual to protect the banker.⁵⁸ Of course, in any event, this gives the banker the personal obligation of the person with whom he has intrusted the document, and an equitable title to the document, good against that person, or against any one who takes from him with notice or without paying value. But at least, under the Sales Act, an innocent purchaser for value would be protected. The banker may readily protect himself, however, by stamping or writing upon the document, before intrusting it to any one, a plain statement of the purpose for which it is intrusted.⁵⁹ Any purchaser of the document will then have constructive notice of the banker's rights. Another matter to which attention should be called is the change in the situation which takes place if one intrusted with a negotiable document of title gets possession of the goods for which the document stands. Though such a person might effectually sell, pledge, or mortgage the document to a purchaser for value, without notice, and such a sale, pledge, or mortgage would carry with it a corresponding right to the goods, yet if instead of dealing with the document the person intrusted therewith first secures the goods, he has no corresponding power over them. His possession of the goods, in itself, does not amount to any representation, and he would have no more power to transfer title to the goods when possession of them had been acquired by means of a negotiable document than if he had been intrusted with them directly by the owner. It is perhaps unnecessary to remark that the doctrine that a document of title is a representation of ownership upon which third persons may rely is confined to negotiable documents.⁶⁰ And though a person intrusted

⁵⁸ See *Moors v. Wyman*, 146 Mass. 601, 15 N. E. 104; *Moors v. Bird*, 190 Mass. 400, 77 N. E. 643; *Blydenstein v. New York Security & Trust Co.*, 67 Fed. Rep. 469, 35 U. S. App. 175, 15 C. C. A. 14. Compare *Union Trust Co. v. Trumbull*, 137 Ill. 146, 27 N. E. 24.

⁵⁹ This was done on the bills of lading in suit in *Farmers' & Mechanics Bank v. Logan*, 74 N. Y. 568, and *Dows v. National Exchange Bank*, 91

U. S. 618, 23 L. ed. 214; *Hieskell v. Farmers' Nat. Bank*, 89 Pa. St. 155, 33 Am. Rep. 745.

⁶⁰ *Commercial National Bank v. Bemis*, 177 Mass. 95, 58 N. E. 476. Defendants pledged a non-negotiable warehouse receipt with B. & Co., who surrendered the receipt to the warehouseman, receiving in return the new negotiable warehouse receipt to themselves, which he pledged to the plaintiff — a larger amount than his own

with the mere custody of a negotiable document of title in which he is consignee or indorsee or which is indorsed in blank may transfer a good title, a thief of such a document cannot, by the Sales Act. In this respect the Sales Act does not go to the full extent of the law of bills and notes. There is this reason for drawing the line between a transfer by a custodian and a thief. In the former case the owner of the document has voluntarily put it in the power of another to deceive a purchaser; the deception is, therefore, accomplished by means which the owner has furnished the custodian. An element of estoppel exists which does not exist in the case of theft. There seems no reason, in justice, in the latter case why the new *bona fide* purchaser should be preferred over the original owner. There is no doubt that under the existing law, aside from statute, a thief can give no title even to a *bona fide* purchaser, whatever the form of the document of title.⁶¹

§ 438. Creditor's rights against goods for which a negotiable document has been issued — Provisions of the Sales Act.—

Sec. 39. ATTACHMENT OR LEVY UPON GOODS FOR WHICH A NEGOTIABLE DOCUMENT HAS BEEN ISSUED.— If goods are delivered to a bailee by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner and a negotiable document of title is issued for them they cannot thereafter, while in the possession of such bailee, be attached by garnishment or otherwise or be levied upon under an execution unless the document be first surrendered to the bailee or its negotiation enjoined. The bailee shall in no case be compelled to deliver up the actual possession of the goods until the document is surrendered to him or impounded by the court.

If the mercantile theory of documents of title were carried to its logical extent, no attachment of the goods represented by a negotiable document, and no levy upon them could be permitted while

advanced. The plaintiff also got a new non-negotiable receipt running to itself. It was held that it could hold the goods only for the amount of the original pledge.

⁶¹ See *supra*, § 292; *Gurney v. Behrend*, 3 E. & B. 622, 634; *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. ed. 892; *Raleigh, etc., R. Co. v. Lowe*, 101 Ga. 320, 28 S. E. 867.

the document was outstanding. For the mercantile theory is founded upon the idea that a negotiable document of title represents the goods and may be dealt with safely on that assumption. For one and the same reason a sale of the goods while such a document is outstanding is invalid against a subsequent purchaser who obtains the document,⁶² and the bailee may not deliver the goods, even to the person entitled to them, without taking up an outstanding negotiable document for them;⁶³ and it is also improper for the law to allow attachment or levy upon the goods when negotiable documents are outstanding. If a document of title is a symbol of the goods in any real sense it must follow that the symbol is the exclusive means of dealing with the goods. Delivery of the symbol cannot amount to a real delivery unless the buyer can be confident that the symbolic delivery excludes the possibility of other dealings with the goods without his consent. For a similar reason the maker of negotiable bills or notes is protected from liability to garnishment in most States by absolutely disallowing the right of garnishment, and in other States by making any garnishment subject to the rights of even a subsequent purchaser for value before the maturity of the paper.⁶⁴ Likewise by statute in some States an attachment of stock on the books of the corporation is postponed to a subsequent purchaser of the stock certificates.⁶⁵ So in the case of carriers, some protection against garnishment has been given by statute. In most States if goods are actually in transit the carrier cannot be garnished.⁶⁶ Although from a theoretical standpoint it would seem that the most exact and logical provision would be one forbidding altogether attachment of the goods or levy upon them, remitting the creditor wholly to the negotiable document of title, it seemed better from a practical standpoint not to go so far but to cover the essential point by making the validity of seizure by attachment or levy depend on an injunction against the negotiation of the document or its impounding. A creditor will thus be unable to hold the goods unless he prevents the possibility of negotiation of the docu-

⁶² See *supra*, § 423.

⁶³ See *supra*, § 285.

⁶⁴ See 14 Am. & Eng. Encyc. 770-774; 1 Daniel, Neg. Inst., § 800a.

⁶⁵ *Clews v. Friedman*, 182 Mass. 555, 66 N. E. 201.

⁶⁶ 14 Am. & Eng. Encyc. 810.

ment, and if he does prevent such possibility there seems no good reason why he should not be allowed to seize the goods.

§ 439. **Creditor's rights against goods for which a negotiable document is outstanding.**—It has already been shown that the transfer of a non-negotiable document does not prevent the bailor's creditors from seizing the goods.⁶⁷ If the document is negotiable in form, however, it is clear that an indorsee of the document, whether a purchaser or merely a security holder, in effect, acquires title and delivery of the goods by a delivery of the document, and will prevail over a subsequent attachment or levy by creditors of the indorser.⁶⁸ If, however, the seizure by creditors precedes the negotiation of the document, apart from some statutory provision like that of the Sales Act, it is not clear that the custom of merchants would be so fully recognized by the courts as to protect the

⁶⁷ See *supra*, §§ 427, 428.

⁶⁸ *American Nat. Bank v. Henderson*, 123 Ala. 612, 26 So. 498, 82 Am. St. Rep. 147; *Tishomingo Sav. Inst. v. Johnson, Nesbitt & Co.*, 146 Ala. 691, 40 So. 503; *Bank of Newport v. Hirsch*, 59 Ark. 225, 27 S. W. 74; *Bishop v. Fulkerth*, 68 Cal. 607, 10 Pac. 122; *Mather v. Gordon*, 77 Conn. 341, 59 Atl. 424; *First Bank v. Mt. Pleasant Milling Co.*, 103 Iowa, 518, 72 N. W. 689; *Shaffer v. Rhynders*, 116 Iowa, 472, 89 N. W. 1099; *Newcomb v. Cabell*, 10 Bush. 460; *Sabel v. Planters' Nat. Bank*, 110 Ky. 299, 61 S. W. 367; *Temple Nat. Bank v. Louisville, etc., Oil Co.*, 26 Ky. L. Rep. 518, 82 S. W. 253; *First Nat. Bank v. Bayley*, 115 Mass. 228; *Robert C. White Co. v. Chicago, etc., R. R. Co.*, 87 Mo. App. 330; *Union Bank v. Rowan*, 23 S. C. 339, 55 Am. Rep. 26; *Millhiser Mfg. Co. v. Gallego Mills Co.*, 101 Va. 579, 44 S. E. 760; *Neill v. Rogers Bros. Produce Co.*, 41 W. Va. 37, 23 S. E. 702. See also *Puckett v. Reed*, 31 Ark. 131; *Harrison v. Mora*, 150 Pa. St. 481, 24 Atl. 705. In *Citizens' Banking Co. v. Peacock*, 103 Ga. 171, 29 S. E. 752, the reason for

this rule is well stated, and these statements were quoted with approval in *Millhiser Mfg. Co. v. Gallego Mills Co.*, 101 Va. 579, 590, 44 S. E. 760: "Such a paper, while not made negotiable by our law, is *quasi*-negotiable, and may pass from hand to hand by delivery, because of the fact that, by express stipulation, delivery of the cotton which it represents is made subject to presentation of the receipt. * * * When a warehouse receipt, in the form of those which were in evidence in this case, is delivered as collateral security to another person to be held as a pledge for the payment of a debt, the effect of such delivery is to constitute the warehouseman the bailee of the person receiving such receipt in pledge; and this is true, although the warehouseman has no notice of the transfer. *Colebrooks*, 413, and authorities cited under note 2. This is so from the nature of the contract entered into originally between the depositor and the warehouseman, and because the property passes by the transfer to the pledgee under the law merchant independently of any statute."

purchaser of the document,⁶⁹ though the Supreme Court of Illinois seems to have gone to this extent.⁷⁰ Even though the buyer of

⁶⁹ *Smith v. Pickett*, 7 Ga. 104, 50 Am. Dec. 383. Goods in a warehouse were attached, and though subsequently the warehouse receipt which ran to the depositor "or bearer" was sold to a *bona fide* purchaser, the attaching creditor prevailed.

⁷⁰ *Peters v. Elliott*, 78 Ill. 321. In this case goods were delivered to a railroad to be forwarded to the plaintiff to sell as commission merchant. The shippers took from the railroad a bill of lading or shipping receipt, making the goods deliverable to the plaintiff. He drew a draft for \$1,000 on the plaintiff against the goods, payable to M. G. & Co., and delivered the bill of lading and the draft to M. G. & Co. as security for an antecedent debt of \$600. M. G. & Co. indorsed the draft and forwarded it, and the bill of lading, to a bank for collection. The plaintiff paid the draft and received the shipping receipt. M. G. & Co. received the \$1,000 paid by the plaintiff, kept \$600 of it and paid the shipper \$400. Between the time when the draft and bill of lading were delivered to M. G. & Co. and the time when they were forwarded by the latter to the bank for collection, the goods were levied upon in attachment suits against the shipper. The plaintiff replevied the goods from the attaching creditor, and was held entitled so to do. The court held the transfer to M. G. & Co., though for an antecedent debt, was a transfer for value, and, therefore, had no difficulty in holding that to the extent of their claim M. G. & Co. had a better right than the subsequent attaching creditor. But the court held further that the plaintiffs' right to the goods, though acquired after the attachment, were superior to the creditors. The reasoning of the

court is not very satisfactory, being based on a fiction. "The interest acquired by the plaintiffs in flour dates back to the time of the delivery of the draft and shipping receipt to M. G. & Co. The delivery to the latter is to be regarded as one made to them for the use of the plaintiffs, vesting the property in the latter provisionally—that is, in case of their acceptance in payment of the draft. The plaintiffs from the time of that delivery had a lien upon the flour for the advance they should make, with possession in themselves, for the constructive possession of M. G. & Co. is to be regarded as theirs." As the goods were not ordered by the plaintiffs, but sent forward to them on consignment as commission merchants, it seems clear that the plaintiffs had no title at the time of the attachment, and to speak of M. G. & Co. holding possession for them, and of the plaintiffs having a lien for advances which they had not even agreed to make, is going very far. It might with equal force be said that every holder of a bill of lading holds possession for the benefit of future holders, and that such possible future holders have liens for the price that they are going to pay. Though the reasoning does not commend itself, the result is that provided in the Sales Act. The bill of lading as the symbol of the goods is protected and made the only valid means of getting at them. Compare *Insurance Co. v. Riger*, 103 U. S. 352, 26 L. ed. 433; *Mortimore v. Ragsdale*, 62 Miss. 86; *Skilling v. Bollman*, 6 Mo. App. 76; *affd.*, 73 Mo. 665, 39 Am. Rep. 537; commented on in *Midland Bank v. Missouri Pac. Ry. Co.*, 132 Mo. 492, 507, 33 S. W. 521, 53 Am. St. Rep. 505.

goods is the consignee of a negotiable bill of lading, a creditor of the buyer cannot successfully attach the goods if the bill of lading has not been delivered to the buyer but has been retained as security by the shipper. Nor can the creditor attach, though the shipment was straight, if it was agreed between the parties that title should not pass to the consignee.⁷¹

§ 440. **Nature of the right of indorsee for security.**—One to whom a negotiable document of title is indorsed as security for an advance is ordinarily called a pledgee, the situation being regarded as analogous to the delivery of the goods themselves; but the transaction seems in its essence a mortgage in which the mortgagee gets the legal title rather than a pledge. The law should reconcile the acts of the parties and their manifest intention so far as may be. To call the transaction a pledge is to disregard the mercantile meaning of indorsement, though the main intent to give security is effectuated. Both the normal meaning of indorsement and the intent to give security are, however, given full force if the transaction is regarded as a mortgage. The question was elaborately considered in the House of Lords, and the court reached the conclusion that an indorsee for security was not one to whom the property in the goods passed within the meaning of the English Bills of Lading Act.⁷² But the Supreme Court of the United States and other American courts seem to have more justly determined the exact nature of such a transaction; holding, as they do, that the assignment of the bill of lading not only transfers the possession but also the title.⁷³ For most purposes it is

⁷¹ *Merchants' Exchange Bank v. McGraw*, 59 Fed. Rep. 972, 15 U. S. App. 332, 8 C. C. A. 420, 76 Fed. Rep. 930, 48 U. S. App. 55, 22 C. C. A. 622; *Meldrum v. Snow*, 9 Pick. 441, 20 Am. Dec. 489.

⁷² *Sewell v. Burdick*, 10 A. C. 74. The court was probably influenced in its decision by the fact that had the transaction been held a mortgage they would have felt obliged to hold the security holder personally liable for freight—a very harsh result, and due to a construction of the statute which the framers probably

did not have in mind. It might well have been held, as Lord Blackburn suggested, that even though the transaction was a mortgage “the” property did not pass in the sense in which the statute intended; that is, a bare legal title, such as a mortgagee holds for security, was not what was meant. *Brett, M. R.*, and *Baggallay, L. J.*, in the court below held that the transaction was a mortgage.

⁷³ *Gibson v. Stevens*, 8 How. 384, 12 L. ed. 1123; *Casey v. Cavaroc*, 96 U. S. 467, 24 L. ed. 779. *Mr. Justice Bradley* in the latter case

of course entirely immaterial whether the transaction be called a pledge or a mortgage, and the use of the word "pledgee" to designate the security holder, though it does not seem strictly accurate, is so generally used that it would probably be hard to change the usage.⁷⁴

§ 441. **Documents of title in sets.**—It has, for centuries, been the custom to draw foreign bills of lading in sets usually of three,

said: "The difference ordinarily recognized between a mortgage and a pledge is that title is transferred by the former and possession by the latter. Indeed, possession may be considered as of the very essence of a pledge; and, if possession be once given up, the pledge, as such, is extinguished. The possession need not be actual; it may be constructive—as where the key of a warehouse containing the goods pledged is delivered, or a bill of lading is assigned. In such case the act done will be considered as a token, standing for actual delivery of the goods. It puts the property under the power and control of the creditor. In some cases such constructive delivery cannot be effected without doing what amounts to a transfer of the property also. The assignment of a bill of lading is of that kind. Such an assignment is necessary, where a pledge is proposed, in order to give the constructive possession required to constitute a pledge; and yet it formally transfers the title also. In such a case there is a union of two distinct forms of security—that of a mortgage and that of a pledge; mortgage by virtue of the title, and pledge by virtue of the possession." In *Farmers' & Mechanics Bank v. Logan*, 74 N. Y. 568, the court said: "The bill of lading confers upon the person in whose favor it is issued or to whom it is transferred the title to the goods; and this although the

transaction is not intended to give the permanent ownership, but to furnish security for advances of money or discount of commercial paper upon the faith of it." These extracts and others to the same effect were quoted with approval in *Neill v. Rogers Bros. Produce Co.*, 41 W. Va. 37, 23 S. E. 702. See also *Tishomingo Sav. Inst. v. Johnson, Nesbitt & Co.*, 146 Ala. 691, 40 So. 503; *First Nat. Bank v. Walsh*, 131 Ill. App. 508; *Willard Mfg. Co. v. Tierney*, 133 N. C. 630, 45 S. E. 1026; *Seward v. Miller*, 106 Va. 309, 55 S. E. 681. Compare, however, the language quoted from *The Carlos F. Roses*, 177 U. S. 655, 665, 20 S. Ct. 803, 43 L. ed. 929, *supra*, § 410, note. For a decision distinguishing a bank holding for collection a draft secured by bill of lading, from a purchaser of such a draft, see *Cotton Mills v. Weil*, 129 N. C. 452, 40 S. E. 218.

⁷⁴*First Nat. Bank v. Crocker*, 111 Mass. 163. "Whether it (the transfer) should be regarded as a sale, a pledge, or a mortgage, there was a sufficient delivery to give to the plaintiffs a special property which they could enforce in suit against any wrongdoer." Quoted with approval in *First Bank v. Mt. Pleasant Milling Co.*, 103 Iowa, 518, 524, 72 N. W. 689. See also extract from *National Newark Banking Co. v. D., L. & W. R. R. Co.*, 70 N. J. L. 774, 58 Atl. 311, 66 L. R. A. 595, 103 Am. St. Rep. 825, quoted *supra*, § 404, note.

but occasionally of a greater number of parts.⁷⁵ The custom is not confined to England or the United States, but extends over the commercial world. The origin of the practice may have been due to the numerous mischances to which documents sent from a distance were subject, as well as to provide each of the several persons interested with authoritative copies. Whatever the object there seems to-day no reason why a single original document with as many copies as are desired would not serve every purpose. Accordingly it is not the custom of railroads, or of most coasting lines in this country, to issue bills in sets. The custom is a dangerous one because each part is an original, and indorsement for value of the second or third part prevails over a later indorsement of the first part.⁷⁶ Even though the later indorsee obtains possession of the goods the prior indorsee is entitled to claim them.⁷⁷ The rule of the civil law is the same.⁷⁸ The analogy of this doctrine to that prevailing in regards to bills of exchange issued in sets is obvious.⁷⁹ The mischief of the practice of issuing documents in sets is plain. No one who buys one part can have any security that he is the first indorsee. He must rely solely on the word of the man he is dealing with, not on the document. And if it be urged that he may protect himself by refusing to buy or take the document unless he gets all the parts, it is to be said that even if this course were always open it would simply amount to a suggestion that business should be tied up where documents had been issued in sets; for frequently one or more parts are retained by the consignor; a result that in itself would indicate that the practice is unfortunate. Moreover the risk of mischance to one document, which is given as a reason for use of sets, is increased thereby instead of

⁷⁵ On the Continent of Europe as many as six parts are frequently used; and some of the codes require that not less than four shall be issued.

⁷⁶ *Caldwell v. Ball*, 1 T. R. 205; *Barber v. Meyerstein*, L. R. 4 H. L. 317.

⁷⁷ *Barber v. Meyerstein*, L. R. 4 H. L. 317.

⁷⁸ 5 *Lyon Caen et Renaud*, *Droit Comm.* (2d ed.), § 727 *bis*.

⁷⁹ *Bills of Exchange Act*, § 71; *Crawford*, *Annotated Negotiable In-*

strument Law, §§ 310-315. If several parts of a bill of exchange issued in sets are indorsed to different persons, the first indorsee gets title to all the parts, but later indorsees of other parts can sue their immediate indorsers. Acceptance must be written on one side only, and the acceptor, when he pays, must get the part upon which his acceptance is written, delivered up; subject to this rule, however, if any part is discharged by payment, or otherwise, the whole bill is discharged.

diminished if each part of the set is essential to any dealing. Nevertheless it is now the custom for careful bankers to refuse to advance money on bills issued in sets unless all the parts are deposited as security. But it seems that a buyer who has contracted to take goods and to pay on receiving bills of lading is not entitled to demand all the parts. He must pay the price when a duly indorsed bill of lading is tendered to him, although the bill was drawn in a set and all the parts were not tendered or accounted for.⁸⁰ Though domestic carriers do not issue bills of lading in sets, it is not uncommon for duplicates to be issued. The use of bills of lading in sets in foreign commerce has led to some confusion as to the effect of the duplicate bill in domestic commerce. The second and third parts of a bill in a set are in no sense duplicates. In legal contemplation there is but one bill which is in parts, and each part is as much an original as any other. A duplicate should, it seems, unless the contrary is stated on the document, be regarded as rather in the nature of a copy.⁸¹ In some cases, however, a different and incorrect practice has been followed, which to some extent has received the sanction of courts.⁸² No doubt it is possible for a bill of lading, though

⁸⁰ *Sanders v. McLean*, 11 Q. B. D. 327. The law in regard to this matter is otherwise provided in the German Commercial Code, which provides that if a shipper does not retain possession of the full set he has no power to dispose of the goods while in transit. The utility of issuing bills in sets becomes questionable under this rule, for parts of the set must be kept together in order to constitute an effective document. When the goods reach their destination, however, under the German law, the carrier is bound to deliver to the holder of a single part. *Handels-gesetzbuch*, §§ 645, 659.

⁸¹ Such seems to have been the way in which the duplicate was regarded by the court and parties in *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. ed. 892. And in *Midland Bank v. Missouri Pac. Ry. Co.*, 132 Mo.

492, 33 S. W. 521, 53 Am. St. Rep. 505, the court held the carrier liable to an indorsee for value of the original bill when the goods were delivered to the holder of the duplicate, since the original did not state that it was to be void on such delivery.

⁸² In *First Nat. Bank v. Ege*, 109 N. Y. 120, 16 N. E. 317, 4 Am. St. Rep. 431, it appeared that the shipper was accustomed to send original bills directly to the consignee, duplicates were retained and attached to drafts. As the suit was against the consignee who had knowledge of the shipper's practice of sending drafts through a bank against the goods, the decision of the court protecting the bank is sound; but it seems obvious that the bank had no real security; for the consignee, by virtue of the original bills of lading,

marked "duplicate" or "triplicate," to be a part of a set and, therefore, an original. If each document states, in effect, that it is a part of a set and that each part will be void when another part has been accomplished, each document would be an original,⁸³ but the mercantile custom permitting each part to be an original should be strictly construed, and unless documents are clearly brought within the custom, only one original should be recognized, and any other documents of like tenor should be regarded as copies. The negotiation of a copy of even a negotiable document of title would not amount to a delivery of the goods.

§ 442. **Substitution of other goods for those bailed.**—It seems to have become the practice in some cities, in regard to certain staple commodities, for warehousemen to allow the removal of goods for which negotiable receipts are outstanding on receiving in substitution a like amount of similar goods. A merchant who warehouses his goods and obtains a negotiable receipt for them may thus raise money on a receipt at the bank and continue to make sales of the goods warehoused, substituting an equal amount of new goods which he is continually receiving. The legal effect of such a transaction deserves attention. It may be supposed that this substitution is made with the consent of the holder of the receipt, or it may be supposed that it is made without such consent. Again, it may be supposed the goods in question are fungible, or it may be supposed that they are not. If the holder of the receipt consents to the substitution, it is obvious that however different the goods substituted may be from the old, he has no cause to complain. Such consent may be implied not only from

could obtain the goods and if he sold them to a *bona fide* purchaser for value without notice, the latter would clearly be entitled to hold the goods. The court, however, seems to regard the original and duplicate as parts of a set, saying: "The practice of carriers in issuing duplicate bills of lading to consignors of property shipped for sale has been much disapproved by the courts, for the reason that it affords a convenient opportunity for the commission of frauds by consignors, as well as sub-

jecting the carrier to the hazard of making incorrect delivery of the property." In *Missouri Pacific Ry. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861, the court also said that a duplicate bill of lading was of equal efficacy with the original. See also *Skilling v. Bollman*, 6 Mo. App. 76, 73 Mo. 665, 39 Am. Rep. 537.

⁸³This was the test applied in *Midland Nat. Bank v. Missouri Pac. Ry. Co.*, 132 Mo. 492, 33 S. W. 521, 53 Am. St. Rep. 505.

express words, but also from the form of the document, or perhaps from a general custom of trade. In considering the form of the document it is important to bear in mind that a warehouse receipt is not merely a promissory note of the warehouseman by which the latter engages to deliver a certain amount of goods of a specified kind when demanded by a holder of the receipt. Documents having this effect are indeed possible and under the statutes of a few States may be made negotiable like bills of exchange.⁸⁴ Such documents are in common use in Scotland in the iron trade, and are known as iron warrants. An ordinary warehouse receipt is, however, primarily an acknowledgment that certain specific goods have already been received, and in the absence of clear proof of consent to substitution, it is these goods which the warehouseman engages to return. Even though the receipt contains no marks distinguishing the goods in question from other goods of the same kind, the ordinary construction of the document, unless aided by evidence showing a different understanding, is that the warehouseman has received specific goods of a certain kind, and will redeliver those goods and no others.⁸⁵ If the goods are fungible,

⁸⁴ Illinois; Iowa, Code (1897), § 3045; Missouri, Rev. St. (1899), § 894. See *Spears v. Bond*, 79 Mo. 467.

⁸⁵ Thus in *Harris v. Bradley*, 2 Dill. 284, a receipt for "3,000 sacks of corn" when delivered was held to transfer title to the 3,000 sacks, in fact, stored. So in *Puckett v. Reed*, 31 Ark. 131, a receipt for "seventeen hundred and forty-two (1,742) pounds seed cotton." See also *Gibson v. Stevens*, 8 How. 384, 12 L. ed. 1123; *Bank of Newport v. Hirsch*, 59 Ark. 225, 235, 27 S. W. 74; *Hoffman v. Schoyer*, 143 Ill. 598, 28 N. E. 823. It must be admitted that the language of the court in *Blydenstein v. New York Security & Trust Co.*, 67 Fed. Rep. 469, 35 U. S. App. 175, 15 C. C. A. 14, seems opposed to the text. In that case the warehouse receipt was in the following form: "Received in Rossiter Stores, No. 4

U. S. bonded, on Storage for account of Lipman & Co. Marks: various (100). Contents unknown. Said to contain 100 bales burlaps. Negotiable. Deliverable only upon return of this receipt and the payment of charges accrued thereon." It was signed by an officer and the manager of the company. On the back was printed: "The property mentioned below is hereby released from this receipt for delivery from warehouse. Date. Quantity. Merchandise. Signature." The court said: "The agreement expressed in this document is plain. The warehouse company undertook to deliver 100 bales of the burlaps stored with it by Lipman & Co., either to Lipman & Co. or to their assignee, but only upon the return of the receipt. It undertook to so manage its warehousing that it should always, while the receipt was outstanding and the

especially if law or custom authorize the mingling of various lots of goods by the warehouseman, it is easy to infer that the meaning of the warehouseman in issuing the receipt was to enter into an agreement to hold the deposited goods in the way authorized by law or custom, for instance, mingled with other goods; and to redeliver not those specific goods but goods of equal amount and similar quality. This is the regular practice in grain elevators. Even though the goods are not strictly fungible, the document may bear a meaning similar to that of a grain receipt if the parties so intend; or a general custom may bind them to the same effect as if they had assented, but clear evidence of such intent or custom should be required. It presumably is not true that one bale of cotton or one bale of burlap is the equivalent of any other bale of cotton or of burlap. It is not natural to suppose, therefore, that a purchaser of a warehouse receipt for 100 bales of cotton or 100 bales of burlap has agreed to buy any hundred bales of cotton or any hundred bales of burlap which the depositor may thereafter choose to substitute for those in storage originally, and at the time the receipt was purchased.⁸⁶ Where substitution takes place and neither the form of the receipt nor the

amount called for by such receipt was not reduced in quantity by a properly executed release indorsed thereon, have on hand and ready for delivery the quantity of such bales called for by the receipt, but it did not undertake so to deliver bales with any particular marks." It is submitted that this construction is not the natural construction of the document. The natural construction is rather that a hundred bales of burlap have been received and the warehouseman has agreed to redeliver those specific bales. When a warehouseman receives a bureau and receipts for it simply as one bureau, it surely is not the natural construction of the contract that he promises to deliver on demand any bureau. Nor does the printed matter on the back of the

receipt aid the construction the court gives the document. Such printed matter is common on all receipts to enable the whole or part of the goods to be released by indorsement on the receipt which then will carry with it notice that it is no longer good for its face. So far as any inference is to be drawn from the memorandum on the back, it is rather that none of the property designated on the face of the receipt was to be released unless so noted on the back of the document. See also *New York Security & Trust Co. v. Lipman*, 157 N. Y. 551, 52 N. E. 595.

⁸⁶ A criticism of so-called open receipts is made in the case of *State Nat. Bank v. Bryant*, 49 La. Ann. 467, 472-475, 22 So. 89. See also *Hoffman v. Schoyer*, 143 Ill. 598, 28 N. E. 823.

express or implied assent of the parties warranted it, these consequences seem to follow. The warehouseman who allows the substitution is guilty of a misdelivery and conversion in surrendering goods to the depositor if the receipt has already been negotiated.⁸⁷ If the receipt has not been negotiated at the time of the substitution and is negotiated afterward, the purchaser has no cause of complaint if the substituted goods are within the description on the receipt. For the agreement to substitute between the warehouseman and the depositor (then being the owner of the goods and the receipt) is in effect an agreement that the receipt shall represent the substituted goods, and the form of the receipt is such as to permit this. If the substituted goods are not within the terms of the receipt, even though the negotiation is subsequent to the substitution, the warehouseman should be liable by estoppel for failure to deliver goods corresponding to the terms of his receipt.⁸⁸ Wherever the substitution is tortious for the warehouseman it is also tortious for the depositor. Further, if the substitution was unauthorized and took place after negotiation of the receipt to a holder for value, the latter must remain owner of the original goods covered by the receipt, and it would seem may demand them even from a purchaser for value. If, however, the holder of the receipt foregoes any claim he may have to the original goods and is satisfied to accept the substituted goods, he may do so. His subsequent assent to the substitution is a ratification of an unauthorized act and takes the place of original authority.⁸⁹

§ 413. **Forged and altered documents.**—It is obvious that a forged document cannot transfer title to goods, for such a document represents no goods; nor can it impose any liability upon the bailee who apparently issued it.⁹⁰ Closely analogous to forged documents are altered documents. It is as evident as in the case

⁸⁷ The case is similar in principle to other cases of misdelivery. See *supra*, § 424.

⁸⁸ See *supra*, § 424.

⁸⁹ See *Blydenstein v. New York Security & Trust Co.*, 67 Fed. Rep. 469, 35 U. S. App. 175, 15 C. C. A. 14; *Union Trust Co. v. Trumbull*, 137 Ill. 146, 27 N. E. 24; *Hoffman v. Schoyer*,

143 Ill. 598, 28 N. E. 823; *State Nat. Bank v. Bryant*, 49 La. Ann. 467, 22 So. 89; *New York Security & Trust Co. v. Lipman*, 157 N. Y. 551, 52 N. E. 595. See also *Bank of Newport v. Hirsch*, 59 Ark. 225, 27 S. W. 74.

⁹⁰ See *McNear v. Bourn*, 122 Cal. 621, 55 Pac. 596.

of forged documents that an altered document cannot bind any one by its terms except the person making the alteration, and persons who, by reason of estoppel, or of apparent authority to make the alteration, are precluded from denying its validity.⁹¹ By the rule of common law in regard to alteration of a mercantile contract, the contract becomes absolutely void.⁹² Under this rule the bailee would be excused from contractual liability upon the document. The bills of lading in common use in this country, however, contain an express provision that "any alteration, addition, or erasure * * * shall be void." The purpose of this clause seems to be to make the alteration void and leave the instrument effectual in its original form; as most of the con-

⁹¹ In *Union Credit Bank v. Mersey Docks & Harbour Board*, [1899] 2 Q. B. 205, a delivery order was left blank as to the number of parcels to be delivered in this form. The order was intrusted to a third person who was authorized to fill it up by inserting a specified number of parcels. This authority was fraudulently exceeded by the insertion of a greater number of parcels. It was held that the warehouseman was not liable to the principal for delivering the greater number. Compare this case with *Lehman v. Central R. R. & Banking Co.*, 12 Fed. Rep. 595, in which it was held that the fact that the shipper was allowed to fill out a bill of lading and leave a blank which afforded opportunity for increasing the number of bales shipped would not render the carrier liable for loss occasioned by the raising of the bill. In *Merchants' Bank v. Baltimore, etc., Steamboat Co.*, 102 Md. 573, 63 Atl. 108, it was held that a carrier was not liable to a purchaser of a spent bill who was deceived into making the purchase by a change in the date of the document so that it appeared to have been recently issued. Comparison with similar cases in the law of bills

of exchange and promissory notes is naturally suggested. There is probably less reason for charging a bailee because of spaces carelessly left allowing insertions and additions, than for charging the drawer of a bill of exchange or maker of a promissory note under similar circumstances. Bills of exchange and promissory notes are habitually carefully executed, and there is no injustice in holding an individual to the standard of care customary in such transactions, but the standard of care in regard to warehouse receipts, and especially in regard to bills of lading is much lower, and it is sometimes said, necessarily so, because of the haste with which such documents must often be prepared and the ignorance of many of those who prepare them. In the form of order bill of lading recommended in 1908 by the Interstate Commerce Commission, the words "order of" must be printed on the bill before the consignee's name. This prevents the fraudulent addition in writing of the words "or order" after the consignee's name in a straight bill from being deceptive.

⁹² See Wald's *Pollock, Contracts* (3d ed.), p. 845 *et seq.*

tractual provisions in a bill of lading are for the benefit of the carrier, the reason for doing this is obvious. The provision has been held by the Maryland Court of Appeals⁹³ not to apply to fraudulent alterations, but this construction does not commend itself. Whatever the effect of alteration upon the contract, it can have no effect on the title to the goods.⁹⁴ Even a depositor who had fraudulently altered a document would still have the rights of ownership and could transfer them.

§ 444. **Time during which documents of title are valid.**—Bills of exchange and promissory notes must be payable at a time certain, or one which may be made certain, as by demand or presentment. After the time of maturity the instrument loses certain characteristics of negotiability. It has often been suggested that the same principle be applied to documents of title, but the difficulties of such application seem insuperable. There is no definite time within which goods shipped should arrive at their destination or within which goods stored should be redelivered. It cannot be laid down, therefore, as a matter of law, that a bill of lading or warehouse receipt ceases to be a symbol of title because of mere lapse of time or carries upon its face, because of its date, constructive notice to a purchaser that it has ceased to be valid. Under particular circumstances, however, and in connection with other facts, the date of a document of title may be important as putting a purchaser upon inquiry or giving him ground for suspicion.⁹⁵

⁹³ *Merchants' Bank v. Baltimore, etc., Steamboat Co.*, 102 Md. 573, 581, 63 Atl. 108.

⁹⁴ See *Wald's Pollock, Contracts* (3d ed.), p. 845.

⁹⁵ Thus in *Van Schoonhoven v. Curley*, 86 N. Y. 187, a Kentucky warehouse receipt for whiskey in a bonded warehouse was bought by the plaintiff after the lapse of more than a year from its issue. By the United States statute whiskey must be removed from bond within one year, and the whiskey in question had, in fact, been shipped by the warehouse-

man to the depositor at the expiration of the year. It was held that the plaintiff was charged with constructive notice of the statute and should have known that the warehouseman could not be in possession of the whiskey; accordingly, the warehouseman was not liable. In *Ratzer v. Burlington, etc., R. Co.*, 64 Minn. 245, 66 N. W. 988, 58 Am. St. Rep. 530, the court laid stress on the fact that a pledgee of a bill of lading had acquired his right before the goods could possibly have reached their destination.

PART III.

PERFORMANCE OF THE CONTRACT.

CHAPTER XIII.

CONTRACTUAL OBLIGATION OF THE PARTIES.

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§ 445. **Nature of contracts to sell and sales.**—A contract to buy and sell when wholly executory is obviously a bilateral contract, the primary promise on the part of the seller being to transfer title to the goods and that of the buyer to pay for them. These primary obligations are not, however, the only ones imposed by law upon the parties. The seller must deliver the goods; under certain circumstances he must permit examination of them. The buyer must accept delivery and make such examination as he wishes and the law allows him. The time and place for the performance of these obligations may be fixed by the contract expressly or impliedly. A contract to sell is generally said to be no longer executory when the property in the goods has passed to the buyer; and such a transaction is called a sale, as distinguished from a

contract to sell, in the Sales Act. Even a sale, however, may still be a partly bilateral contract; that is, a contract in which some unperformed promise exists on each side though there has been some performance on one side as part of the consideration. For though the property in the goods has passed, the seller may still be subject to the subsidiary obligations to afford opportunity for inspection and to deliver the goods, and the promises of the buyer may still be unperformed. In other cases, when a sale has taken place, the only obligation remaining outstanding may be the purely unilateral obligation of the buyer to pay for the goods. This will be true when the seller has not only transferred the property in the goods to the buyer but has also delivered them, and the buyer has accepted them. In still other cases of sale no contract whatever may be outstanding, both seller and buyer having fully performed their respective obligations. For many purposes the vital classification is between sales and agreements to sell; that is, between cases where the property in the goods has passed and cases where it has not passed. But for purposes of the present chapter, attention should rather be directed to the question whether obligations on the part of the buyer and the seller still exist. For the questions now to be considered relate to the obligations implied from the nature of a sale and to the conditions implied by law in such obligations. These questions are not peculiar to the law of sales; they are rather particular applications of the general law of contracts in the law of sales. Like other contractual obligations, sales and contracts to sell may be formed by agents, and whether an agent in a particular case is authorized to enter into the obligation on behalf of his principal, which he purports to make, is a question of the law of agency, and the solution of it depends upon the facts of each case. The power of agents to transfer title to goods in violation of the actual authority given them has been previously considered.¹ One question of the agent's power to bind his principal by special agreement arises so frequently in the law of sales that it demands notice, namely, the power of an agent authorized to sell to bind his principal by warranty of the goods. It need hardly be said

¹ *Supra*, §§ 313-323. As to the authority of an agent to sign a memo-

randum under the Statute of Frauds, see *supra*, § 114.

that if the agent is expressly authorized to give a warranty he may do so effectually, but frequently warranties are made by agents who have simply been authorized to sell. Two somewhat different questions are not always sufficiently differentiated in the decisions and discussions of the matter. (1) Does authority to sell imply in fact authority to warrant under the well-known doctrine that authority to do a specific act includes authority to do everything reasonably necessary for performance of the act, so that the agent may be said to have actual authority? (2) Does authority to sell justify those dealing with the agent in assuming that he has authority to warrant, so that on the doctrine of apparent authority he will bind his principal by so doing, even though he has been expressly forbidden to give a warranty? Both these questions seem essentially questions of fact, but they have in many cases been dealt with as questions of law. It was laid down in two early English cases² that authority to sell a horse implied authority to warrant him. This doctrine though based on the assertion "it is now most usual in the sale of horses to require a warranty."³ and though confined by a later decision⁴ to cases where the agent represented a dealer in horses, and not a private person, as thus limited, is still the law of England.⁵ As to goods other than horses, it is probable that the decision would turn upon whether it was usual to give a warranty in the market in question for goods of the sort which were sold.⁶ The early English cases have led to a number of American decisions which state as a matter of law as to various kinds of goods that authority to sell includes authority to warrant.⁷ Such a rule

² *Helyear v. Hawke*, 5 Esp. 72; *Alexander v. Gibson*, 2 Campb. 555. See also *Fenn v. Harrison*, 3 T. R. 757.

³ *Alexander v. Gibson*, 2 Campb. 555.

⁴ *Brady v. Todd*, 9 C. B. (N. S.) 592.

⁵ *Brooks v. Hassall*, 49 L. T. 569; *Howard v. Sheward*, L. R. 2 C. P. 148; *Baldry v. Bates*, 52 L. T. 620. In the case last cited the rule as to dealers in horses was applied to one who kept a riding school on the

ground that such a person was constantly buying and selling horses.

⁶ *Dingle v. Hare*, 7 C. B. (N. S.) 145. The principal was held bound by a warranty given by his agent in selling guano that it contained 30 per cent. of phosphate. The jury had found that such warranties were usual.

⁷ *Alexander v. Gibson*, 2 Campb. 555; *Dingle v. Hare*, 7 C. B. (N. S.) 145; *Schuchardt v. Allen*, 1 Wall. 359, 369, 17 L. ed. 642; *Skinner v. Gunn*, 9 Port. 305; *Bradford v. Busn,*

of law, however, is hard to support, and the better view is that evidence is necessary either of actual authority or that the practice of giving a warranty in a sale of the sort in question was so usual that a reasonable man would have understood that the power was granted.⁸ Many of the decisions which hold that the agency to sell implies authority to warrant contain in qualification "unless the agent was expressly instructed to the contrary." But other decisions have held that even though the agent is positively forbidden to warrant, he may bind his principal by so doing if the purchaser is ignorant of the limitation of his authority.⁹ Even if it is granted that the agent's warranty does not bind his principal, the latter may ratify his agent's acts. And it seems that it amounts to such ratification if the principal accepts the benefits of the bargain knowing that the agent has given a warranty. And though the principal was ignorant at the time when he received payment of the price, the subsequent retention of the benefits of the bargain would indicate a ratification of the means by which the benefits were obtained. For the buyer has been induced to enter into the bargain by means of a warranty, and if the warranty was unauthorized and the principal refuses to ratify it, the buyer though not entitled to sue the

10 Ala. 386; *Cocke v. Campbell*, 13 Ala. 286; *Woodford v. McClenahan*, 9 Ill. 85; *McCormick Harvesting Mach. Co. v. Snell*, 23 Ill. App. 79; *Murray v. Brooks*, 41 Iowa, 45; *First Nat. Bank v. Robinson*, 105 Iowa, 463, 75 N. W. 334; *Randall v. Kehlor*, 60 Me. 37, 11 Am. Rep. 169; *J. I. Case Threshing Mach. Co. v. McKinnon*, 82 Minn. 75, 84 N. W. 646; *Palmer v. Hatch*, 46 Mo. 585; *Hayner v. Churchill*, 29 Mo. App. 676; *Samuel v. Bartee*, 53 Mo. App. 587; *Tice v. Gallup*, 2 Hun, 446; *Alpha Mills v. Watertown Engine Co.*, 116 N. C. 797, 21 S. E. 917; *Dayton v. Hooglund*, 39 Ohio St. 671; *Ezell v. Franklin*, 2 Sneed, 236; *Deming v. Chase*, 48 Vt. 382; *Boothby v. Scales*, 27 Wis. 626.

⁸ *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4; s. c., 73 Ala. 446;

Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96; *Upton v. Suffolk County Mills*, 11 Cush. 586, 59 Am. Dec. 163; *Cooley v. Perrine*, 41 N. J. L. 322, 32 Am. Rep. 210; *Decker v. Fredericks*, 47 N. J. L. 469, 1 Atl. 470; *Smith v. Tracy*, 36 N. Y. 79; *Wait v. Borne*, 123 N. Y. 592, 25 N. E. 1053; *Bierman v. City Mills Co.*, 151 N. Y. 482, 483, 45 N. E. 856, 37 L. R. A. 799, 56 Am. St. Rep. 636; *Reese v. Bates*, 94 Va. 321, 26 S. E. 865; *Larson v. Aultman & Taylor Co.*, 86 Wis. 281, 56 N. W. 915, 39 Am. St. Rep. 893; *Waupaca Elec. Co. v. Milwaukee Elec. Co.*, 112 Wis. 469, 88 N. W. 308.

⁹ *Howard v. Sheward*, L. R. 2 C. P. 148; *J. I. Case Threshing Mach. Co. v. McKinnon*, 82 Minn. 75, 84 N. W. 646; *Hayner v. Churchill*, 29 Mo. App. 676; *Ezell v. Franklin*, 2 Sneed, 236; *Boothby v. Scales*, 27 Wis. 626.

principal for damages for breach of the warranty should be allowed to rescind the transaction. It is one of the requisites of rescission, however, that the party claiming it should put the other party *in statu quo* and unless he can do so the principal should be allowed to keep the price which he has received.¹⁰ If the price has not been paid and the seller seeks to recover it after knowledge of the warranty, it has been held a ratification.¹¹ Certainly if the buyer refused to rescind the transaction when it was possible to restore the original status, it would be a ratification, but this qualification seems necessary.

§ 446. **Obligation of delivery and acceptance—Provisions of the Sales Act.—**

Sec. 41. SELLER MUST DELIVER AND BUYER ACCEPT GOODS.—It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale.¹²

§ 447. **Delivery and payment are concurrent conditions under the Sales Act.—**

¹⁰ *Cooley v. Perrine*, 41 N. J. L. 322, 32 Am. Rep. 210. In this case the horse had died while in the possession of the buyer, and it was held that the price could not thereafter be recovered.

¹¹ *Phillips & Buttorff Mfg. Co. v. Wild*, 144 Ala. 545, 39 So. 359. The court said: "We hold that while it is true that, when the vendee is the actor in a suit against the vendor on a warranty given by an agent of the vendor in the sale of chattels, it devolves upon the plaintiff to show that the agent had authority to make the warranty either by direct proof, or by proof of a general custom to that effect. *Herring v. Scaggs*, 62 Ala. 180, 34 Am. Rep. 4; s. c., 73 Ala. 446. Yet, where the agent, in selling chattels for the vendor, makes representations, agreements, or guaranties, as a part of the contract of sale, and suit is brought by the

vendor against the vendee, he is bound by the agreement of the agent. He cannot ratify the contract of sale in part and repudiate it in part. It is his duty to ascertain, and not the duty of the purchaser to inform him, what representations have been made by the agent. *Williamson v. Tyson*, 105 Ala. 644, 653, 17 So. 336; *Atwood v. Wright*, 29 Ala. 346, 351, 352; *Elwell v. Chamberlin*, 31 N. Y. 611, 619, 620; *Rogers v. Empkie Co.*, 24 Neb. 653, 39 N. W. 844; *Busch v. Wilcox*, 82 Mich. 336, 47 N. W. 328, 21 Am. St. Rep. 563; *Haskell v. Starbird*, 152 Mass. 117, 25 N. E. 14, 23 Am. St. Rep. 809."

¹² This section is identical with section 27 of the English Sale of Goods Act with the single substitution of "contract to sell or sale" for the words "contract of sale" in the English act.

Sec. 42. DELIVERY AND PAYMENT ARE CONCURRENT CONDITIONS.— Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.¹³

This and the preceding section of the Sales Act express rules of the common law and their effect will appear in the following discussion.

§ 448. **Delivery and payment concurrent conditions at the common law.**— Under the heading of "Cash Sales" ¹⁴ it has already been shown that by the early law of England transfer of the property in the goods and payment of the price were presumably concurrent; and the more modern view has been advocated that the implied condition relates rather to delivery than to ownership. In cases where the property does not pass until delivery, the condition in regard to delivery will, in effect, be also a condition in regard to the property but where all the terms of the bargain are agreed upon, the property presumably passes at once, irrespective of delivery or payment.¹⁵ And in such cases and others where, by the proper construction of the bargain, the property passes before delivery the mutual dependency is merely between delivery and payment. As parties to a bargain may make any terms they will, it is obvious that the implied dependency between the obligation to deliver and the obligation to pay may be negated by agreement. A term of credit necessarily indicates a negative intention; but unless such an intention appears, the general rule must be applied. Therefore, not only does the mutual dependency exist in cases where no time is fixed by the contract for the performance of either party,¹⁶ but also where the time for the performance of one party is fixed, but no provision

¹³ This section is identical with section 28 of the English Sale of Goods Act.

¹⁴ See *supra*, §§ 341, 342.

¹⁵ See *supra*, § 264.

¹⁶ *Bloxam v. Sanders*, 4 B. & C. 941;

Lehman v. Warren, 53 Ala. 535, 540; *Merrill Furniture Co. v. Hill*, 87 Me. 17, 32, 32 Atl. 712; *Haskins v. Warren*, 115 Mass. 514, 533. See also *supra*, § 342, and *infra*, § 575.

is made as to the time for the counter performance.¹⁷ The provisions of the contract may, however, be such that in the nature of the cases it is impossible to perform as the contract requires, and also perform concurrently. In such a case the implication of dependency must yield to the evident intent of the parties. Where the conditions are concurrent it necessarily follows that neither party can maintain an action against the other for breach of the latter's obligation, without first making an offer of performance himself. It has been said that readiness and willingness on the part of the plaintiff is sufficient, or that even this is not part of the plaintiff's case.¹⁸ But it is evident not only that the plaintiff must be ready and willing, but also that readiness and willingness, unless manifested by some notice to the defendant, are insufficient. For if neither buyer or seller approached the other, but each stayed at home ready and willing to perform, the rule suggested would give each party a right of action; whereas neither party would have a right of action without putting the other in default. It may be suggested that readiness and willingness implies notice thereof to the other party, but the words themselves do not naturally imply notice; and in some cases the words are used where notice is unnecessary. Where by the terms of the contract the defendant has not performed some condition precedent, it is enough for the plaintiff to allege that he was ready and willing; he need do nothing actively until

¹⁷ *Morton v. Lamb*, 7 T. R. 125; *Withers v. Reynolds*, 2 B. & Ad. 882; *Parker v. Rawlings*, 4 Bing. 280; *Brennan v. Ford*, 46 Cal. 7. 16; *Skillman Hardware Co. v. Davis*, 53 N. J. L. 144, 20 Atl. 1080; *Dunham v. Pettee*, 8 N. Y. 508; *Ziehen v. Smith*, 148 N. Y. 558. 42 N. E. 1080; *Catlin v. Jones*, 48 Or. 158. 85 Pac. 515, Or. , 97 Pac. 546.

¹⁸ *Chalmers, Sale of Goods Act* (5th ed.), p. 66: "In an action for non-delivery, it seems the buyer need not give evidence that he was ready and willing to pay, till the seller shows he was ready to deliver. *Wilks v. Atkinson*, [1815] 1 Marsh. 412. 'The averment of the plaintiff's readi-

ness and willingness to perform his part of the contract will be proved by showing that he called on the defendant to accomplish his part.' Notes to *Cutter v. Powell*, 2 Smith Lead. Cas. (9th ed.), p. 18; (11th ed.), p. 15. Conversely, in an action for nonacceptance, the seller need not prove any tender of delivery. It is enough to show that he was ready and willing to deliver. *Jackson v. Allaway*, [1844] 6 M. & G. 942; *Baker v. Firminger*, [1859] 28 L. J. Ex. 130.'" The decisions cited by Judge Chalmers do not warrant the conclusion that readiness and willingness without demand upon or notice to the other party is sufficient.

the defendant has performed the prior obligation. But where the conditions are strictly concurrent, the defendant is under no liability until the plaintiff has put him in default, by himself offering to perform. The evidence by which this offer can be shown is another matter. A request or a notice may be sufficient indication to the defendant that the plaintiff not only wishes the defendant to perform, but is himself ready to perform. Certainly a formal tender either of goods or money is not necessary, but in the absence of any legal excuse, some notification that in effect amounts to an offer to perform, coupled with an immediate ability to perform, seems requisite, both on principle and authority, in order to give the plaintiff a right of action.¹⁹

§ 449. Place, time, and manner of delivery—Provisions of the Sales Act.—

Sec. 43. PLACE, TIME, AND MANNER OF DELIVERY.—(1.) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer, is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business, if he have one, and if not, his residence; but in case of a contract to sell or a sale of specific goods, which to the knowledge of the parties when the contract or the sale was made were in some other place, then that place is the place of delivery.

(2.) Where by a contract to sell or a sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3.) Where the goods at the time of sale are in the possession of a third person, the seller has not fulfilled his obligation to deliver to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf; but as against all others than the seller the buyer shall be regarded as having received delivery from the time when such third person first has notice of the sale. Nothing in this section, however, shall affect the operation of the issue or transfer of any document of title to goods.

¹⁹ Wilks v. Atkinson, 1 Marsh. M. & W. 431; Atkinson v. Smith, 14 412; Levy v. Herbert, 7 Taunt. 314; M. & W. 695; Boyd v. Lett, 1 C. B. Pickford v. Grand Junction Ry., 8 222; Catlin v. Jones, Or. , 97 M. & W. 372; Granger v. Dacre, 12 Pac. 546.

(4.) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5.) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.²⁰

§ 450. **Place of delivery.**— It is, of course, open to the parties to make such agreement as they may choose as to the place of delivery, and if they make no express agreement, usage or circumstances may take the place of express language.²¹ The rules of the Sales Act and the rules of the common law on which they are based are merely conclusions of fact, conforming, as is supposed, to the presumable intention of the parties. It is of advantage, in order that the obligations of the parties may be clearly defined, for the law to establish rules of presumption here as it does in regard to the time of transfer of the property, and other matters. It seems reasonable to assume that the buyer intends to take the goods from the seller's shop or residence rather than that the seller was expected to deliver them at the buyer's. This, therefore, is the presumption the law makes in the absence of any facts showing a contrary intention.²² But if the goods are known to be at some place other than in the seller's place of business or residence, it is rather to be inferred that the buyer is to take them from their present situation than that the seller is to deliver them at the buyer's place of business or residence, or is to

²⁰ This section is in most respects identical with section 29 of the English Sale of Goods Act. For the words "contract for the sale" and "contract of sale" have been substituted the words "contract to sell or sale," and one or two slight and unimportant changes of phraseology have been made. The latter half of the first sentence of subsection (3) has been added.

²¹ *Hatch v. Oil Co.*, 100 U. S. 124, 25 L. ed. 554; *Van Valkenburgh v. Gregg*, 45 Neb. 654, 63 N. W. 949; *Field v. Runk*, 22 N. J. L. 525; *Bronson v. Gleason*, 7 Barb. (N. Y.) 472.

²² *Sousely v. Burns' Admr.*, 10

Bush, 87; *Bliss Co. v. United States Gaslight Co.*, 149 N. Y. 300, 43 N. E. 859; *Halvordson v. Grossman*, N. Y. Misc. Rep. , 107 N. Y. Suppl. 627. This is the rule laid down by Pothier, *Contrat de Vente*, No. 52 (see also French Civil Code, Art. 1609), as the general rule in regard to delivery. The English Sale of Goods Act, followed by the Sales Act, in making the place of business or residence of the seller the place of delivery unless the goods are known to be elsewhere, agrees with the rule of the German Commercial Code, § 342.

remove them to his own place of business or residence in order that the buyer may remove them from there.²³ It is evident that the rule as to place of delivery in some measure affects the obligation of the buyer and seller to make offer of performance in order to put one another in default. If it is the duty in a particular case for the buyer to come to the seller's place of business or residence in order to take delivery, the seller is under no duty to go forward; he may wait until the buyer comes to receive the goods. In such case the seller's only duty is to be ready and willing to perform, until the buyer has performed his preliminary obligation of coming to the proper place.²⁴ Thereafter the right of the seller to payment would be concurrently conditional upon the performance of his obligation to deliver. The buyer, on the other hand, cannot obtain a right of action against the seller without making a demand for the goods at the proper place accompanied with an offer (though not necessarily a tender) of the price, unless the sale was on credit. If the place for the delivery of the goods was fixed by the contract as the buyer's residence, a converse situation is presented. The buyer may wait for the arrival of the goods, and if they do not come the seller is liable. A mere allegation on the part of the buyer that he was ready and willing to receive them at the agreed place but that the seller failed to bring them would be a sufficient statement of a cause of action. Again, it may be supposed that delivery was to be made at a place which is the place of business or residence neither of the seller or the buyer. Here the conditions seem directly concurrent. Either party in order to maintain an action must have been ready at the place to perform his legal duty, and if the other party was present also, must have offered

²³ *Hatch v. Oil Co.*, 100 U. S. 124, 25 L. ed. 554; *Ragland v. Wood*, 71 Ala. 145, 46 Am. Rep. 305; *Phœnix Lock Works v. Capelle Hardware Co.*, 9 Houst. 232, 32 Atl. 79; *Wilmouth v. Patton*, 2 Bibb, 280; *Sousely v. Burns' Admr.*, 10 Bush, 87; *Smith v. Gillett*, 50 Ill. 290; *Middlesex Co. v. Osgood*, 4 Gray, 447; *Janney v. Sleeper*, 30 Minn. 473, 16 N. W. 365; *Dakota Stock Co. v. Price*, 22 Neb. 96, 34 N. W. 97; *Lobdell v. Hopkins*,

5 Cow. 516; *Rice v. Churchill*, 2 Denio, 145; *Gray v. Walton*, 107 N. Y. 254, 14 N. E. 191; *Hamilton v. Calhoun*, 2 Watts, 139; *Perlman v. Sartorius*, 162 Pa. St. 320, 29 Atl. 852, 42 Am. St. Rep. 834. See also *Moyle*, Sale in the Civil Law, 100.

²⁴ *Hannuic v. Goldner*, 11 M. & W. 849; *Bell v. Hatfield*, 121 Ky. 560, 89 S. W. 544, 2 L. R. A. (N. S.) 529; *Catlin v. Jones*, Or. , 97 Pac. 546.

to perform.²⁵ A special case may arise where the goods are so bulky, or of such a nature that delivery must be made in a place especially adapted for the purpose. Here it has been held in Maine that the buyer is entitled to name a suitable place, and the seller should request that this be done. If the buyer fails to comply with the request, the seller may then appoint the place.²⁶

§ 451. **Time of delivery where no time fixed.**—The rule laid down by the English Sale of Goods Act and copied in the Sales Act that delivery must be made in a reasonable time, if no time is fixed by the contract, is so clear that perhaps it hardly needed statement.²⁷ The obligation of the seller to deliver in a reasonable time is, in the nature of the case, somewhat indefinite; and it would always be well for the buyer to give notice to the seller when, in the opinion of the buyer, a reasonable time has elapsed,

²⁵ In *Catlin v. Jones*, 48 Or. 158, 85 Pac. 515, the contract for the sale of hops required them to be delivered on a certain day at a certain place. It was held that the mere transportation of the hops to that place was not a sufficient performance by the seller without the presence of the seller or his agent to make delivery and receive the purchase price. In the same case on appeal from a second trial (97 Pac. 546), it was held, that since in the case at bar no money would have been required until the goods were inspected and weighed and the value ascertained, the plaintiff was entitled to recover although he did not have immediate means of payment, if he was so situated that he could have procured the price in time to make seasonable payment, had the seller been present and able to deliver the goods.

²⁶ In *Lincoln v. Gallagher*, 79 Me. 189, the court said: "It was said in *Howard v. Miner*, 20 Me. 325, 330, that on a contract for the delivery of specific articles which are pon-

derous or cumbrous, when it is not designated in the contract, and there is nothing in the condition and situation of the parties to determine the place of delivery, it is the privilege of the creditor to name a reasonable and suitable one; that the debtor should request the creditor to select the place, and if the creditor fails to do so, the debtor may appoint the place. In the case at bar a vessel was purchased on the eastern coast somewhere, to be delivered to the buyer in Portland. Had the defendant provided a suitable place at some dock or wharf, which could have been reached by the use of reasonable exertion, the delivery should have been made there. The purchaser, after notice, failing to provide a place, we think the seller would be justified in tendering a delivery at safe anchorage in the harbor. He should not be required to go to special expenses to himself to obtain a place at the wharf or upon the shore."

²⁷ *Kidder v. Flanders*, 73 N. H. 345, 61 Atl. 675.

or is about to elapse, and demand prompt performance.²⁸ Where the goods are at the time of the bargain in a deliverable state and capable of immediate delivery, the natural supposition is that immediate delivery is intended. In such a case a reasonable time for delivery would be a very short time.²⁹ Where the buyer is, by the terms of the contract, under a duty to take possession of the goods where they are, he also must perform his duty within a reasonable time.³⁰ What is a reasonable time is properly a question of fact. This is expressly so provided in the English Sale of Goods Act.³¹ The section covering the point was omitted in the American act,³² but apart from statute it states the correct rule;³³ though if the facts are undisputed and especially if only one inference can properly be drawn from them, the court may decide the question.³⁴

²⁸ In *Jones v. Gibbons*, 8 Ex. 920, it appeared that a seller contracted to deliver goods as required. It was held that the seller in order to rescind such a contract must give the buyer notice or make inquiry of the buyer whether the buyer intended to take the goods.

²⁹ *Ellis v. Thompson*, 3 M. & W. 445; *American Extract Co. v. Ryan*, 104 Ala. 267, 15 So. 807; *Stange v. Wilson*, 17 Mich. 342; *Bolton v. Riddle*, 35 Mich. 13; *Pope v. Terre Haute Car & Mfg. Co.*, 107 N. Y. 61, 13 N. E. 592; *Dennis v. Stoughton*, 55 Vt. 371; *Boyd v. Gunnison*, 14 W. Va. 1; *Greenbrier Lumber Co. v. Ward*, 36 W. Va. 573, 15 S. E. 89.

³⁰ *Blydenburgh v. Welsh*, Bald. 331, 3 Fed. Cas. 771; *Bolton v. Riddle*, 35 Mich. 13; *Mowry v. Kirk*, 19 Ohio St. 375; *Simmons v. Green*, 35 Ohio St. 104; *Zuck v. McClure*, 98 Pa. St. 541; *Cameron v. Wells*, 30 Vt. 633.

³¹ Section 56.

³² See, however, § 19, rule 3(2) (b).

³³ *Ellis v. Thompson*, 3 M. & W. 445; *American Extract Co. v. Ryan*, 104 Ala. 267, 15 So. 807; *Walden v.*

Murdock, 23 Cal. 540, 83 Am. Dec. 135; *Dubois v. Spinks*, 114 Cal. 289, 46 Pac. 95; *Woods v. Miller*, 55 Iowa, 168, 7 N. W. 484, 39 Am. Rep. 170; *Hill v. Hobart*, 16 Me. 164; *Derosia v. Winona, etc.*, R. Co., 18 Minn. 133; *Pinney v. Railroad Co.*, 19 Minn. 251; *New Jersey Furniture Co. v. Board of Education*, 58 N. J. L. 346, 35 Atl. 397; *Farr v. Swigart*, 13 Utah, 150, 44 Pac. 311; *Everett v. Taylor*, 14 Utah, 242, 47 Pac. 75; *White v. Pease*, 15 Utah, 170, 49 Pac. 416.

³⁴ *Averill v. Hedge*, 12 Conn. 424; *Howe v. Huntington*, 15 Me. 350; *Greene v. Dingley*, 24 Me. 131; *Wheeler v. Harrison*, 94 Md. 147, 50 Atl. 523; *Gilmore v. Wilbur*, 12 Pick. 120, 22 Am. Dec. 410; *Echols v. Railroad Co.*, 52 Miss. 610; *Morse v. Bellows*, 7 N. H. 549, 28 Am. Dec. 372; *Aymar v. Beers*, 7 Cow. 705, 17 Am. Dec. 538; *Hedges v. Hudson Riv. R. Co.*, 49 N. Y. 223; *Colt v. Owens*, 90 N. Y. 368; *Wright v. Bank of Metropolis*, 110 N. Y. 237, 18 N. E. 79, 1 L. R. A. 289, 6 Am. St. Rep. 356.

§ 452. Construction of agreements as to time of performance.—

Frequently the parties by their agreement specify a time when the contract is to be performed upon one or both sides. The terms of the agreement as to time may be exact or may be somewhat indefinite. If the terms are inexact the court must give them such construction as is reasonable under the particular circumstances. This will often involve a question of fact, and then the question should be left to the jury. A common mode of defining time of performance is by the use of such words as "immediately," "as soon as possible," "at once," "forthwith," "directly," "promptly," "all convenient speed." None of these terms have a meaning that can be reduced to hours or days, and in different cases they may mean different things, but they indicate at what time performance is expected with somewhat greater exactness than if no time were fixed.³⁵ The time may be fixed more exactly

³⁵ "Immediately." *Woods v. Miller*, 55 Iowa, 168, 7 N. W. 484, 39 Am. Rep. 170 (eight days too late); *Rhoades v. Coiton*, 90 Me. 453, 38 Atl. 367 (seventeen days too late); *Rommel v. Wingate*, 103 Mass. 327 (nine days too late). See also *McCormick Co. v. Brower*, 88 Iowa, 607, 55 N. W. 537; *Neldon v. Smith*, 36 N. J. L. 148. In the case last cited it was held that the word "immediate" might be explained by custom as meaning even so late a time as the next month. The word is construed in cases other than in the law of sales, in *Pybus v. Mitford*, 2 Lev. 75, 77; *Thompson v. Gibson*, 8 M. & W. 281; *Hoggins v. Gordon*, 3 Q. B. 466; *Alexiadi v. Robinson*, 2 F. & F. 679; *Webster v. Appleton*, 62 L. T. (N. S.) 704; *Reg. v. Berkshire Justices*, 4 Q. B. D. 469. "As soon as possible." *Atwood v. Emery*, 1 C. B. (N. S.) 110 (the construction was given that as soon as possible meant as soon as was possible to the seller, considering his particular situation. It seems this construction might be a true one in

some cases and not in others); *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. D. 670; *Egan v. Barclay Fibre Co.*, 61 Fed. Rep. 527; *Tufts v. McClure*, 40 Iowa, 317; *Childs v. Omaha Paraphernalia House*, Neb., 114 N. W. 941. "At once." *Fisher v. Boynton*, 87 Me. 395, 32 Atl. 995; *Lewis v. Hojer*, 16 N. Y. Suppl. 534 (sooner than a reasonable time); *Victor Safe Co. v. O'Neil*, 48 Wash. 176, 93 Pac. 214. See also *Reg. v. Rogers*, 3 Q. B. D. 33. "Forthwith." *Roberts v. Brett*, 11 H. L. C. 337 (not immediately, but within a reasonable time); *Burgess v. Boetefeur*, 7 M. & G. 481, 494 (with all possible celerity); *Kenney v. Hutchinson*, 6 M. & M. 134 (as soon as reasonably possible). See also *Hyde v. Watts*, 12 M. & W. 254; *Boyes v. Bluck*, 13 C. B. 652; *Hudson v. Hill*, 43 L. J. C. P. 273; *Furber v. Cobb*, 18 Q. B. D. 494; *Staunton v. Wood*, 16 Q. B. 638 (goods to be delivered "forthwith," price to be paid within "fourteen days"—forthwith held to mean less

by specifying a number of days, weeks, or months within which performance must take place; or by fixing a date. Sometimes the contract will provide that performance is to take place "about" a certain time. This word also must be construed with reference to the particular circumstances of the case.³⁶ The words "not later than," "on or before," or "before" a specified date are susceptible, on the other hand, of perfectly exact definition unless qualified.³⁷ The case is not so clear where performance is to be within a named period, or between two specified days, or until a specified day. The difficulty with these words is to decide whether the first or last day of the period, or both, are to be included.³⁸

than fourteen days); *Anderson v. Goff*, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34 (as soon as reasonably possible). "Directly." *Duncan v. Topham*, 8 C. B. 225 (sooner than a reasonable time, but not "instantly"). "Promptly." *Soper v. Creighton*, 93 Me. 564, 45 Atl. 840, 74 Am. St. Rep. 375 (shipment ordered by the seller from a distant place involving transit of a month, not compliance with order for "prompt shipment"); *Tobias v. Lissberger*, 105 N. Y. 404, 12 N. E. 13, 59 Am. Rep. 509 (means immediately, or at once). See also *Elliott v. Lord*, 48 L. T. (N. S.) 542. "All convenient speed." *Gill v. Browne*, 53 Fed. Rep. 394, 3 U. S. App. 333, 3 C. C. A. 573.

³⁶ See *Smiley v. Barker*, 83 Fed. Rep. 684, 55 U. S. App. 125, 28 C. C. A. 9; *Campbell Printing Press Co. v. Marsh*, 20 Colo. 22, 36 Pac. 799.

³⁷ In *Re Lockie*, 86 L. T. (N. S.) 388, the words "not later than June 30th" were held qualified by the words "due allowance being made for delays" for named reasons; "or for circumstances beyond the builders' control." As to "on or before," see *Harmon v. Owden*, 1 Ld. Raym. 620; *Wattnough v. Holgate*, 3 Lev. 293; *Hawley v. Simpson*, Cro. Eliz. 14;

Forest Oak SS. Co. v. Richard, 5 Comm. Cas. 105.

³⁸ "Until" or "till" is generally held to include the day named, but this construction is admitted to depend upon the circumstances of the case. *Anonymous*, 3 Leon. 211; *Wicker v. Norris* Cas. temp. Hard. 109 (Fol.); *Dakins v. Wagner*, 3 Dowl. 535; *Isaacs v. Royal Ins. Co.*, L. R. 5 Ex. 296. See also *Conway v. Smith Co.*, 6 Wyo. 327, 44 Pac. 940. And sometimes the last day has been held to be excluded, which seems the more natural meaning. *Nichols v. Ramsel*, 2 Mod. 280; *Rogers v. Davis*, 8 Ir. L. R. 399; *Kendall v. Kingsley*, 120 Mass. 94; *People v. Walker*, 17 N. Y. 502. "Unto" or from a "time or place" it is said, generally, but not necessarily excludes the time or place. *Halsey's Case*, Latch. 183; *Rex v. Gamlingay*, 3 T. R. 513; *Rex v. Knight*, 7 B. & C. 413. In *Newby v. Rogers*, 40 Ind. 9, "from the 15th to the 28th" was held to exclude both days, but in *Conawingo Co. v. Cunningham*, 75 Pa. St. 138, the contract performable "at any time from this date to Dec. 31st" was held to be satisfied by the performance on the latter date. "Between" two specified days excludes both days. *Agnew v. Fowler*, 1 Ir. C. L.

Generally where a number of days are given for performance, the first day is excluded from the count,³⁹ but the day on which the act is done is included.⁴⁰ This rule would, however, yield to circumstances if they showed a different intention.⁴¹ Where a number of days is specified, Sundays and holidays are included in the count;⁴² but if the final day falls on a Sunday or a holiday, the obligation is satisfied by performance on the following day.⁴³ The rule as to negotiable paper, that if the third day of grace falls on Sunday or a legal holiday presentment must be made on the preceding day, is exceptional and is due to the fact that these days are, as the name implies, an additional allowance by the way of favor, and not to be extended;⁴⁴ but if paper is payable without grace, it is not due until the following day, when by its terms the day of maturity would fall on a Sunday or holiday.⁴⁵ Month means calendar month as distinguished from lunar month.⁴⁶ Some ques-

Rep. 462; *Cook v. Gray*, 6 Ind. 335; *Atkins v. Boylston Ins. Co.*, 5 Met. 439, 39 Am. Dec. 692. So "between two places" excludes both. *Reg. v. Fisher*, 8 C. & P. 612. "By 8 February" fixed as the time on which an option given on February 7th was to terminate was held to include the later day. *Blalock v. Clark*, 133 N. C. 306, 45 S. E. 642.

³⁹ *Sheets v. Selden*, 2 Wall. 177, 189, 17 L. ed. 822; *Vogel v. State*, 107 Ind. 374, 8 N. E. 164; *Farwell v. Rogers*, 4 Cush. 460; *Seekonk v. Rehoboth*, 8 Cush. 371; *Bemis v. Leonard*, 118 Mass. 502, 19 Am. Rep. 470; *Clark v. Lancy*, 178 Mass. 460, 59 N. E. 1034; *Shelton v. Gillett*, 79 Mich. 173, 44 N. W. 428.

⁴⁰ *Pease v. Norton*, 6 Greenl. 229. And see 1 Daniel, *Negotiable Instruments*, § 426.

¹ *Lester v. Garland*, 15 Ves. 248. Referring to this case, Bayley, J., said, in *Hardy v. Ryle*, 9 B. & C. 603, 608: "All the authorities on the subject are reviewed by Sir W. Grant, who takes this distinction: That where the act done from which

the computation is made is one to which the party against whom the time runs is privy, the day of the act done may reasonably be included; but where it is one to which he is a stranger, it ought to be excluded."

⁴² *Brown v. Johnson*, 10 M. & W. 331; *Disney v. Furness*, 79 Fed. Rep. 810; *Salter v. Burt*, 20 Wend. 205, 32 Am. Dec. 530.

⁴³ *Stebbins v. Leowolf*, 3 Cush. 137; *Salter v. Burt*, 20 Wend. 205, 32 Am. Dec. 530.

⁴⁴ See 1 Daniel, *Negotiable Instruments*, § 627.

⁴⁵ 1 Daniel, *Negotiable Instruments*, § 627.

⁴⁶ This doubtless conforms to the intention of the parties and might not need statement were it not that early cases state a contrary rule. *Lacon v. Hooper*, 6 T. R. 224. They would not now, however, be followed. The English Sale of Goods Act provides, § 10 (2), that "month means *prima facie* calendar month." This provision was not preserved in the American statute, but doubtless ex-

tion has arisen in regard to the meaning of a condition requiring shipment in a certain month. An English case decided that such a stipulation is an ambiguous requirement and may mean either that shipment must be completed within the month named or that the shipment must be begun and ended within the month.⁴⁷ A later decision of the House of Lords, however, seems to overthrow the authority of the earlier decision and to hold that shipment during a specified month means, in the absence of special custom, as matter of law that the entire loading must be begun and ended during the month.⁴⁸ The condition governing the time of the seller's performance may be based on the time of the vessel's clearance. Identical principles are applicable.⁴⁹

§ 453. **Time of the essence of the contract.**—It is not a necessary consequence logically of the seller's failure to deliver the goods at the time when he was bound to deliver them that the buyer is freed from all obligation to take them. The failure of the seller to perform his duty necessarily gives the buyer a right of action, but whether such failure operates as a condition excusing the buyer from the performance of his obligation is another matter. So, conversely, if the buyer fails to pay the price on time, the question whether his delay excuses the seller altogether is distinct from the question whether a right of action arises in favor of the injured seller. The general rule of contracts is that a party is not excused by the other party's breach of contract unless the breach was material or essential; and in equity stipulations as to time in contracts for the sale of land are not regarded as essen-

presses the law. See *Webb v. Fairman*, 3 M. & W. 473; *Bruner v. Moore*, [1904] 1 Ch. 305; *Churchill v. Merchants' Bank*, 19 Pick. 532; *Leffingwell v. White*, 1 Johns. Cas. 99, 1 Am. Dec. 97. See also 1 Daniel, *Negotiable Instruments*, § 624.

⁴⁷ *Alexander v. Vanderzee*, L. R. 7 C. P. 530. The meaning to be attached to the words was left to the jury, who found that the cargo in question in the case was within the designation of June shipment, al-

though the loading was begun in the middle of May.

⁴⁸ *Bowes v. Shand*, 2 A. C. 455.

⁴⁹ *Thalmann v. Texas Star Mills*, 82 L. T. 833. In this case the contract contained the stipulation "clearance not later than May 31st." It was held that the condition was satisfied by the granting of a certificate of clearance before that date though the cargo was not completely loaded until June 2d. Compare *Kidston v. Monceau Iron Works Co.*, 18 Times L. R. 320.

tial. But it has been said that "to apply the equitable rule to mercantile contracts would be dangerous and unreasonable,"⁵⁰ and it is well settled that as a general rule in such contracts time is of the essence.⁵¹

§ 154. **Delivery of goods in possession of a third person.**—The question of what constitutes delivery has been somewhat confused by failing to distinguish between different kinds of cases where delivery is important. Cases under the Statute of Frauds ordinarily involve the meaning of the words "acceptance and actual receipt." It is quite possible that the requirement imposed by these words is more stringent than that required to satisfy other rules of law relating to delivery. Cases under the Statute of Frauds, therefore, while they may furnish an analogy elsewhere, should not be regarded as conclusive. It is also important to observe a distinction between the delivery which will satisfy the seller's duty to the buyer and the delivery which is necessary to protect the buyer against third persons. Since the seller must, in the absence of agreement to the contrary, put the buyer in possession of the goods, he can hardly be discharged from that obligation where the goods are in the possession of a third person by simply telling the buyer that they are there, or by notifying the bailee to deliver to the buyer. The bailee must assent to the request.⁵² It is not enough to discharge the seller that the bailee has become by operation of law the agent for the buyer. The buyer is entitled to have an agent who acknowledges his agency. Where, however, the question is whether there has been sufficient delivery to protect a buyer's rights against a seizure by the seller's creditors, or against subsequent purchasers, the result is otherwise. Unless the bailee is notified of the buyer's rights it is clear that there has been no sufficient delivery,⁵³ if by the local law delivery is

⁵⁰ Cotton, L. J., in *Reuter v. Sala*, 4 C. P. D. 239, 249.

⁵¹ The cases are collected *supra*, § 189.

⁵² *Buddle v. Green*, 27 L. J. Ex. 33; *Edwards v. Meadows*, 71 Ala. 42. This was an action by the seller for the price, and he was held not entitled to recover after merely giving

a delivery order to the buyer. See also *Barney v. Brown*, 2 Vt. 374, 19 Am. Dec. 720; *Spaulding v. Austin*, 2 Vt. 555.

⁵³ *Hallgarten v. Oldham*, 185 Mass. 1, 46 Am. Rep. 433; *Buhl Iron Works v. Teuton*, 67 Mich. 623, 629, 35 N. W. 804.

requisite against third persons.⁵⁴ But when the bailee has notice, whether he assents to the transfer or not, he is by operation of law bailee for the buyer. He cannot thereafter disregard the buyer's rights. A delivery to the original bailor would thereafter be a tort.⁵⁵ The bailee may indeed refuse to continue to hold for the buyer, but only by surrendering the goods to him. Accordingly, the Sales Act provides, what was aside from statute the law, that mere notice to the bailee protects the buyer.⁵⁶ It is sometimes said that the bailee may agree in advance that he will hold the goods for the buyer; and doubtless such an agreement may be made by the buyer with the bailee before the transfer of the property by the seller to the buyer; but no agreement by the bailee with the seller that the bailee will hold for the buyer can give the buyer himself a direct contract relation with the bailee under the rules of the common law,⁵⁷ and, therefore, cannot satisfy the seller's obligation to the buyer unless the buyer assents.⁵⁸ So far as creditors or subsequent purchasers are concerned, however, if the seller informed the bailee that a sale to a specific buyer was about to be made, and the sale thereafter was made, it seems that such notice to the bailee would be as operative as if given by the purchaser himself. As has been seen, notification by the purchaser to the bailee is enough, since on receiving notice the bailee must hold for the buyer. Where the notice is given by the seller either before or after the sale, the same consequences should follow. But the mere fact that the bailee knows that a sale to some unspecified person was likely to be made, or might be made, and the assent of the bailee to any sale that the bailor might choose to make, might well be held insufficient.

⁵⁴ As to this see §§ 25, 26, and *supra*, § 352 *et seq.*

⁵⁵ See *supra*, § 421.

⁵⁶ *Hodges v. Hurd*, 47 Ill. 363; *Carter v. Willard*, 19 Pick. 1; *Dempsey v. Gardner*, 127 Mass. 381, 34 Am. Rep. 389; *Buhl Iron Works v. Teuton*, 67 Mich. 623, 631, 35 N. W. 804; *Freiberg v. Steenbock*, 54 Minn. 509, 56 N. W. 175.

⁵⁷ See *supra*, § 426.

⁵⁸ The case of *Salter v. Woolfams*, 2 M. & G. 650, is often cited for the

proposition that the bailee may at-torn in advance, but the case does not necessarily involve this point. The decision might well have been reached on the ground on which it was put by Erskine, J., that the seller "only agreed to give the purchaser the full legal authority to remove the hay, and that he has done." In so far as the case goes beyond this, the criticism in Benjamin, *Sale* (5th Eng. ed.), p. 692, seems sound.

§ 455. **Hour of delivery.**—The rules stated by the Sales Act, that the hour must be reasonable, and that what is reasonable is a question of fact, are clearly sound and might not need statement, were it not that in the early cases on obligations technical rules in regard to midnight and sunset had been stated. These rules were summed up by Baron Parke.⁵⁹ It is probably better, however, at least so far as the law of sales is concerned, to avoid any attempt to reduce to a rule of law what is a reasonable hour. The question should be treated as one of fact,⁶⁰ and the nature of the business and the customs of the place will be of great importance in deciding the question correctly.⁶¹

⁵⁹ *Startup v. Macdonald*, 6 M. & G. 593: "A party who is by contract to pay money, or to do another thing *transitory*, i. e.—anywhere—on a certain day, or on one of several days, has the whole of that day, or of all of the days, respectively, for performance. He must find the other at his peril (*Kidwelly v. Brand*, [1551] Plowden, 71), and within the time limited, if the other be within the four seas (*Shep. Touch.* 136), and must do all that, without the concurrence of the other, he can do, and at a convenient time, having regard to the nature of the act, *before midnight*. 'Therefore, if he is to pay a sum of money, he must tender it a sufficient time before midnight for the party to whom the tender is made to receive and count; or if he is to deliver goods, he must tender them so as to allow sufficient time for examination and receipt. * * * But where the thing to be done is to be performed *at a certain place* on or before a certain day to another party to a contract, there the tender must be to the other party *at that place*;' and as the attendance of that party at that place is necessary to complete the act, the law fixes a particular part of the day for his presence, and 'it is enough if he be at the place at such

a convenient time *before sunset* on the last day as that the act may be completed by daylight.' But this being a rule made only for the convenience of both parties, 'if it happen that both parties meet at the place at any other time of the last day, or upon any other day within the time limited, and a tender is made, the tender is good.' See 7 Bac. Abr. 529; 'Tender,' D.; Co. Lit. 202a, 211; 5 Co. Rep. 114; Cro. Eliz. 14."

⁶⁰ See *supra*, § 451.

⁶¹ In *Berry v. Nall*, 54 Ala. 446, a contract to buy cotton was in suit. A demand by the buyer on the last day within the period in which demand could be made, one-half an hour after sunset, was held sufficient if enough time before midnight remained for the cotton to be delivered without danger of loss. It may be doubted if this case would be followed if the seller were a city merchant with regular business hours. In *Croninger v. Crocker*, 62 N. Y. 151, a tender of wool at ten o'clock in the evening of the last day for performance was held insufficient in view of the fact that the wool was stored in a warehouse to which the owner refused admission at that hour because of condition in his insurance contracts. In *Catlin v. Jones*, 48 Or. 158, 85 Pac. 515, a con-

§ 456. **The seller must put the goods in deliverable condition.**—The provision of the Sales Act⁶² throwing upon the seller the expense of putting the goods in a deliverable state is copied from the English Sale of Goods Act,⁶³ which in turn seems to have taken it from the French Civil Code.⁶⁴ The provision is declaratory of the law and seems to be a necessary consequence of the duty of the seller to deliver the goods bargained for.

§ 457. **Notice.**—In order for either buyer or seller to put the other party in default, it is often necessary that notice of some fact be given. This necessity is sometimes due to an express condition in the contract.⁶⁵ In other cases the condition though not expressed in words is necessarily involved in the agreement. What may be called a condition implied in fact in such a case qualifies the promise. Accordingly if the seller agrees to deliver on the buyer's ship when it is ready to receive the goods, notice to the seller that the ship is ready to receive them is a condition precedent to the seller's obligation.⁶⁶ So in cases where the seller has by the terms of the contract an option as to time or place of performance by the seller, it is a condition qualifying the seller's obligation that the buyer shall have given notice of his choice.⁶⁷ Conversely if the buyer is to take goods

tract for the sale of hops required delivery to be made on a certain day. It was held incumbent upon the seller to make delivery at such a time of day that the purchaser might have an opportunity to inspect the hops by daylight.

⁶² Section 43 (5).

⁶³ Section 29.

⁶⁴ Art. 1608. See also *Story, Sale*, § 297 (a).

⁶⁵ *Henkle v. Smith*, 21 Ill. 238; *Empire State Phosphate Co. v. Heller*, 61 Fed. Rep. 280.

⁶⁶ *Armitage v. Insole*, 14 Q. B. 728, cited and followed in *Davis v. Columbia Coal Mining Co.*, 170 Mass. 391, 49 N. E. 629; *Hughes v. Knott*, 138 N. C. 105, 50 S. E. 586. See also *Sutherland v. Allhusen*, 14 L. T. 666; *Stanton v. Austin*, L. R. 7 C. P. 651; *Dwight v. Eckert*, 117 Pa. St. 490, 12 Atl. 32. In *Pinkham v. Haynes*, 103 Me. 112, 68 Atl. 642.

the sellers agreed to deliver potatoes on board cars to be furnished by the buyer "on or before" a certain date. It was held that the sellers were entitled to such notice of the arrival of the cars as would enable them with reasonable diligence to load the potatoes, and not having received such notice were freed from their obligation to deliver any potatoes.

⁶⁷ *Dingley v. Oler*, 117 U. S. 490, 6 S. Ct. 850, 29 L. ed. 984; *Colvin v. Weedman*, 50 Ill. 311; *Posey v. Scales*, 55 Ind. 282; *Bell v. Hatfield*, 121 Ky. 560, 89 S. W. 544, 2 L. R. A. (N. S.) 529; *Harrow Spring Co. v. Whipple Harrow Co.*, 90 Mich. 147, 51 N. W. 197; *Hunter v. Wetsell*, 84 N. Y. 549, 38 Am. Rep. 544; *Lockhart v. Bonsall*, 77 Pa. St. 53; *Hocking v. Hamilton*, 158 Pa. St. 107, 27 Atl. 836. See also *Lincoln v. Gallagher*, 79 Me. 189, stated *supra*, § 450.

when the seller has manufactured them or made them ready for delivery, the buyer's obligation to take the goods is qualified by the condition that notice of the completion of the goods be given.⁶⁸ The general requirement to which allusion has already been made⁶⁹ that, where delivery and acceptance are concurrent conditions, it is essential that either party in order to obtain a right of action against the other shall make demand and accompany his demand with an offer to perform (or, what amounts to the same thing, give notice of his readiness and willingness to proceed with the performance of the contract), is an illustration of the same principle. For since neither party is bound to perform before the other, in the nature of the case notice by one party to the other of his readiness to perform is essential. And in any case where the obligation to perform by either party depends upon some option to be exercised by the other, notice must be given of the exercise of the option.⁷⁰ In such cases as these, the knowledge which is requisite for the performance of the contract can come only from the other party. In other cases the promise of buyer or seller may be conditional upon the happening of an event, which cannot readily be ascertained by the promisor, and which is within the knowledge of the promisee. Here too, although the fact of which notice must be given does not rest solely in the knowledge or upon the will of the promisee, he must give notice.⁷¹ Such a condition is rather imposed by law for the ends of justice than agreed upon by the parties. The rule has thus been stated: "Where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him."⁷² Generally where the buyer

⁶⁸ *Bliss v. United States Gaslight Co.*, 149 N. Y. 300, 43 N. E. 859; *Cullum v. Wagstaff*, 48 Pa. St. 300.

⁶⁹ See *supra*, §§ 447, 448.

⁷⁰ Thus where a horse was sold with a warranty and an agreement on the part of the vendor to replace him or to return the notes given him if the stipulation of the warranty was not fulfilled, the seller is entitled to

notice of the breach of such stipulations. *Beckett v. Gridley*, 67 Minn. 37, 69 N. W. 622.

⁷¹ This principle was early recognized in cases on bonds: *Cole's Case*, Cro. Eliz. 97; *Haverleigh v. Leighton*, Jenk. Cent. 311; *Gable v. Moss*, 1 Bulstr. 44; *Holmes v. Twist*, Hob. 51; *Henning's Case*, Cro. Jac. 132.

⁷² *Abinger, C. B., in Vyse v. Wake-*

or seller is entitled to notice before performing, the notice is not simply a condition qualifying his obligation but it is also a legal duty of the other party to give such notice within a reasonable time. Accordingly if the notice is not given, not simply is the party who should receive it excused from performing but he has a right of action against the party who should have given it.⁷³

§ 458. Effect of delivering wrong quantity — Provisions of the Sales Act.—

Sec. 44. DELIVERY OF WRONG QUANTITY.—

(1.) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell; the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received.

(2.) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the

field, 6 M. & W. 442. Thus in *Henning's Case*, Cro. Jac. 432, the seller sold barley to be paid for at as much as he could sell to any other man. It was held that he could not sue the buyer for the price without giving notice of what he had sold to others. The common rule that a lessor under obligation to repair is entitled to notice of lack of repair unless he has a right to enter and view the premises rests on the same principle. *Makin v. Watkinson*, L. R. 6 Ex. 25; *London, etc., Ry. Co. v. Flower*, 1 C. P. D. 77; *Manchester Warehouse Co. v. Carr*, 5 C. P. D. 507; *National Tar Co. v. Malden Gaslight Co.*, 189 Mass. 234; *Thomas v. Kingsland*, 12 Daly, 315; *Sinton v. Butler*, 40 Ohio St. 158. And see further on the general principle, *Phoenix*

Ins. Co. v. Doster, 106 U. S. 30, 27 L. ed. 65; *Spooner v. Baxter*, 16 Pick. 409; *McLean v. Republic Fire Ins. Co.*, 3 Lans. 421; *Genesee College v. Dodge*, 26 N. Y. 213.

⁷³ *Kingman v. Hanna Wagon Co.*, 176 Ill. 545, 52 N. E. 328. The seller agreed to sell a large number of wagons to be delivered monthly "as ordered" by the buyer. The failure by the buyer to order the number specified in the contract was held to give the seller a right of action without the necessity of making tender. So in *Weill v. American Metal Co.*, 182 Ill. 128, 54 N. E. 1050, when goods were to be shipped as directed by the buyer, and the seller sent for directions, the failure of the buyer to send such directions was held a breach of contract.

whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3.) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4.) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

This section is borrowed from section 30 of the English statute with some changes,⁷⁴ the reason for which will appear in the following discussion.

§ 459. **Obligation in regard to quantity—General considerations.**—A difference in quantity from that ordered or contracted for by the buyer may become important in several ways, which it is desirable to distinguish. In the first place the buyer may have ordered a specified quantity of goods. Such an order is, in legal effect, an offer; and shipment of a different quantity cannot be an acceptance of that offer, for the rule in regard to the formation of contracts not only of sale, but of all kinds, is that the terms of an offer must be strictly complied with in order to form a contract.⁷⁵ Secondly, defects in quantity may be important in considering the seller's liability under a contract by which the seller has agreed to deliver a specified quantity. It is this case that is primarily considered in section 44 of the Sales Act. Any decision, however, to the effect that delivery of the wrong quantity does not satisfy the seller's obligation under a contract *a fortiori* shows that such defective performance would not amount to an acceptance of an offer. It is a third and an entirely different question, however, whether defective performance of his contract by the seller justifies the buyer in terminating it altogether. It might be urged as to this question that if the defect was slight in comparison with the amount involved in the contract, the buyer should be compelled to accept the defective

⁷⁴ In subsection (1), the last sentence is not contained in the English act, nor are the words in the first sentence "knowing that the seller is

not going to perform the contract in full."

⁷⁵ See Wald's Pollock, Contracts (3d Am. ed.), p. 43.

performance and rely upon his claim for damages, under the rule of contracts that where a breach does not go to the essence, the injured party cannot refuse to go on with the contract but must seek redress in damages. The cases about to be cited, the authority of which was accepted in the provisions of the Sales Act, show, however, that a defect in quantity is a breach going to the essence, and that the buyer, except under special circumstances of custom or contract, cannot be compelled to accept a quantity different from that for which he bargained. This is not saying, however, that a tender of a defective quantity in every case justifies the buyer in immediately renouncing all obligation under the contract; on the contrary, though the buyer may refuse the defective tender, it seems that if a proper tender is thereafter made within such limit of time as satisfies the terms of the contract, the buyer is bound to accept.⁷⁶ One qualification should, however, be observed; the original defective tender may be made under such circumstances as to warrant the buyer in believing that the tender thus made is the only one that will be made. Under such circumstances the buyer would be justified

⁷⁶ In *Borrowman v. Free*, 4 Q. B. D. 500, the contract called for a cargo of maize, the bill of lading to be dated between the 15th of May and the 30th of June. The cargo of one vessel was offered, but, because shipping documents did not arrive, arbitrators held the buyer not bound to accept performance. Thereafter the sellers tendered a bill of lading dated the 24th of June, and it was held that this tender satisfied the seller's obligation. So in *Tetley v. Shand*, 20 Wkly. Rep. 206, there was a contract to sell cotton of June shipment. Cotton of May shipment was tendered first, but it was held the seller might still within a reasonable time tender cotton of June shipment. See also *Ashmore v. Cox*, [1899] 1 Q. B. 436, 440. These cases do not relate to defects in quantity, but if a tender defective in any essential respect may be cured by a subsequent correct tender, it

necessarily follows that this rule must apply to tenders defective because of the improper quantity of goods. This was so held in *Whitla v. Moore*, 164 Pa. St. 451, 30 Atl. 257. A contract had been made to sell \$10,000 worth of the seller's stock of goods. The seller had a larger stock, and it was a part of the agreement that the stock should be reduced to an amount of that value by the day fixed for the completion of the bargain. This had not been done and the buyer refused to take the goods. The seller thereupon offered to remove the excess, or to sell it on credit. The defendant was held liable for refusing to go on with the bargain. The original defective tender was cured by the offer promptly to make a proper one. Compare *Jefferson v. Querner*, 30 L. T. (N. S.) 867; *Bell v. Hoffman*, 92 N. C. 273.

in securing the goods he needed elsewhere, or in otherwise changing his position. Should he do this a subsequent correct tender by the seller, even though within a time in itself proper, need not be accepted.⁷⁷ The particular cases that arise under the provision of section 44 of the Sales Act may now be considered in detail.

§ 460. **Delivery of too small a quantity.**—Where the seller is under a contract to deliver a specific quantity of goods and tenders a smaller quantity, the buyer may reject the tender.⁷⁸ The buyer may, however, accept the offer though defective.⁷⁹ In so doing he enters into a new contract. The offer of a quantity not contracted for is a manifestation of the seller's willingness to sell that quantity. The terms of this new contract, if nothing is said, are identical with the terms of the original bargain, except as to quantity. If, therefore, the original bargain provided for a lump price, it would seem that the buyer, if he accepted the goods, would become liable for that price. If, however, the original contract provided for payment by number, weight, or measure, the buyer would become liable to pay at this rate for the quantity of goods actually received.⁸⁰ But in case the seller's obligation is either by its terms or by the buyer's permission performable in instalments it may happen that the buyer, not supposing the seller is going to be guilty of a breach of contract, accepts one or more instalments, assuming that the rest are to follow. If the buyer was to pay a lump price after all the instalments had been delivered, it is obvious that the acceptance of the early instalments could not bind the buyer to pay the agreed price; delivery of the later instalments would be a condition precedent to the buyer's obligation.⁸¹ Even if the price of each instalment was payable separately, the buyer should have relief. It is true that his acceptance of a part indicates an assent to take title to the goods

⁷⁷ *Hallwood Cash Register Co. v Lufkin*, 179 Mass. 143, 60 N. E. 473.

⁷⁸ *Norrington v. Wright*, 115 U. S. 188, 6 S. Ct. 12, 29 L. ed. 366; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 30 L. ed. 920; *Churchill v. Holton*, 38 Minn. 519, 38 N. W. 611; *Hill v. Heller*, 27 Hun, 416; *Inman v. Elk Cotton Mills*, 116 Tenn. 141, 92 S. W. 760.

⁷⁹ *Norrington v. Wright*, 115 U. S. 188, 205, 6 S. Ct. 12, 29 L. ed. 366.

⁸⁰ *Morgan v. Gath*, 3 H. & C. 748; *Avery v. Willson*, 81 N. Y. 341, 37 Am. Rep. 503.

⁸¹ *Oxendale v. Wetherell*, 9 B. & C. 386, 387; *Waddington v. Oliver*, 2 B. & P. (N. S.) 61; *Colonial Ins. Co. v. Adelaide Ins. Co.*, 12 A. C. 128, 138, 140.

offered, and to pay for them at the contract rate, but this assent was given in the justifiable expectation of receiving an additional quantity of goods. The buyer may, therefore, on finding out that the contract is not going to be fully performed by the seller, return the goods in his possession and refuse to pay the price, if not already paid, and, if already paid, recover it back.⁸² If, however, the buyer when he accepts the partial delivery is aware that the seller proposes to make no other delivery, it is clear that the buyer should pay for the goods; and, similarly, if he retains them after he knows that no future delivery is to be made, even though at the time the partial delivery was accepted the buyer had no reason to suppose the contract was not to be performed. If the contract is divisible and a price is, therefore, due according to the terms of the contract for what has been delivered and accepted, there can be no doubt of the seller's right to recover the price fixed by the contract.⁸³ It may, however, be supposed that the contract was entire and that no part of the price was due until full performance by the seller. Even in such a case, if the buyer accepted a portion of the goods knowing that no more were to be delivered, there is no difficulty in finding a real contract to pay for them, as distinguished from a *quasi-contractual* obligation, since the partial delivery was in effect a new offer. But if the deficient quantity of the goods were delivered under such circumstances that the buyer was not aware that full delivery would not be made, no new contract can be said to have been agreed to by the buyer. Here accordingly, if the seller recovers payment for what he has furnished, it must be on principles of *quasi-contract*. It is true that it has often been laid down that a contract will not be implied by the law in favor of one who is in default under an express contract, but the injustice of allowing the seller to retain the benefit of goods without paying for them is so clear that even in England, where *quasi-contractual* rights are generally

⁸² Benjamin, Sale (5th Eng. ed.), 697; Polhemus v. Heiman, 45 Cal. 573.

⁸³ Bowker v. Hoyt, 18 Pick. 555. The court held in this case that retention of the goods after knowledge of the seller's default made the buyer liable for the contract price; but the

buyer, it was said, might recoup the damages that he suffered from the seller's failure to completely fulfil his contract. As to the question of the seller's liability where incomplete performance has been accepted, see *infra*, § 485 *et seq.*

most strictly limited, recovery has been allowed,⁸⁴ and the weight of authority in this country strongly supports this view;⁸⁵ but in New York by a long series of decisions the seller is denied relief.⁸⁶ The New York view has been accepted in a few other States.⁸⁷ The measure of damages in such an action is not necessarily the contract price even if the contract fixes a price by number, weight, or measure. If the buyer retained the goods, having it in his power to redeliver them after he knew that the seller was going to make default in delivering the whole amount, it seems just that the buyer should pay the contract price. This result seems supported by the decisions which hold the buyer liable under such circumstances. It is commonly said that the retention operates as a severance of the contract.⁸⁸ The buyer, however, may in good faith have dealt with the goods in such a way as to make it impossible for him to return them, and yet the value of the portion received may not be so large a proportion of the total price as the goods are of the total amount of goods which should have been delivered. As the buyer's obligation is imposed by law, the extent of it should be restricted to the benefit which the defendant has received. The seller, being a wrongdoer in failing to deliver the whole amount, can certainly claim no more than

⁸⁴ *Oxendale v. Wetherell*, 9 B. & C. 386. In this case the plaintiff delivered 130 bushels of wheat and though he was bound to deliver 250 bushels and failed to deliver the residue, the court held that after the expiration of the time within which delivery should by the contract have been made, recovery could be had for the 130 bushels. Parke, J., said: "If the buyer retained the part delivered after the seller had failed in performing his contract, the latter may recover the value of the goods which he so delivered."

⁸⁵ *Richards v. Shaw*, 67 Ill. 222; *Holden Mill v. Westervelt*, 67 Me. 446; *Rodman v. Guilford*, 112 Mass. 405; *Hedden v. Roberts*, 134 Mass. 38, 45 Am. Rep. 276; *Clark v. Moore*, 3 Mich. 55; *Shaw v. Badger*, 12 S. & R. 275.

⁸⁶ *Champlin v. Rowley*, 13 Wend. 258, 18 Wend. 187; *Mead v. Degolyer*, 16 Wend. 632; *Baker v. Higgins*, 21 N. Y. 397; *Catlin v. Tobias*, 26 N. Y. 217, 84 Am. Dec. 183; *Kein v. Tupper*, 52 N. Y. 550; *Nightingale v. Eiseman*, 121 N. Y. 288, 24 N. E. 475. If there are any facts tending to show waiver or prevention of full performance, the New York court is quick to seize upon these facts as a ground of liability. *Avery v. Willson*, 81 N. Y. 341, 37 Am. Rep. 503; *Brady v. Cassidy*, 145 N. Y. 171, 39 N. E. 814.

⁸⁷ *Haslack v. Mayers*, 26 N. J. L. 284; *Witherow v. Witherow*, 16 Ohio St. 238.

⁸⁸ See cases cited in note 85, *supra*.

this; and so it is provided in the section of the Sales Act under consideration. Though it has been seen the buyer may accept the smaller quantity offered him, he has, it seems, no right to accept a portion only of this amount. If he does so, his action amounts to a new offer to the seller to purchase the partial quantity.

§ 461. **Delivery of too large a quantity.**—Where the seller delivers or offers to deliver a quantity larger than that ordered or contracted for, it may conceivably be supposed that the seller is making his offer merely in lieu of the smaller quantity, and to make sure of the sufficiency of the offer, but not expecting to be paid for more than the order or contract required. In such a case the buyer would ordinarily have no just ground of objection.⁸⁹ This supposition is much more natural where the order or contract fixes a lump price than where the price is to be determined by the number, weight, or measure of the goods. In a case of the latter sort, at least if more than a slight difference exists, the buyer would not be justified in assuming that the seller was offering him all the goods for the price of the quantity ordered or contracted for. Accordingly, the offer of the larger quantity must be regarded as a new offer by the seller. The buyer may accept this offer and by so doing make himself liable for the price of all the goods. He may, however, decline to do this. Usually an offer can be accepted only in one way, but in this case it seems reasonable to suppose that the seller is willing to have the buyer separate from the goods sent such a quantity as was ordered or contracted for, and reject the rest. Accordingly, the buyer may do this.⁹⁰ The buyer may, however, reject the offer altogether. It may seem that this rule is harsh; for since the buyer is justified in regarding the seller's offer as not merely an offer of the whole or none, but also as an offer of the portion ordered or contracted for, the rest being rejected, the only burden thrown upon the buyer, if the offer were regarded as a legal tender of performance by the seller, would be the trouble of separating

⁸⁹ *Shrimpton v. Warmack*, 72 Miss. 208, 16 So. 494; *Downer v. Thompson*, 6 Hill, 208.

⁹⁰ *Martz v. Putnam*, 117 Ind. 392, 20 N. E. 270; *Rommel v. Wingate*,

103 Mass. 327; *Iron Cliffs Co. v. Buhl*, 42 Mich. 86, 3 N. W. 269; *Downer v. Thompson*, 2 Hill, 137, 6 Hill, 208.

the correct quantity from the remainder. A special reason may perhaps exist for the rule allowing the seller to reject, namely, that the chance of dispute with the seller in regard to the quantity or the correctness of the buyer's separation is such that the buyer ought not to be compelled to assume the chance against his will. Whatever the reason for the rule, the provision of the Sales Act allowing the buyer to reject the offer expresses the well-established law.⁹¹ Nor is the buyer obliged to accept as a satisfaction of what is due him a tenancy of a larger mass in common with others.⁹² The right of the buyer to refuse to assume the burden of severance or to be a tenant in common with others may readily yield to evidence of a course of dealing between the parties, or of a general custom of trade. It is in regard to cases of this sort that provision of the Sales Act⁹³ making provisions of the section subject to usage, special agreement, or course of dealing is particularly important.⁹⁴ Unless the seller's offer can be construed as an offer of the larger quantity of goods for the price agreed upon for the smaller quantity, the buyer, if he accepts the offer of all the goods, must pay for them all. Taking the goods when he knew, or ought to have known, that they exceeded in amount what were ordered or contracted for, is sufficient evidence of assent. The obligation is, therefore, contractual, not *quasi-contractual*. If, by the terms of the original contract or order, the price of the goods was based on their number, weight, or measure, the same rate must be paid for the larger quantity.⁹⁵ If, however, a lump price was fixed for the smaller quantity, the terms of the agreement in regard to the larger quantity must be that the fair value shall be paid.⁹⁶

§ 462. **Delivery of goods mixed with others.**—Closely analogous to the question discussed in the preceding section is that which

⁹¹ *Cunliffe v. Harrison*, 6 Ex. 903; *Reuter v. Sala*, 4 C. P. D. 239; *Norington v. Wright*, 115 U. S. 188, 205, 6 S. Ct. 12, 29 L. ed. 366; *Rommel v. Wingate*, 103 Mass. 327; *Perry v. Mt. Hope Iron Co.*, 16 R. I. 318, 15 Atl. 87; *Barton v. Kane*, 17 Wis. 37, 84 Am. Dec. 728.

⁹² *Bostock v. Jardine*, 3 H. & C. 700.

⁹³ Section 44 (4).

⁹⁴ See *infra*, § 156.

⁹⁵ *Bedell v. Kowalsky*, 99 Cal. 236, 33 Pac. 904.

⁹⁶ *Shipton v. Casson*, 5 B. & C. 378, 383. The court was speaking of a case of delivery defective in respect to the quality of the goods, but the principle seems the same, whether the defect is in quantity or quality.

arises when the buyer's offer is of goods which the contract or order called for mingled with other goods of a different kind. What has been said in the previous section is applicable here too. The circumstances of the offer might show that the seller was offering all the goods for the price specified in the contract or order for part of them. The only ground for rejection of such an offer by the buyer is that the difficulty of separation exceeded the value of the added goods.⁹⁷ If the seller's offer cannot, as it usually cannot, be interpreted as an offer of the whole for the price of the proper goods, the buyer cannot be required to separate the two kinds of goods.⁹⁸ Instead of rejecting the offer altogether the buyer may, if he wishes, assume the burden of separation, if the terms of the contract or the circumstances of the case do not show unwillingness of the seller to permit a severance.⁹⁹ But even though a separate price be fixed for each article, the buyer is not bound thus to take a portion only of the goods which he ordered.¹

§ 463. **The preceding rules may be controlled by usage or agreement.**—Under modern methods of doing business, especially in regard to such fungible goods as grain and oil, and other commodities which are dealt with in the same way, it is very common to mingle goods of different owners and to substitute a tenancy in common in a mass for ownership of the whole of a specified quantity.² Where such methods of business prevail, it would be a natural consequence that a tender of a right in a mass would be a good delivery. In grain markets, for instance, the tender of a warehouse receipt for a certain number of bushels would undoubtedly be a good tender by one bound to deliver so many bushels of wheat, though the grain was mingled in an elevator with grain of

⁹⁷ Thus a contract for 100 bushels of wheat would not be satisfied by a larger quantity of wheat mixed with other substances; but a contract for a dozen books of a particular kind would, it seems, be satisfied by the delivery of the required books with another one of a different sort thrown in.

⁹⁸ *Dixon v. Fletcher*, 3 M. & W. 146; *Levy v. Green*, 8 E. & B. 575,

1 E. & E. 969; *Rylands v. Kreitman*, 19 C. B. (N. S.) 351; *Nicholson v. Bradfield Union*, L. R. 1 Q. B. 620; *Clark v. Baker*, 11 Metc. (Mass.) 186, 45 Am. Dec. 199; *Hoffman v. King*, 58 Wis. 314, 17 N. W. 136.

⁹⁹ See *infra*, § 493.

¹ *Sun Publishing Co. v. Minnesota Foundry Co.*, 22 Or. 49, 29 Pac. 6.

² See *supra*, § 154.

other owners. Other cases not so obvious as this, but depending upon the same principle, are collected in the note.³

§ 464. **Construction of agreement in regard to quantity.**—A contract to sell or sale of goods may exactly define the quantity to be sold, or the terms used may be somewhat indefinite. Even though the goods to be sold are specific, the contract or sale may be accompanied by either an estimate or a warranty that the goods are of

³ In *Johnson v. Kershaw*, L. R. 2 Ex. 82, the defendant at Liverpool had ordered of the plaintiff at Pernambuco 100 bales of cotton of specified quality. Acting on this order the plaintiff bought and paid for ninety-four bales of the specified cotton. It was a reasonable inference that he had accomplished all that was practicable. The defendant refused to pay, but was held liable on the ground that the order must be construed with reference to the state of the market. In *Ireland v. Livingston*, L. R. 2 Q. B. 99, the facts were very similar. The purchase of 500 tons of sugar had been ordered at Mauritius. So large a quantity could not be produced at once, and the seller was purchasing, from time to time, as it was possible, and had obtained 400 tons when prices rose and the defendant countermanded it. It was held that the order must have been given with reference to the Mauritius market, and the defendant was liable for each lot of sugar as it was bought. In *Brownfield v. Johnston*, 128 Pa. St. 254, 18 Atl. 543, 6 L. R. A. 48, the defendants had ordered 400 hectoliters of Brazil nuts to be shipped by the plaintiffs from Brazil. The plaintiffs, on receiving the order, bought two lots of Brazil nuts at different prices and amounting in all to 582 hectoliters. The nuts were mingled and shipped to New York. The defendants, on finding the quantity on board, refused to accept any. The

plaintiffs made several offers to the defendants, either all the nuts or 400 hectoliters at the invoice price, or at the average cost of the two lots which the plaintiffs had bought. Finally the plaintiffs separated 400 hectoliters and offered them. All these offers were refused; but the court held the defendant liable. The court said: "That in view of the methods of business and that the nuts were all of the same sort, and that the separation of 400 hectoliters was not burdensome or expensive, that when the nuts were delivered on board the *Portuense* at Para, the title to 400-482 of the bulk belonged to the defendants, and that upon the arrival of the vessel at New York the tender of the 582 hectoliters from which the defendants were invited to take their share was a good delivery." In *McHenry v. Bulifant*, 207 Pa. St. 15, thirteen cars of fruit were shipped from California to Philadelphia in accordance with a contract. By the terms of the contract it was not only the duty of the seller to ship the goods from California in good and merchantable condition, but also to deliver them in such condition. The crates in one of the cars were changed in transit so that a small portion of the fruit was not in good condition on its arrival. It was held that this was not such a noncompliance with the contract as to justify a refusal on the part of the purchasers to receive the fruit.

a certain number, weight, or measure. Such an estimate or warranty may be exactly defined or may be qualified by such words as "about," "more or less," or "nearly." The considerations applicable to the use of such qualifying words have been summed up in a passage often quoted from an opinion of Bradley, J., of the Supreme Court of the United States.⁴ "Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualifications of 'about' or 'more or less,' or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it. In such cases, the governing rule is somewhat analogous to that which is applied in the description of lands, where natural boundaries and monuments control courses and distances and estimates of quantity.⁵ But when no such independent circumstances are referred

⁴ *Brawley v. United States*, 96 U. S. 168, 171, 24 L. ed. 622.

⁵ This was approved in *Steel Co. v. Tancred*, 26 Sc. L. Rep. 305. See also *Tancred v. Steel Co.* of Scotland, 15 A. C. 125. And the principle is illustrated in *McLay v. Perry*, 44 L. T. (N. S.) 152 (where the contract was for "all iron contained in the seller's yard, about 150 tons." The last three words were held words of estimate only and a delivery of forty-four tons only, being all the iron in the yard, was not a breach of contract); *Robinson v. Noble*, 8 Pet. 181, 8 L. ed. 910 (where the contract was to transport certain stores supposed to amount to about 3,700 barrels. This was held not to amount to a warranty and the delivery of 3,105 barrels being all the stores was a fulfilment of the contract). See also *Pine River Log-*

ging Co. v. United States, 186 U. S. 279, 288, 22 S. Ct. 920, 46 L. ed. 1164; *Navassa Co. v. Commercial Co.*, 93 Ga. 92, 18 S. E. 1000; *Morris v. Wibaux*, 47 Ill. App. 630; *Day v. Cross*, 59 Tex. 595; *Rib River Lumber Co. v. Ogilvie*, 113 Wis. 482, 89 N. W. 483. It is submitted, however, that the statement quoted in the text is somewhat too broad and can at most be regarded only as a rule of presumption. If a seller of specific goods positively states, as an inducement to a buyer to purchase them, that the lot contains a certain amount, and relying upon this statement the buyer makes the purchases, it seems clear that the statement amounts to a warranty; and though the statement is qualified by the words "about" or "more or less," the statement should still be regarded as a warranty, the only dif-

to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words, 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight.⁶ If, however, the qualifying words are sup-

ference being that the amount warranted would be subject to moderate variation from the amount stated. In *Tilden v. Rosenthal*, 41 Ill. 385, 89 Am. Dec. 388, the seller in performance of a contract expressed to be for the sale of "262 head, more or less" of cattle, being "the McCoy and Bishop lot," offered 178 head. This was held not a performance of the contract. The case is cited with approval in *Bloomington v. Hewitt*, 40 N. Y. App. Div. 208, 58 N. Y. Suppl. 9.

⁶This was quoted with approval and followed in *Norrington v. Wright*, 115 U. S. 188, 204, 6 S. Ct. 12, 29 L. ed. 366. So in *Moore v. United States*, 196 U. S. 157, 25 S. Ct. 202, 49 L. ed. 428 (no exact statement of the amount of variation permitted can be made. The nature of the contract, custom of trade, and other circumstances must all be considered. "About" gives a margin for a moderate excess or diminution of the quantity named); *Salmon v. Boykin*, 66 Md. 541, 7 Atl. 701 ("about so much," while not exactly designating the amount, indicates an approximation in quantity); *Sample v. Pickard*, 74 Mich. 416; s. c., *sub nom.*, *Sample v. Upton*, 42 N. W. 54 (the effect of the words "more or less" or "about" is only to permit the vendor to fulfil his contract by delivering so much as may reasonably and fairly be held to be a compliance with the contract, after making due allowance for the excess or

short delivery arising from the usual and ordinary causes which prevent an accurate estimate of the weight or number of the articles sold); *Cabot v. Winsor*, 1 Allen, 546. In *Cross v. Eglin*, 2 B. & Ad. 106, a contract for the sale of "about 300 quarters, more or less," of rye, did not authorize the seller to deliver or bind the buyer to receive 350 quarters. In *Cabot v. Winsor*, 1 Allen, 546, a shortage of 5 per cent. in a contract for the sale of "500 bundles of gunny bags, more or less," was held within a reasonable limit. In *Moore v. United States*, 196 U. S. 157, 25 S. Ct. 2, 49 L. ed. 428, 4,634 tons was held not to be about 5,000. In *Holland v. Rea*, 48 Mich. 218, 12 N. W. 167, an agreement to sell 500,000 feet of lumber, "more or less," is complied with by delivering 473,000 feet. In *Creighton v. Comstock*, 27 Ohio St. 548, the words "more or less" were held not to justify a variation of 7,000 feet in a contract for the sale of 23,000 feet. In *Patterson v. Judd*, 27 Mo. 563, the seller agreed to sell "two rafts of logs containing from 350,000 to 400,000 feet each, more or less." One raft brought down by the seller contained 410,000 feet and the seller refused to deliver all of the lumber. It was held that the delivery of any amount between 350,000 and 400,000 feet would be a compliance with the contract and that the words "more or less" did not cover so great an excess as upward of 19,000 feet.

plemented by other stipulations or conditions which give them a broader scope or a more extensive significancy, then the contract is to be governed by such added stipulations or conditions. As, if it be agreed to furnish so many bushels of wheat, more or less, according to what the party receiving it shall require for the use of his mill, then the contract is not governed by the quantity named, nor by that quantity with slight and unimportant variations, but by what the receiving party shall require for the use of his mill; and the variation from the quality named will depend upon his discretion and requirements, so long as he acts in good faith. So where a manufacturer contracts to deliver at a certain price all the articles he shall make in his factory for the space of two years, 'say a thousand to twelve hundred gallons of naphtha per month,' the designation of quantity is qualified not only by the intermediate word 'say,' but by the fair discretion or ability of the manufacturer, always provided he acts in good faith."⁷

See also *Morris v. Levison*, 1 C. P. D. 155; *Pine River Logging Co. v. United States*, 186 U. S. 279, 289, 22 S. Ct. 920, 46 L. ed. 1164; *Hardy v. United States*, 9 Ct. Cl. 244; *Polhemus v. Heiman*, 45 Cal. 573; *Hackett v. State*, 103 Cal. 144, 37 Pac. 156; *Chicago v. Galpin*, 183 Ill. 399, 55 N. E. 731; *New England Wool Co. v. Standard Worsted Co.*, 165 Mass. 328, 43 N. E. 112, 52 Am. St. Rep. 576; *Gleckler v. Slavens*, 5 S. Dak. 364, 381, 50 N. W. 323.

⁷ *Gwillim v. Daniell*, 2 C. M. & R. 61. In *Tancred v. Steel Co. of Scotland*, 15 A. C. 125, the contract was for "the whole steel required for a particular bridge." The "estimated quantity" "we understand to be 30,000 tons, more or less." The seller was held entitled to furnish all the steel in fact required though the amount was greater than that stated. Conversely, in *Berk v. International Explosives Co.*, 7 Com. Cas. 20, where a contract was for "all requirements during twelve months, estimated at 500 and 750

tons," for two classes of goods, it was held that the seller had no right to require the buyer to take more than his requirements, even though a discontinuance of business in good faith had caused his requirements to cease. In *Brawley v. United States*, 96 U. S. 168, 24 L. ed. 622, a contractor undertook to deliver 880 cords of wood, "more or less, as shall be determined to be necessary by the post commander for the regular supply * * * of the troops and employees of the garrison of said post." The post commander, as soon as the contract came to his knowledge, within four days after it was signed, notified the contractor that but forty cords would be required. It was held the government was not liable. The specified amount named in a contract is sometimes controlled by the further statement that the goods shall constitute a cargo of a vessel. In *Pembroke Iron Co. v. Parsons*, 5 Gray, 589, an agreement to sell a cargo of iron to be delivered by a specified ship—

The quantity of goods is sometimes fixed in the contract wholly without reference to a numerical standard. The buyer may agree to take all the seller manufactures, or, more commonly, the seller may agree to sell such quantity as the buyer requires. It has sometimes been urged that a bilateral agreement in which there is a bargain to buy and sell all that one of the parties manufactures or requires is lacking in consideration because it is wholly optional with one party whether any goods shall be manufactured or required. It is true, as a general rule, that if it is wholly optional with one party to a bilateral agreement whether he shall perform or not, there is no legal contract.⁸ The promise of that party in such a bargain is illusory; that is, though in form a promise, it is so qualified that the promisor really engages himself for nothing. Therefore, a promise to buy such quantity of goods as the buyer may thereafter order,⁹ or to take goods "in such quantities as may be desired,"¹⁰ is not sufficient consideration to support a counter-promise.¹¹ Clearly, also, an agreement on the part of the seller to sell even a definite quantity of goods, or a quantity that may be made definite, lacks consideration and, therefore, is not binding if there is no agreement on the part of

"about 300 or 350 tons"—is satisfied by the delivery of a full cargo of the ship, though only 227 tons. See also *Kreuger v. Blanck*, L. R. 5 Ex. 179; *Ireland v. Livingston*, L. R. 2 Q. B. 99; *Lobenstein v. United States*, 91 U. S. 324, 23 L. ed. 410.

⁸ *Great Northern Ry. Co. v. Witham*, L. R. 9 C. P. 16; *Wagner v. Meakin*, 92 Fed. Rep. 76, 63 U. S. App. 477, 33 C. C. A. 577; *Harvester King Co. v. Mitchell, etc., Co.*, 89 Fed. Rep. 173; *Morrow v. Southern Express Co.*, 101 Ga. 810, 28 S. E. 998; *McCaw Mfg. Co. v. Felder*, 115 Ga. 408, 41 S. E. 664; *Missouri, etc., Ry. v. Bagley*, 60 Kans. 424, 56 Pac. 759.

⁹ *Great Western Ry. Co. v. Witham*, L. R. 9 C. P. 16; *Cold Blast Transportation Co. v. Kansas City Bolt*

Co., 114 Fed. Rep. 77 (C. C. A.), 57 L. R. A. 696.

¹⁰ *American Cotton Oil Co. v. Kirk*, 68 Fed. Rep. 791, 34 U. S. App. 60, 15 C. C. A. 540; *Columbia Wire Co. v. Freeman Wire Co.*, 71 Fed. Rep. 302; *Rafolovitz v. American Tobacco Co.*, 29 Abb. N. C. 406; *Hoffman v. Maffioli*, 104 Wis. 630, 80 N. W. 1032, 47 L. R. A. 427.

¹¹ Other illustrations of this principle may be found in *Harvester King Co. v. Mitchell, etc., Co.*, 89 Fed. Rep. 173; *Wagner v. Meakin*, 92 Fed. Rep. 76, 63 U. S. App. 477, 33 C. C. A. 577; *Morrow v. Southern Express Co.*, 101 Ga. 810, 28 S. E. 998; *Chicago, etc., Ry. Co. v. Jones*, 53 Ill. App. 431; *Missouri, etc., Ry. v. Bagley*, 60 Kans. 424, 56 Pac. 759.

the buyer to buy the goods.¹² It was held in an early Minnesota case that an agreement to sell all that the buyer might require or want in his business was open to the same objection, though the buyer promised to buy all he should require;¹³ but the weight of authority is clearly otherwise,¹⁴ and rightly. Though it may be true that a seller by ceasing to manufacture may relieve himself from liability on a promise to sell all the goods he manufactures, and similarly a buyer by going out of business may be under no obligation to purchase under an agreement to buy all that he requires, these releases from liability can only be obtained by doing something which is in itself a legal detriment, namely, the cessation of business. To put the matter in another way—the promise of a seller not to manufacture except for the

¹² *American Refrigerator Co. v. Chilton*, 94 Ill. App. 6; *Allen B. Wisley Co. v. Mathieson Alkali Works*, 107 Ill. App. 379; *Benjamin v. Bruce*, 87 Md. 240, 39 Atl. 810; *Michigan Bolt Works v. Steel*, 111 Mich. 153, 69 N. W. 241; *Tarbox v. Gotzian*, 20 Minn. 139; *Beyerstedt v. Winona Mill Co.*, 49 Minn. 1, 51 N. W. 619; *Teipel v. Meyer*, 106 Wis. 41, 81 N. W. 982.

¹³ *Bailey v. Austrian*, 19 Minn. 535. See also *Cool v. Cunningham*, 25 S. C. 136.

¹⁴ *Church v. Proctor*, 66 Fed. Rep. 240, 33 U. S. App. 1, 13 C. C. A. 426 (contract to buy what buyer required in his business); *Ludenback Fertilizer Co. v. Tennessee Phosphate Co.*, 121 Fed. Rep. 298, 58 C. C. A. 220, 61 L. R. A. 402 (contract to buy buyer's "entire consumption" of phosphate rock); *Klipstein v. Allen*, 123 Fed. Rep. 992 (contract to buy all quebracho needed for buyer's factory); *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427 (contract to buy all iron buyer should use, need, or consume in his business); *Minnesota Lumber Co. v. Whitebreast Coal Co.*, 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529 (contract to buy buyer's

"requirements" of coal); *Warden Coal Washing Co. v. Meyer*, 98 Ill. App. 640 (contract to give buyer's "trade"); *Smith v. Morse*, 20 La. Ann. 220 (contract to buy all ice buyer required for his hotels); *Burgess Fibre Co. v. Broomfield*, 180 Mass. 233, 62 N. E. 367 (contract to buy all iron which seller might desire to sell); *Cooper v. Lansing Wheel Co.*, 94 Mich. 272, 54 N. W. 39, 34 Am. St. Rep. 341 (contract to buy all wheels buyer might "want" during ensuing season); *Hickey v. O'Brien*, 123 Mich. 611, 82 N. W. 241, 49 L. R. A. 594, 81 Am. St. Rep. 227 (contract to buy all ice necessary to carry on buyer's business); *Dailey Co. v. Clark Can Co.*, 128 Mich. 591, 87 N. W. 761 (contract to buy all the cans buyer should use in its factory); *East v. Cayuga Lake Ice Line*, 21 N. Y. Suppl. 887 (contract for all ice buyer might require in his business); *Ames-Brooks Co. v. Etna Ins. Co.*, 83 Minn. 346, 86 N. W. 344 (contract for a shipper's "insurance business" for a season); *Miller v. Leo*, 35 N. Y. App. Div. 589; *affd.*, without opinion, 165 N. Y. 619, 59 N. E. 1126 ("necessary brick, lime, and cement which I may require at my two jobs").

buyer, or the promise of a buyer not to buy except from a particular seller, is clearly a promise to do something detrimental. A few cases¹⁵ seem to admit that a contract to buy and sell the requirements or output of a particular factory is a valid contract, but to hold that an agreement which gives the buyer an option to take no goods is invalid because it lacks mutuality, although the buyer agreed that if he should buy any goods of the kind in question from any one he would buy them from the seller. These decisions cannot be supported. There is no requirement of mutuality in an action at law other than the rule of consideration that the promisee must incur or promise something which is or may be detrimental. The promise to buy from no one else than the seller sufficiently fulfills this requirement of consideration.¹⁶ The distinctions that have just been taken are enough to show that in dealing with a bargain of this sort, the first thing necessary is to construe the agreement and find the actual meaning of the parties. In a loosely-expressed agreement the distinction between a promise to buy all the buyer shall choose to order, on the one hand, and, on the other hand, a promise to buy all that he shall need in his business or all that he shall buy of any one, is frequently not clearly brought out. Where an agreement is open to possible interpretation, either as meaning all the buyer shall choose to take or all that he shall need or buy of any one, the latter interpretation will be given by the court, since it is to be supposed, if possible, that the parties made a valid contract.¹⁷ Still another construction is possible, namely, that the agreement of the buyer

¹⁵ *Crane v. Crane*, 105 Fed. Rep. 869, 45 C. C. A. 96 (an agreement to buy and sell what the buyer, a retail merchant, "should require for his trade," was held bad because the retail merchant could increase or diminish his orders as fluctuations in the price at which he could sell made desirable); *Huggins v. Southeastern Lime Co.*, 121 Ga. 311, 48 S. E. 933 (an agreement that certain cement should be sold exclusively through the buyer's agency was held invalid since the buyer need take none).

¹⁶ See cases cited in note 14. *supra*, especially *Burgess Fibre Co. v. Broomfield*, 180 Mass. 283, 62 N. E. 367. In this case the amount sold was by the terms of the contract fixed by no outside standard but simply by the "desire" of the seller. Nevertheless the bargain was rightly held legally binding, since whatever the seller desired to sell, he must sell, according to the terms of the agreement, to this particular buyer.

¹⁷ *Minnesota Lumber Co. v. Whitebreast Coal Co.*, 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529.

is to take all the goods that his business, if maintained under substantially the same conditions as exist at the time of the bargain, would require.¹⁸ This construction, however, does not seem the proper one in ordinary cases where the buyer agrees to take what he "requires," "needs," or "wants."¹⁹ So far as the validity of the consideration for the contract is concerned, it is immaterial whether the construction put upon it is the actual requirements or the ordinary requirements if present conditions continue. A question of construction also arises where an offer does not exactly define the quantity of the goods. It may sometimes be the true construction of such an offer that the offeror contemplates a reply specifying the amount of goods which shall be covered by the contract, thereby forming an immediate bilateral contract in regard to them.²⁰ Sometimes, however, the true construction seems to be that the offer is an open one to be accepted, from time to time, by the order of small quantities. A series of con-

¹⁸ This was the construction given the agreement in *Wells v. Alexandre*, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218. The buyer in that case accepted an offer to furnish three special steamers with coal for the year 1888. The buyer subsequently sold the steamers to another company. It was nevertheless held liable for failure to purchase coal. The court said: "The fact that the defendant deemed it best to sell the steamers cannot be permitted to operate to relieve them from the obligation to take the coal which the ordinary and accustomed use of the steamers require." In *Hickey v. O'Brien*, 123 Mich. 611, 615, 82 N. W. 241, 49 L. R. A. 594, 81 Am. St. Rep. 227, the buyer agreed to buy, and the seller to sell, all the ice the buyer needed for five years. It was intimated that the buyer must continue his business during that period.

¹⁹ *Berk v. International Explosives Co.*, 7 Comm. Cas. 20. In this case the seller was held to have no legal ground of complaint because the

buyer went out of business. So in *Drake v. Vorse*, 52 Iowa, 417, 3 N. W. 465. In most of the cases cited in note 14, *supra*, this question was involved.

²⁰ *Keller v. Ybarru*, 3 Cal. 147 (an offer to sell as many of the defendant's crop of grapes at ten cents a pound as the plaintiff wanted was held to ripen into a contract for 1,900 pounds, when the plaintiff notified the defendant that he would take that quantity); *College Mill Co. v. Fidler* (Tenn.), 58 S. W. 382 (an offer was made to sell bran for \$7 a ton, no amount being specified. An immediate order was telegraphed, "Ship fifty tons as per your letter." This was held a binding contract). See also *Seymour v. Armstrong*, 62 Kans. 720, 64 Pac. 612; *Harty v. Gooderham*, 31 U. C. Q. B. 18. In *Chicago & Great Eastern Ry. Co. v. Dane*, 43 N. Y. 320, an offer was made to transport "not exceeding 6,000 tons gross during certain specified months." The person addressed replied, assenting in terms to the pro-

tracts are thus formed as separate orders are given.²¹ Frequently, however, when parties are discussing the formation of a contract, a price is stated by the buyer in a general way, not as an offer to the buyer of any quantity he may wish to order at that price, but with a view of inducing the buyer to make an offer to buy a specified quantity.²²

posul. This was held to create no contract, nor was a contract subsequently formed by a tender of goods for transportation. The offer contemplated a prompt reply on receipt of the letter specifying the quantity of goods which would be offered for transportation. In *Minneapolis, etc., Ry. Co. v. Columbus Rolling Mill*, 119 U. S. 149, 7 S. Ct. 168, 30 L. ed. 376, the seller offered 2,000 to 5,000 tons of iron rails on certain terms. The court assumed that this offer might be accepted and turned into a binding contract by an acceptance by the buyer of any quantity within the specified limits, but an answer ordering 1,200 was held to give rise to no contract.

²¹ *Great Northern Ry. Co. v. Witham*, L. R. 9 C. P. 16. Here the defendant agreed to sell the plaintiff "such quantities of specified article, as the company's storekeeper may order, from time to time." It was held that a general acceptance of this offer did not give rise to a contract, but as orders were given, from time to time, separate contracts arose. It would seem that the offer in such a case might be revoked at any time so that no future orders could impose an obligation on the offeror to deliver. See also *Queen v. Demers*, [1900] A. C. 103; *Ford v. Newth*, [1901] 1 K. B. 683.

²² In *Johnston v. Rogers*, 30 Ont. 150, the defendants wrote a letter in regard to flour, containing these words: "We quote you * * * Hungarian \$5.40, and strong Bakers \$5,

car lots only." An immediate telegraphic reply was made: "We will take two cars Hungarian at your offer of yesterday." It was held that no contract was created—the first letter not being an offer. In *Moulton v. Kershaw*, 59 Wis. 316, 48 Am. Rep. 516, the defendants, salt dealers, wrote to the plaintiff, a dealer in salt, accustomed to buy salt in large quantities as the defendants knew, as follows: "Dear Sir.—In consequence of a rupture in the salt trade we are authorized to offer Michigan fine salt, in full carload lots of 80 to 95 barrels, delivered at your city at 85 cts. per barrel to be shipped per C. & N. W. R. R. Co. only. At this price it is a bargain, as the price in general remains unchanged. Shall be pleased to receive your order." The plaintiff on the day this letter reached him telegraphed: "Your letter of yesterday received and noted. You may ship me two thousand (2,000) barrels Michigan fine salt as offered in your letter. Answer." The defendant replied on the following day, refusing to fill the order. The court held that no contract had been created, chiefly because the defendants' letter did not specify any limit of quantity. In *Beaupre v. Pacific & Atlantic Telegraph Co.*, 21 Minn. 155, the plaintiffs wrote: "Have you any more northwestern mess port? also extra mess? Telegraph price on receipt of this." The reply was telegraphed: "Letter received. No light mess here. Extra mess \$28.75." The plaintiffs replied by telegraph:

§ 465. Instalment contracts—Provisions of the Sales Act.—

Sec. 45. DELIVERY IN INSTALMENTS.—(1.) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2.) Where there is a contract to sell goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken.²³

§ 466. Divisible contracts — Meaning of the term.— Some confusion has arisen from the inexact use of the terms “divisible contract” and “severable contract” on the one hand, and “entire contract” on the other. In an ordinary contract for the purchase and sale of goods, the buyer is not bound to receive delivery of the goods in instalments. He is entitled to delivery of all the goods at the same time, and, it may be added, is bound to receive delivery of all at the same time.²⁴ And, similarly, the buyer has no

“Despatch received. Will take two hundred extra mess, price named.” The court held that there was no contract. See also *Harvey v. Facey*, [1893] A. C. 552; *Schon-Klingstein Co. v. Snow*, Colo., 96 Pac. 182; *Talbot v. Pettigrew*, 3 Dak. 141, 13 N. W. 576; *Knight v. Cooley*, 34 Iowa, 218; *Smith v. Gowdy*, 8 Allen, 566; *Schenectady Stove Co. v. Holbrook*, 101 N. Y. 45, 4 N. E. 4; *Kinghorne v. Montreal Tel. Co.*, U. C. 18 Q. B. 60.

²³ This section is based on section 31 of the English Sale of Goods Act, but in subsection (2) a slight change has been made. Instead of

the words in the American act, “It depends,” etc., the English act reads, “It is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated.” The reasons for changing the English provision will appear in the criticisms hereafter made, *infra*, § 467, of the English law.

²⁴ *Reuter v. Sala*, 4 C. P. D. 239. This rule is a necessary consequence

right to pay the price in instalments. By agreement, however, either the goods may be deliverable in instalments or the price payable in instalments, and this agreement need not be in express words.²⁵ But this does not create a divisible or severable contract. The essential feature of such a contract is that a portion of the price is by the terms of the agreement set off against a portion of the goods and made payable for that portion so that when part of the goods have been delivered a debt for that part immediately arises.²⁶ Where by the terms of a contract the goods are to be paid for at a certain rate so that the price for a portion of them can readily be calculated, though the contract becomes divisible if a portion of the goods are delivered, and a debt arises for them, yet without special agreement it is not payable until all the goods have been received.²⁷ It is essential to recovery not only that the price for a part can be calculated, but that expressly or impliedly there is a promise to pay for a part. If the contract is divisible it must not be supposed for that reason that there is more than one contract. "Provisions as to shipping in different months and as to paying for each shipment upon its delivery do not split up the contract into as many contracts as there shall be

of the fact that the buyer cannot be compelled to accept a smaller quantity than the contract specifies, for a buyer who accepts an instalment can never have any certainty that he will get the remainder of the goods.

²⁵ *Brandt v. Lawrence*, 1 Q. B. D. 344. The plaintiff had agreed to sell the defendant 9,000 quarters of oats by two contracts each for 4,500 quarters. The contracts contained the words "shipment by steamer, or steamers, during February." The plaintiff shipped 4,511 quarters to answer his first contract and also 1,139 quarters on the same steamer to answer in part his second contract, and subsequently shipped enough oats to fulfill his obligations. The defendant refused to accept any of the oats on account of delay in shipment. The jury found that the

first shipment was seasonable, but the subsequent one too late. The court held the defendant liable, not only for his failure to accept the 4,511 quarters in satisfaction of the first contract, but also for his refusal of the 1,139 quarters in part satisfaction of the second contract. Although the seller afterward had made default upon the second contract, at the time when the 1,139 quarters were tendered, there was no evidence that the buyer would not completely perform the contract, and the terms of the contract were such that the buyer was bound to accept performance in instalments.

²⁶ See *McGrath v. Cannon*, 55 Minn. 457, 57 N. W. 150.

²⁷ *Waddington v. Oliver*, 2 B. & P. N. R. 61; *Baker v. Higgins*, 21 N. Y. 397. See definition of "Divisible" in section 76, *infra*, § 619.

shipments or deliveries of so many distinct quantities.”²⁸ The use of the word “entire” has led to confusion here, for sometimes the word is used as meaning one contract as distinguished from several contracts, and at other times it is used as meaning a contract that is not divisible. A divisible contract, using that term properly, is “one and entire in its origin,” but, looking to a series of performances on one side and equivalent counter-performances on the other, is “divisible in its operation.”²⁹ It is not always an easy question to determine whether a bargain constitutes a simple divisible contract or whether there are several separate contracts. As has been seen³⁰ in cases involving the Statute of Frauds, courts have gone to a considerable length in holding bargains for different articles a single sale. The question essentially is one of fact: Did the parties give a single assent to the whole transaction or did they assent separately to several things? It is sometimes suggested,³¹ that the test is whether the nature of the subject-matter of the several things to be performed is such that part performance will be of diminished value unless the rest of the performance is furnished. An inquiry of this sort is an aid in a doubtful case in determining whether several things were contracted for in one bargain, or whether several bargains were made, but no more than this can be said. It is certainly possible for parties to make a single contract for several things which have no relation to each other, and the value of which is not increased by being associated together or diminished by separation. It is equally possible to make several contracts for goods which have little use unless associated together.³²

§ 467. **Divisible contracts—Conditions implied.**—If it be granted that upon a true construction a contract is divisible, the

²⁸ *Mersey Steel Co. v. Naylor*, 9 A. C. 434, 439; *Norrington v. Wright*, 115 U. S. 188, 203, 6 S. Ct. 12, 129 L. ed. 366; *Fullam v. Wright & Colton Co.*, 196 Mass. 474, 82 N. E. 711; *Providence Coal Co. v. Cox*, 19 R. I. 380, 35 Atl. 210. The contrary view expressed in *Herzog v. Purdy*, 119 Cal. 99, 51 Pac. 27, holding that fixing a separate price for

different articles made independent bargains as to each is unsound.

²⁹ *Barrie v. Earle*, 143 Mass. 1, 8 N. E. 639, 58 Am. Rep. 126.

³⁰ *Supra*, § 70.

³¹ See for instance, *Wooten v. Walters*, 110 N. C. 251, 256, 14 S. E. 734, 736.

³² See further, *infra*, § 493.

obligations of the buyer and seller in regard to any one instalment are for the most part to be determined as if that instalment constituted the whole contract. Thus, if no time is fixed showing an intention inconsistent with concurrent performance, the seller will not be bound to deliver the instalment until the buyer pays the price, and, conversely, the buyer will not be bound to pay the price unless the seller delivers the goods. If by the terms of the contract, delivery of an instalment is to precede payment for it, or if, as will more rarely happen, payment for an instalment is to precede delivery, the performance of the prior act is a condition precedent to any obligation to perform the subsequent act. Furthermore, the same conditions as to quantity and quality exist as are applicable in contracts and sales generally. Accordingly the buyer need not receive a smaller or a larger instalment than he bargained for; nor need he receive goods of a different kind, or of defective quality. If a tender defective in quality or quantity is made, the right to correct the defect and substitute a proper tender depends on principles already stated.³³ These principles though not all of them undisputed, have not chiefly engaged attention. The question that has been extensively litigated is, how far does a defective performance of one or more instalment justify the injured party in refusing to continue the contract as to further instalments. If the separate instalments of the contract were properly to be considered as so many separate contracts, the answer would be clear; for a breach of one contract does not permit the party aggrieved to refuse to perform another.³⁴ But as

³³ See *supra*, § 459.

³⁴ *Arbuthnot v. Streckeisen*, 35 L. J. C. P. (N. S.) 305; *Stephenson v. Cady*, 117 Mass. 6; *Hutchens v. Sutherland*, 22 Nev. 363, 40 Pac. 409; *Bowers Granite Co. v. Farrell*, 66 Vt. 314, 29 Atl. 491. It is often a difficult question of fact to determine whether one contract or several has been made. Thus in *Jordan v. Patterson*, 67 Conn. 473, 35 Atl. 521, the plaintiff sent defendant fourteen separate orders for goods, each specifying fully the amount and kind of goods ordered and the terms of payment. The defendant on receipt of

the last order sent a letter saying: "We are in receipt of the following contracts," describing the several contracts. This letter was held to be an acceptance of all the orders creating a single contract. Compare *Peoria Mfg. Co. v. Bain Mfg. Co.*, 76 Mo. App. 76. Here an order was given for twine, and on the same day another order for rope. Acceptance of both orders was made in one letter. This was held not to create such a connection between the two orders that a countermand of the order for the twine released the seller from liability to furnish rope.

has already been seen, there is but one contract in the case under consideration. Accordingly the general rule governing bilateral contracts must be applied. If either buyer or seller, therefore, has committed a material breach of contract, or has by repudiation manifested an intention to commit such a breach, the other party should be excused from the obligation to perform further.³⁵ If, however, the injured party knowingly accepts defective performance of the contract, or accepts further performance after he is aware that a breach of contract has been committed, such conduct will operate as a waiver of his right to refuse to go on with the contract, though not necessarily of his right to recover damages for the breach committed by the other party.³⁶ These principles are reasonably well settled in regard to contracts generally, and should furnish a sufficient guide in regard to instalment contracts; but, unfortunately the English courts, though at first seeming to accept these views,³⁷ in later decisions seem to deny the injured party the right to refuse to continue performance irrespective of the materiality of the breach, unless the breach or some acts or conduct of the wrong-doer "amount to an intimation of an intention to abandon and altogether to refuse performance of the contract."³⁸ This seems to have been adopted by the most

³⁵ See Wald's *Pollock, Contracts* (3d ed.), pp. 333, 339, 347.

³⁶ As to waiver of the right to damages, see *infra*, §§ 484-494.

³⁷ *Hoare v. Rennie*, 5 H. & N. 19. The contract here was to sell about 667 tons of iron to be shipped in June, July, August, and September, in about equal portions. Twenty-one tons only were shipped in June, but when tendered were refused because June had then elapsed and no further shipments had been made during the month. The sellers brought action but the defendants' plea setting up that the plaintiffs were never willing or ready to deliver a June shipment according to the contract was sustained. As time is of the essence of mercantile contracts the decision seems sound. The difference between

twenty-one tons and about 167 tons to which the buyer was entitled as a June shipment was material even though it be assumed that the seller would within the four months have delivered the correct total number of tons; and if it be supposed that the seller would only have shipped about 167 tons during each of the remaining three months the materiality of the breach is still more apparent.

³⁸ *Freeth v. Burr*, L. R. 9 C. P. 208. In *Simpson v. Crippin*, L. R. 8 Q. B. 14, the buyer had contracted to take from six to eight thousand tons of coal in his wagons from the seller's colliery in equal monthly quantities for twelve months. During the first month the buyer sent wagons for only 150 tons. This was

recent English decisions as a general rule in bilateral contracts.³⁹ But it is unsound both in theory and on the authority of modern

held not to entitle the seller to refuse to deliver any more coal. The court discredited *Hoare v. Rennie*, 5 H. & N. 19, and *Blackburn, J.*, who delivered the longest opinion, said: "I prefer to follow *Pordage v. Cole*" [1 Wms. Saund. 319 (1)]. In view of the fact that *Pordage v. Cole* is regarded as the leading authority for the medieval doctrine that the promises in bilateral contracts are independent unless the parties have expressly stated a condition (a doctrine which was overthrown by Lord Mansfield, of which Lord Kenyon said in *Goodisson v. Nunn*, 4 T. R. 761, that it outraged common sense, and which is now generally regarded as wholly indefensible), this statement seems extraordinary. In *Freeth v. Burr*, L. R. 9 C. P. 209, there was a contract to deliver 250 tons of iron, half to be delivered in two months, the remainder in four months. Payment was to be made fourteen days after delivery of each lot. The buyer under a mistaken claim of a right to set off loss for delay in delivery of the first instalment refused to pay for it as agreed, and was sued for the price and only then paid it. The seller because of the buyer's delay in paying for the first instalment refused to deliver the second, but was held liable for this failure to deliver because the nonpayment by the buyer did not "evince an intention no longer to be bound by the contract." In *Honck v. Muller*, 7 Q. B. D. 92, the contract was for 2,000 tons of iron to be delivered in November or equally over November, December, and January. The buyer failed to take any iron in November but requested delivery of all in December and January. December 1st the seller

refused to perform and in this action the Court of Appeals upheld his refusal. *Hoare v. Rennie* was approved and other cases distinguished on the ground that in *Hoare v. Rennie* and in the case at bar no performance at all had taken place. In *Mersey Steel Co. v. Naylor*, 9 A. C. 434, the contract was for the delivery of 5,000 tons of steel in monthly instalments of 1,000 tons each, commencing in January, payment to be within three days after receipt of shipping documents. The seller delivered a part of the steel about the first of the month of January and early in February made a further delivery, but before payment became due a petition was presented to wind up the company. Under erroneous legal advice the buyer refused to pay the instalments unless the sanction of the court was first obtained. The buyer was informed that such refusal would be considered a breach of contract releasing the seller from further obligation; and though further correspondence took place, neither party receded from his position. An action was brought for the price of the steel delivered and the buyer counter-claimed for damages sustained by the seller's refusal to deliver the remainder of the steel. The House of Lords held the seller not justified in its refusal—Lords Selborne and Bramwell on the principle stated in *Freeth v. Burr*, that there was no renunciation or absolute refusal by the buyer to perform the contract; Lord Blackburn, because the breach did not appear to him to go to the root of the contract.

³⁹ See in addition to the cases cited in the previous note, *Cornwall v. Henson*, [1900] L. R. 2 Ch. 298;

but earlier English decisions and the great preponderance of American decisions. As a matter of theory the excuse of an innocent promisor in a contract should depend on whether he will receive, if he goes on with the contract, substantially what he bargained for. If he will not receive substantially what he bargained for, he ought not to be required to perform even though the wrongdoer has no intention of abandoning the contract or failing to perform the remainder.⁴⁰ If a party to an instalment contract fails in an important particular to keep his promise as to one instalment, what does it

Rhymney Ry. Co. v. Brecon, etc., Ry. Co., 83 L. T. 111. In *Re Phoenix Bessemer Steel Co.*, 4 Ch. D. 108; *Bloomer v. Bernstein*, L. R. 9 C. P. 588, there are strong expressions to the same effect in Colonial decisions. In *Bradley v. Bertoumieux*, 17 Vict. L. R. 144, 147, it is said: "A contract broken is not a contract rescinded, and unless one of the parties to the contract clearly intimates his intention not to perform his contract, or his inability to perform it, the other party is not at liberty to rescind the contract." So in *Oaten v. Stanley*, 19 Vict. L. R. 553, 555, "The point is whether the person who committed the breach meant to abandon the contract." And see to similar effect, *Prendergast v. Lee*, 6 Vict. L. R. (Law) 411; *Hacker v. Australian, etc., Co.*, 17 Vict. L. R. 376; *Moroney v. Roughan*, 29 Vict. L. R. 541; *Midland Ry. Co. v. Ontario Rolling Mills*, 10 Ont. App. 677. See, however, *Muston v. Blake*, 11 S. C. New South Wales, 92.

⁴⁰The general principle is stated in numerous cases. Thus in *National Surety Co. v. Long*, 125 Fed. Rep. 887 (C. C. A.), Sanborn, J., said (p. 892): "He who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for a subsequent failure on his part to

perform," citing: *Guarantee Co. v. Mechanics', etc., Co.*, 183 U. S. 402, 421, 22 S. Ct. 124, 49 L. ed. 253; *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 463, 467, 14 S. Ct. 379, 38 L. ed. 231; *Hubbard v. Mutual Reserve Fund Assn.*, 100 Fed. Rep. 719, 40 C. C. A. 665; *Seal v. Insurance Co.*, 59 Neb. 253, 80 N. W. 807; *Brady v. United Life Assn.*, 60 Fed. Rep. 727, 9 C. C. A. 252; *Rice v. Fidelity & Deposit Co.*, 103 Fed. Rep. 427, 433, 43 C. C. A. 270, 276; *Cresswell Cattle Co. v. Martindale*, 63 Fed. Rep. 84, 89, 11 C. C. A. 33, 38; *Norrington v. Wright*, 115 U. S. 188, 204, 205, 6 S. Ct. 12, 29 L. ed. 366; *Filley v. Pope*, 115 U. S. 213, 6 S. Ct. 19, 29 L. ed. 372; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 261, 264, 7 S. Ct. 882, 30 L. ed. 920; *Beck & Pauli Lith. Co. v. Colorado Milling Co.*, 52 Fed. Rep. 700, 3 C. C. A. 248; *King Philip Mills v. Slater*, 12 R. I. 82, 34 Am. Rep. 603; *Smith v. Lewis*, 40 Ind. 98; *Hoare v. Rennie*, 5 H. & N. 19; *Pope v. Porter*, 102 N. Y. 366, 371, 7 N. E. 304; *Dwinel v. Howard*, 30 Me. 258; *Robson v. Bohn*, 27 Minn. 333, 344, 7 N. W. 357; *Reybold v. Voorhees*, 30 Pa. St. 116, 121; *Stephenson v. Cady*, 117 Mass. 6, 9; *Branch v. Palmer*, 65 Ga. 210; *Fletcher v. Cole*, 23 Vt. 114, 119.

matter whether he plans to fulfill the remaining instalments or not? He has already committed a material breach. Why should the innocent party be compelled to go on with the bargain merely because the performance is divided into instalments when he could not be compelled to put up with deficient performance if the contract had been performable at one time? Accordingly the correct rule upon principle is that stated in the Sales Act. This rule makes the obligation of the innocent party depend upon the materiality of the breach committed by the wrongdoer. Whether a given breach is material or essential, or not, is a question of fact; but the question in a particular case may be so clear that a decision can properly be given only one way, and in such a case the court may properly decide the matter as if it were a question of law. The view here expressed is in general that of the American cases. These may be classified according to the nature of the breach committed. A breach of one instalment of an instalment contract which causes a refusal to go on with subsequent instalments may be of several sorts: (1) The seller may have failed to deliver the quantity of goods he was bound to deliver as an instalment. (2) The buyer may have refused to take or accept delivery of the quantity of goods he was bound to take as an instalment. (3) The buyer may have failed to pay an instalment of the price. (4) Part or all of the goods delivered by the seller may have been defective in quality. These breaches may have happened in regard to one instalment or in regard to more than one. Under any of these circumstances the innocent party should be allowed to refuse further performance if the breach is material. The American cases clearly support this doctrine at least as to the first three of the classes of cases just referred to. Failure to deliver one instalment is generally held to excuse the buyer from taking the rest.⁴¹ A few cases in-

⁴¹ *Norrington v. Wright*, 115 U. S. 188, 6 S. Ct. 12, 29 L. ed. 366 (in this case the plaintiff agreed to sell and the defendants to buy 5,000 tons of rails, shipment to be at the rate of about 1,000 tons per month, beginning February, 1880, the whole contract to be shipped before August 1, 1880. Price to be paid on presen-

tation of the bills. The plaintiff shipped 400 tons the last part of February. 885 tons in March. 1,571 tons in April, 850 tons in May. 1,000 tons in June, and 300 tons in July. The defendants received and paid for the February shipment, but on May 14th, about the time of the arrival of the March shipment, having then

fluenced by the English decisions hold the contrary in the absence of an intention on the part of the seller to repudiate or abandon

learned for the first time the amounts shipped in February, March, and April, notified the plaintiff that they should decline to accept the shipments in March and April. The trial court instructed the jury that on these facts the defendants had a right to rescind the contract. This instruction was sustained; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 7 S. Ct. 882, 30 L. ed. 920 (the contract involved in this case was for all the pig iron made from 1,400 tons of ore, to be shipped in instalments. About seven-eighths was seasonably shipped, the remaining one-eighth was delayed two months. The buyer was held justified in refusing to take any iron after it appeared that the seller could not deliver all of it in substantially the time agreed upon); *Bollman v. Burt*, 61 Md. 415 (the contract involved was to buy and sell 200 tons of iron to be delivered in monthly instalments of eighteen tons. No delivery was made for the first four months. As to three months' delay the default was held to be waived by the buyer's conduct, which indicated he still regarded the contract as subsisting, but the default during the fourth month was not waived, and it was held to justify a notice by the buyer that he would not go on with the contract); *Pope v. Porter*, 102 N. Y. 366, 7 N. E. 304 (contract for 500 tons of Caultness iron due in April next, and 500 tons of Caulder's iron due in March. The seller made default as to the first instalment but offered to perform the second, which the defendants refused to accept. The sellers were held not entitled to recover damages. The buyers were not compelled to accept part performance or to accept the

Caulder's iron first, and as the plaintiffs had made default at the outset the defendant had a right to rescind the whole contract); *King Phillip Mills v. Slater*, 12 R. I. 82, 34 Am. Rep. 603 (the plaintiff agreed to sell the defendant the production of 400 looms till July 1st, to be delivered in lots of a thousand pieces, payment thirty days after delivery of each lot. The mill was expected to be in operation by April 1st, but deliveries were to be made earlier if possible, and the maximum production was to be reached as soon as practicable, and maintained. About April 17th, two lots of a thousand pieces were delivered but were deficient in width and weight, and it appeared that the plaintiff to fulfill the contract must procure new machinery; thereupon the defendant rescinded the contract. In *assumpsit* for goods subsequently manufactured, tendered, and refused before July 1st, it was held that the defendant was justified. The court disapproves of *Simpson v. Crippen*, L. R. 8 Q. B. 14, and [at page 86], sharply criticizes *Pordage v. Cole*, 1 Wms. Saund. 319 [1]). See also *Hamilton v. Thrall*, 7 Neb. 210. The defendant agreed to rent to the plaintiff, hotel furniture for a year for \$6,000 in twelve month payments. By the same contract it was agreed that certain perishable furnishings were to be bought outright, the buyer to pay for them on a fixed day. Rent was paid for eleven months and then the tenant refused to pay for the twelfth month, and brought action on the ground that the furniture had not cost as much as it was agreed that it should. The court held that the covenant to purchase the

the contract altogether.⁴² In accordance with the prevailing American view, also, default in accepting one instalment is held to excuse the seller from delivering the remainder.⁴³ So failure

perishable goods by the defendant would not be enforced without the lease of the furniture and, *vice versa*, the enforcement of one stipulation depending on a compliance with the other.

⁴² *Norris v. Harris*, 15 Cal. 226 (a contract made at the same time for different articles at different prices held not an entire contract unless the taking of the whole is essential from the character of the property, or is made so by the agreement of the parties, and a failure to obtain part of the articles, unless such failure would materially effect the object of the contract and thus influence the sale, had such a failure been anticipated, will not justify a refusal to take the rest); *Herzog v. Purdy*, 119 Cal. 99, 51 Pac. 27 (the contract was for the sale of certain salt hides, skins, pelts, and tallow of animals previously slaughtered and thereafter during the current month to be slaughtered; to be delivered on or about the 1st of the following month. It was held that a refusal to take the salt hides did not justify a refusal to deliver the other articles, as a separate price was fixed by the contract for each).

⁴³ *Cresswell Co. v. Martindale*, 63 Fed. Rep. 84, 11 C. C. A. 33 (the contract was for the sale of about 5,000 steers, each to weigh over 900 pounds, to be delivered in instalments. After nearly half the cattle had been delivered, the seller offered an instalment of 980 steers. These the buyers refused to accept or pay for 282 on the ground that they did not weigh 900 pounds. Before the time for another delivery arrived, the seller notified the buyers that since

they had violated the contract by rejecting the 282 head, that no more cattle would be delivered. The buyers sued for damages for the failure of the seller to deliver the remainder. The trial court instructed the jury that the mere fact that the plaintiff refused to accept 282 head, even though of the proper weight, did not relieve the seller of its obligation to deliver the remainder. The jury found that the rejected cattle fulfilled the requirements of the contract, but the buyer had judgment. This judgment was reversed, however, and the court said: "Our conclusion is that the right of a party to a continuing contract to refuse to make subsequent performance on his part, after the other contracting party had refused, upon full notice and demand, to perform a substantial part of the contract on his part, is not dependent on the good faith of the latter, nor on his belief that he is not violating the contract, but rests solely upon the fact whether or not he has violated or failed to perform a substantial part of the contract that the agreement required him to perform"); *Loudenback Fertilizer Co. v. Tennessee Phosphate Co.*, 121 Fed. Rep. 298, 58 C. C. A. 220, 61 L. R. A. 402 (the plaintiff agreed to buy from the defendant the plaintiff's consumption of phosphate rock for five years, and the defendant agreed to sell the same. After about seven months' performance the buyer for nearly a year and a half wrongfully failed to order any phosphate rock. Upon receiving an order after that time the seller refused to fill it or deliver any more rock. It was held that the seller was

to pay for one instalment by the buyer excuses the seller from delivering the rest.⁴⁴ A few decisions, however, here also adopt

not liable for its refusal. The court said [p. 344]; "The contract was not a number of single contracts of sale and delivery of definite quantities as ordered, from time to time, and the breach went to the whole consideration"; *Smith v. Keith Coal Co.*, 36 Mo. App. 567 (contract for the sale of 120 tons of hay to be delivered before May 1st; fifty-two tons were delivered and the defendant then rejected several loads of merchantable hay; whereupon the seller refused to haul any more. After the rejection of the hay the defendant requested a fulfillment of the contract. The court held that on notice of the rejection of merchantable hay the seller was justified in refusing further to perform the contract and disapproved the case of *Simpson v. Crippen*, L. R. 8 Q. B. 14. The seller was, therefore, allowed to recover damages for the hay delivered on the theory of a wrongful termination of the contract by the buyer). *Providence Coal Co. v. Cox*, 19 R. I. 380, 35 Atl. 210 (a contract to sell 10,000 tons of coal, "cash thirty days." "Barge loaded immediately, balance in equal monthly proportions before February 1, 1893." The buyer failed to take shipment for July and four following months. This was held to warrant the seller in rescinding the contract). See also *Alpena Cement Co. v. Backus*, 156 Fed. Rep. 944, 84 C. C. A. 444. But see *Worthington v. Gwin*, 119 Ala. 44, 24 So. 379, 43 L. R. A. 382. The plaintiff in this case agreed to mine all the ore within a given territory, the defendant paying monthly a specified sum for each ton delivered. The plaintiff mined several thousand tons and a small part of this was mined and delivered

in a way not authorized by the contract. This was held not to give the defendant a right to forbid the plaintiff to continue mining. The court cites with approval the doctrine of the English and New Jersey cases.

"*Stokes v. Baars*, 18 Fla. 656 (the seller contracted to deliver 2,500 to 3,000 pieces of timber to be inspected and delivered as fast as water would permit, and to be completed not later than June 15, 1880; payment cash, on handling specifications. The buyer failed to pay for part of the timber though payment was demanded. This was held to amount to a positive repudiation and abandonment of the contract, and to justify a refusal on the part of the seller to make further delivery); *Branch v. Palmer*, 65 Ga. 210 (the defendant contracted to sell 600 bales of cotton of three lots, and the plaintiff to buy them. The defendant shipped the first lot and drew on the plaintiffs for the price with the bill of lading attached. The draft was dishonored and the defendant thereupon refused to deliver the lot for which the draft was drawn, or any of the remaining lots. The trial court charged the jury that the buyer's failure to pay the draft absolved the defendant from his obligation to forward the remainder. This charge was sustained by the upper court); *Savannah Ice Co. v. American Refrigerator Co.*, 110 Ga. 142, 35 S. E. 280 (the plaintiff agreed to sell all the ice the defendant required for a period of a year. The defendant agreed to buy the same at \$5 a ton, payable monthly. Part of the ice was delivered and paid for. One bill for certain quantities of ice furnished May 1st and 3d was presented but

not paid until July 9th. July 16th another order for ice was given but the defendant refused to fill it. The trial court charged that the time of payment was not an essential matter, not having been expressly made so by the terms of the contract. The court upheld an exception, holding the stipulation making all bills payable monthly was "that credit should be extended only as to such quantities of ice as it might require in a given month during that period, prompt settlement for which should be made at the end of the month as a condition precedent to the extension of further credit"); *Bradley v. King*, 44 Ill. 339 (the plaintiff contracted to buy and the defendant to sell a million feet of lumber to be delivered by September 1st following, part of the price being paid when the contract was signed and part was to be on the 15th of the three following months and the remainder as fast as the lumber was received. By the 1st of September there had been delivered about 218,000 feet; in the next four weeks nearly 600,000 feet more were delivered. The buyer brought action for the seller's failure to deliver the lumber as required by the contract. The defendant set up that the plaintiffs refused to make payment for the last cargo received, amounting to about 175,000 feet. The court upheld this defense, saying that the payment for the lumber at the time of its receipt was a condition precedent to the right to demand more. The court intimated that a valid replication might be made to this plea to the effect that the buyer was entitled to damages for non-delivery of the balance more than equal to the amount of the price due for the cargo in question, but in the absence of such a replication held the plea good); *Hess v. Dawson*, 149 Ill. 138, 36 N. E. 557 (the plaintiff

agreed to furnish the defendant, monthly, such castings as he might order, and the defendant agreed to pay for the castings delivered each month by the 20th of the following month. Castings to the value of \$1,634 were ordered by the defendant and delivered, but not paid for. The defendant set up as a defense to an action for this amount the failure of the plaintiffs to make and deliver castings as they agreed, and claimed a right to recoup the damage. The court held the defense inadmissible, since the defendant did not offer to prove that it was not in default in making payments at the time of the plaintiff's failure to perform); *Curtis v. Gibney*, 59 Md. 131 (there was in this case a sale of 10,000 bushels of barley to be shipped, from time to time, drafts for the price to be made at five days. It was held that on account of the failure on the part of the buyer to accept and pay such drafts, the seller was under no obligation to make further shipments); *McGrath v. Gerner*, 77 Md. 331, 26 Atl. 502, 39 Am. St. Rep. 415 (the plaintiff agreed to buy of the defendant all the oyster shells made by him for the ensuing season, and to pay on the first day of each week for the shells delivered the previous week. After the delivery of about 75,000 bushels of shells, about the middle of the season the defendant notified the plaintiff that the contract was at an end on account of failure on the part of the plaintiff to make weekly payments. Repeated request had been made for prompt payment, and finally, the plaintiff being two weeks in default, the defendant sold his oyster shells to some one else. The defendant was held justified in so doing); *Baltimore v. Schaub*, 96 Md. 534, 54 Atl. 106 (the plaintiff contracted to sell the city of Baltimore coal for the school board, pay-

ment to be made once a month, the price to be based on an analysis of the coal. Coal delivered in July was not paid for in August because the city chemist had made no analysis, and the city chemist informed the plaintiffs that he could not make the kind of analysis required by the school board until the end of the year. The coal delivered in August was not paid for prior to September 3d, and on that day the plaintiffs notified the defendant that they rescinded the contract. On September 6th, the city chemist furnished them an analysis. The plaintiffs sued to recover for the coal delivered, and the defendant claimed to recoup damages for the plaintiffs' failure to fulfill the contract. The court held the recoupment could not be allowed); *Eastern Forge Co. v. Corbin*, 182 Mass. 590, 66 N. E. 419 (the defendant agreed to sell to the plaintiff all its production of steel scrap for one year from March 1st. "Payment to be made between the 20th and 25th of the month following that in which shipment has been made." The defendant made four shipments in March, three in April, five in May, and one on June 5th. No part of the price had been paid when on June 21st the defendant wrote canceling the contract. The next day the plaintiff sent a check for the March and April shipments and promised to pay for the May shipment by July 1st, and requested further deliveries. The defendant declined to reconsider its determination. The plaintiff sued for damages, but the trial judge found for the defendant, and was held warranted in so doing. The court laid stress on the fact that there had been no performance by the plaintiff at the time of the cancellation and said that "under these circumstances, the seller might reasonably conclude that this failure

to pay was chronic and would continue to be so"); *Robson v. Bohn*, 27 Minn. 333, 7 N. W. 357 (contract for the sale of 425,000 feet of lumber to be delivered at the rate of 20,000 feet a week until the whole should be delivered; payment of \$3,000 by note on the execution of the contract and \$2,000 on the 1st of August, and the remainder when the whole should be delivered. Held that the obligation to deliver after August 1st was dependent on the promise to pay \$2,000 and if the seller delivered at the agreed rate until that day, and the buyer without excuse refused to pay \$2,000, the former might treat the contract as abandoned and recover the value of the lumber delivered. Held further that if on August 1st, the seller had delivered at the correct rate the kinds and quality required by the contract, it was no excuse for refusing to pay the \$2,000 that the buyer had also delivered some lumber not of the quality required by the contract and which had been rejected); *Palmer v. Breen*, 34 Minn. 39, 24 N. W. 332 (the defendants contracted to sell and the plaintiffs to buy 5,280 feet of granite curbing, "payments to be made monthly or as often as estimates are made for all curb delivered, and final payment to be made in thirty days after the last of said curb is delivered." The trial court instructed the jury — "Taking the intention of the parties, my construction is that these defendants had a right to refuse to continue furnishing curbing if payment was refused according to the terms of the contract, and to entitle them to that right there must be a demand of payment. It is not sufficient to merely ask for money, from time to time. There must be a specific demand upon the other party of payment, and some indication of a purpose to in-

sist upon the payment as a condition of a further delivery." This instruction was sustained); *Berthold v. St. Louis Construction Co.*, 165 Mo. 280, 65 S. W. 734 (the plaintiffs contracted to sell and the defendant to buy 5,000 telegraph poles. Payment for each month's delivery was to be made on the 10th of the following month. One thousand five hundred and seventeen poles were ordered and delivered when the defendant wrote the plaintiff that in view of the plaintiff's violation of the terms of the contract it annulled the same, adding that the defendant would obtain the remaining poles called for by the contract and settle with the plaintiff after deducting damage for the plaintiff's breach of contract. The plaintiff refused to accept this annulment and brought action for the price. It was held that the plaintiff was entitled to recover without full performance because the defendant's failure to pay justified the plaintiff in ceasing work and suing for what he had done); *Gardner v. Clark*, 21 N. Y. 399 (this was an action upon a contract by which the defendant agreed to sell 1,000 bushels of barley at forty-four cents a bushel. A portion of the barley was delivered when the defendant refused to deliver more because of failure to pay on delivery for what had been delivered. The court said: "An exception was taken to that part of the charge to the jury in which the latter was told that, assuming that the defendant was entitled to demand payment for each load of barley upon its delivery, yet if he delivered several loads without further payment, 'it was, in law, a waiver of the condition of the payment for each load as delivered, and credit was thereby given to Gardner for the barley so delivered.' This portion of the charge is somewhat equivocal, and its accuracy

depends upon the interpretation which is given to it. If it meant that the defendant could no longer insist upon the condition in respect to the barley which had been delivered, it is simply a self-evident proposition. If, on the other hand, it means that, by delivering several loads without insisting upon payment, the defendant had waived the condition as to the barley still to be delivered, so that upon the delivery of a subsequent load he could no longer insist upon payment for such load, it was, I think, clearly erroneous. I am inclined, however, to think that neither of these is the true interpretation; but that what the judge intended to say, and what the jury must have understood him to say, was that the defendant could not insist upon payment for the barley which had been delivered as a condition precedent to the delivery of the residue. If this is the true meaning of the language used in this portion of the charge, it was, in my judgment, obviously right. But the judge carried his views as to the effect of the defendant's act in waiving the condition as to several of the loads to still greater and, as I think, erroneous lengths, in the subsequent parts of his charge. He was requested by the counsel to charge, that, 'although the defendant had not required payment for each load so delivered, so far as the same had been delivered, yet the defendant had a right at any time, upon being ready to deliver a load and offering so to do, to demand payment for such load, and that, upon noncompliance by the plaintiff, the contract was broken on his part.' This request was refused by the judge, and the ground of this refusal is shown by his proceeding to charge that, 'if the said defendant intended to require payment for each load as de-

livered, for the barley thereafter to be delivered, and thus change the practice which he had begun with, he should have given Gardner *reasonable notice* that he intended to make such change, and should make demand of payment in such manner that it could have reasonably been complied with on the part of Gardner.' It is impossible, I think, to sustain the position here taken by the judge"); *Kokomo Co. v. Inman*, 134 N. Y. 92, 31 N. E. 248 (the contract was to furnish the defendant 1,200 tons of strawboard during the year 1888 on "90 days' acceptance from date of invoice." A considerable portion of the strawboard was delivered and the defendants' notes payable in ninety days were taken instead of acceptances. A note maturing July 5th for \$1,054 was not paid, and a note due July 20th for \$658 was also unpaid. Another of these notes was paid subsequently. Eighty-seven tons of strawboard were delivered in June, for which the defendants promised to give their notes, as they had for other shipments, but they failed to do so. It was held the plaintiff might treat the contract as rescinded and recover the value of the strawboard furnished); *American Broom Co. v. Addickes*, 19 N. Y. Misc. Rep. 36, 42 N. Y. Suppl. 871 (failure to comply with a term of an instalment contract providing for cash on delivery was held to justify the seller in refusing to deliver the balance and in bringing an action for the price of the goods already delivered); *Reybold v. Voorhees*, 30 Pa. St. 116 (the plaintiff agreed to buy all the peaches growing on the defendant's farms to be delivered in instalments and paid for at the end of each week. Five hundred dollars was paid down as security for the faithful performance of the agreement at the time the con-

tract was executed. Peaches were delivered for a week but no payment was made at the end of the week. On Monday of the following week peaches were delivered. Those delivered at this time amounted in value to \$539. Thereupon, on Tuesday, the defendant stopped sending peaches to the plaintiff and sold elsewhere. On the afternoon of the same day, the plaintiffs having learned this called upon the defendant and tried to induce him to continue sending his peaches to them, which he refused to do. The plaintiffs, however, did not offer to pay for the peaches already delivered but permitted the original security to remain in the defendant's hands, and subsequently paid the balance of \$39. On instructions given by the trial court, the plaintiffs recovered damages for the failure of the defendant to deliver the rest of the peaches, but the judgment was reversed and a new trial awarded. The court said: "The plaintiffs broke their contract by not paying up on Saturday and the defendant had a right then to rescind it and seek another market. He continued another day to execute it on his side and again plaintiffs failed; then he rescinded and a day or two afterward the plaintiffs came and were willing to pay, but they were too late"); *Rugg v. Moore*, 110 Pa. St. 236, 1 Atl. 320 (the defendants agreed to sell to the plaintiff six carloads of corn at a price per bushel. On August 16th, the first car arrived and two drafts. The plaintiff paid the first draft, and on August 21st, a second car arrived. About the same time a letter from the defendants was received stating that all the grain was shipped and calling for payment. The plaintiff got the corn from the second car from the station agent without presenting the bill of lading, and refused to pay the draft until

the English test, whether there was an intent to repudiate.⁴⁵ Where the seller sends one or more instalments of goods inferior

the four remaining cars should be heard from. When the defendants heard of this refusal to pay, they at once notified the plaintiff that they rescinded the contract. The plaintiff finally paid the draft for the second car and sued for the failure to deliver the four carloads. Verdict and judgment were for the plaintiff in the court below, but the judgment was reversed. The court said [p. 242]: "If this contract required payments of deliveries and the plaintiff willfully refused payment according to the contract, he thereby authorized the defendants to rescind at their option"); *Easton v. Jones*, 193 Pa. St. 147, 44 Atl. 264 (the plaintiff agreed to sell the defendant 800,000 feet of lumber, the defendant agreeing to pay \$7.25 a thousand when loaded on the cars. The plaintiff delivered 284,000 feet on the cars and brought this action to recover the price. It was held the failure of the defendant to make payments when agreed would justify the plaintiff in rescinding the contract whether the agreed payments were to be regarded as severable payments for what had been delivered or partial payments in advance of a total price).

"*Monarch Cycle Co. v. Royer Wheel Co.*, 105 Fed. Rep. 324, 44 C. C. A. 523 (the plaintiff agreed to sell and the defendant to buy 2,000 bicycles at specified prices, monthly shipments to be made and payments net sixty days subject to agreed discount for cash in ten days. Two hundred and nineteen bicycles were delivered when the plaintiff sued for the price. The defendant set up a counterclaim a claim for damages for failure to deliver the remainder. The court held the contract an entire

contract, not a number of separate contracts, and from this drew the conclusion "that the mere failure to pay for a number of bicycles specified to be delivered under the contract would not necessarily be a renunciation of the agreement which would authorize the plaintiff to treat the same as abandoned by defendant, and, therefore, absolve it from the obligations of the contract. The vendor is still bound by the terms of its agreement. It has agreed to furnish 2,000 bicycles. It is bound to fulfill the contract, in the absence of such emphatic refusal to carry out the terms thereof as would amount to a renunciation of it"); *West v. Bechtel*, 125 Mich. 144, 84 N. W. 69, 51 L. R. A. 791 (the plaintiff agreed to buy and the defendant to sell 400 cords of wood, the plaintiff promising to pay as fast as the wood should "come in"; three cars were shipped and two were paid for. On February 7th the plaintiffs wrote asking that the wood be shipped faster; the defendant meantime had begun negotiations with another buyer and on February 28th wrote saying that the plaintiff had agreed to pay for wood as fast as it came in, that a car had been shipped February 4th and was received within three or four days, but had not been paid for. The trial judge instructed the jury that the evidence was not sufficient to warrant a finding that there was such a breach of contract on the part of the plaintiff as would justify the defendant in refusing further performance, and accordingly left only the question of damages to the jury. After an elaborate consideration of the English authorities the court sustained this instruction);

in quality to what the contract calls for, there seems no reason to distinguish the case from the kinds of breach of contract

Blackburn v. Reilly, 47 N. J. L. 290, 1 Atl. 27, 54 Am. Rep. 159 (stated in note 46, *infra*); *Otis v. Adams*, 56 N. J. L. 38, 27 Atl. 1092 (the defendant agreed to sell and the assignors of the plaintiff to buy, in lots, fish scrap at prices fixed by the agreement. One hundred and five tons were delivered, but so far as the pleading showed had not been paid for. On demurrer this was held no objection, the court saying that in continuing contracts of sale, "default by one party will not release the other from his continued obligation unless the conduct of the defending party evinces an intention on his part to abandon the contract and no longer be bound thereby." It is to be observed that New Jersey has now passed the Sales Act and that the test laid down in the act differs from that adopted in this and previous New Jersey decisions). See also *Johnson Forge Co. v. Leonard*, 3 Pennw. 342, 51 Atl. 305, 94 Am. St. Rep. 86, 57 L. R. A. 225 (the plaintiff agreed to buy and the defendant to sell 300 tons of iron, cash payable on receipt of each 100 tons. Four cars of iron aggregating 100 tons or more were shipped. To a demand for payment the sellers wrote the buyer saying that they would not remit until they got enough of the balance of the contract in hand to be assured that the whole amount purchased would be received. The sellers refused to make further delivery and brought this action for the value of the iron delivered. The trial court held as matter of law that the plaintiff was entitled to recover. This was affirmed by the court above. But the court said that nonpayment or non-delivery will not of itself ordinarily

be sufficient to warrant a rescission; but where, as here, the buyer insisted upon new terms different from the original agreement, the contract might be treated as at an end. The comment may be made upon this, that wherever the contract is broken the terms as originally agreed upon are not carried out, and it can be matter of very little importance to the injured party whether the terms are not carried out because the wrongdoer insisted that he had a right to do as he did); *Winchester v. Newton*, 2 Allen, 492 (the defendant agreed to sell all the oak timber on two wood lots at \$6 a cord; payment six months after delivery; deliveries to be completed before a fixed date. Some timber was delivered but payment was refused on the ground that the contract meant payment six months after delivery of all the timber. The defendant then delivered no more timber, and this action was brought for damages. The court held this construction erroneous but held the refusal to pay did not operate to discharge the defendant from his promise. Compare *Eastern Forge Co. v. Corbin*, 182 Mass. 590, 66 N. E. 419); *Beatty v. Howe Lumber Co.*, 77 Minn. 272, 79 N. W. 1013 (the plaintiff agreed to deliver logs and the defendant to pay for them in instalments on the 25th day of each month for all logs delivered the preceding month. After delivery had been made of some logs, the defendant failed to pay the first instalment due on February 25th, and the plaintiffs abandoned the contract on the same day that the defendant made default. The court held the plaintiffs could not recover damages for breach of contract. The plaintiffs

already considered. Even if the seller does not manifest an intent to persist in sending inferior goods, if he has already sent a great quantity of inferior goods, the inevitable consequence is that he will not substantially perform the contract even though all the remaining instalments are what the contract calls for. The buyer should, therefore, be allowed to refuse to go on with the contract unless he has waived his right by knowingly and

had an immediate remedy on failure to pay the instalments to recover the stipulated amount, but could not recover as damages anticipated profit on the contract, since immediate cessation of work was not justified by default in payment for a single day, nor did it make any difference that the plaintiffs were without means to continue logging in the absence of prompt payment of the instalments); *Trotter v. Heck-scher*, 40 N. J. Eq. 612, 4 Atl. 83 (the plaintiff agreed to deliver 1,000 tons of ore a month for a year; the defendant to pay for each month's delivery on the 15th day of the succeeding month. The price was to vary according to the quality of the ore, and the plaintiff demanded payment for all ore accepted at the rates fixed for ore above a certain standard. The defendant refused to pay on this basis and, because of nonpayment the plaintiff discontinued delivery. The court found that, though the plaintiff's contention was unfounded, nevertheless part of the ore was richer than the defendant's analysis showed, and, consequently, that when the plaintiff stopped delivery, the defendants were in arrears. The plaintiff was, nevertheless, held not justified in his action since the defendant's conduct did not evince an intention to abandon the contract or a design not to be bound by its terms); *Tucker v. Billings*, 3 Utah, 82, 8 Pac. 554 (the plaintiff entered into a contract to supply the defend-

ant with lumber, payment to be made for 20,000 feet as often as 25,000 feet was delivered, the balance to be paid at the end of the year. A considerable quantity of lumber was delivered. Part was paid for, but the defendant failed to pay four-fifths of the price of an instalment of lumber and subsequently the plaintiff refused to deliver any more. The plaintiff sued for the price of what had been delivered and the defendant set up as a counterclaim damages for the refusal of the plaintiff to make further delivery. The trial court refused to sustain the counterclaim, but this was held error, the upper court holding that the refusal to pay any instalment was no legal justification for the refusal to supply more). See also *Myer v. Wheeler*, 65 Iowa, 390, 21 N. W. 692 (there was here a sale of ten carloads of barley, like sample, to be delivered, from time to time, and paid for as delivered. Upon receipt of the first carload the defendants refused to pay for it because it was not equal to sample, but informed the sellers that credit had been given for sixty-five cents a bushel, five cents less than the contract price, and that they would withhold payment until the ten carloads had been delivered. The seller thereupon refused to ship any more and brought action to recover the price of the carload delivered. A counterclaim for failure to deliver the remaining carloads was made by the defendants. The court held the

voluntarily accepting inferior goods. The decisions perhaps show less readiness to allow a refusal to go on with the contract on account of a defect in quality than because of the other breaches of contract referred to above. Many cases certainly seem to regard it as no defense to the buyer that a considerable quantity of inferior goods have been furnished.⁴⁶ But the view here advocated is supported by recent decisions of courts of the highest standing.⁴⁷ So far as concerns the right to refuse performance of later instalments because the contract has been essentially broken in regard to the earlier instalments, the results reached by the majority of the American decisions, it is submitted, are sound. In the discussion of the principles involved there is one matter, however, that is perhaps insufficiently brought out. When one party to an instalment contract violates in any respect his obligations, it is conceivable that the injured party may take one of two positions. He may assert that he will perform no further

contract severable, but the refusal to pay for the first carload did not enable the plaintiffs to rescind and refuse to deliver the rest. Beck, J. dissented).

⁴⁶ *Jonassohn v. Young*, 4 B. & S. 296; *Wayne's Coal Co. v. Morewood*, 46 L. J. Q. B. (N. S.) 746; *Guernsey v. West Coast Lumber Co.*, 87 Cal. 249, 25 Pac. 414; *Vallens v. Tillman*, 103 Cal. 187, 37 Pac. 213; *Blackburn v. Reilly*, 47 N. J. L. 290, 1 Atl. 27, 54 Am. Rep. 159; *Cahen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203; *Scott v. Kittanning Coal Co.*, 89 Pa. St. 231, 33 Am. Rep. 753. In *Blackburn v. Reilly*, 47 N. J. L. 290, 1 Atl. 27, 54 Am. Rep. 159, the plaintiff agreed to sell fifty-two carloads of bark to be delivered one carload a week until the whole should have been delivered. Five carloads were delivered and paid for. It was not used for some time after delivery and the buyer then claiming it was unfit for the purpose for which it had been bought notified the seller not to send any more. The seller brought action, but the parties settled their differences by a further

agreement for the delivery of the remainder of the bark weekly, shipments to begin on April 1st or within ten days. No bark was delivered within the time stipulated, and on April 21st the buyer gave notice that he would not receive any bark under the contract. On an action by the seller for damages the court held that the plaintiff could not recover because the circumstances were not such as to warrant an inference that the plaintiff purposed to abandon the contract. *Cahen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203, and *Scott v. Kittanning Coal Co.*, 89 Pa. St. 231, 33 Am. Rep. 753, were approved and followed.

⁴⁷ *McDonald v. Kansas City Bolt Co.*, 149 Fed. Rep. 360, 79 C. C. A. 298, 8 L. R. A. (N. S.) 1110. The delivery of defective instalments was held to justify the buyer in refusing to go on with the contract if prompt notice of his election was given to the seller. But in regard to this the court said: "The chief failure of the plaintiff was in the character of the pipe bands in the

until the wrongdoer has made good his omission; or conceivably he may make a more vigorous assertion of right by refusing to go on with the contract in the future, irrespective of reparation for the injury. The distinction is between saying, "I will not further perform until you do" and, "I will never perform further because you have not performed on time what you agreed to do." It is submitted that situations often occur where the injured party is justified in taking the former stand when he might not be justified in taking the latter. Thus if the seller fails to deliver goods on time, the buyer may say, "I will not pay until you deliver" and, he may say also, "I will not take the second instalment until you have delivered the first, for, by the terms of the contract, that was to precede the other."⁴⁸ The mere fact that by the terms of the contract one performance is

first two carloads of materials, which were delivered about the last of July, 1903. McDonald discovered this default in August of that year, and immediately complained of it. The plaintiff thereupon furnished three more carloads of better bands, which it bent at the factory, and promised to replace all that had been broken free of charge. McDonald received, used, and paid for the three latter carloads. The plaintiff was a manufacturer. It was making and shipping these bands for the specific purpose of binding the wooden pipe that was to be used to conduct water to the city of Golden. The pipe bands were not worth their contract price in the open market for any other purpose. McDonald gave the manufacturer no notice that he would not accept and pay for the remaining four carloads which the vendor was required to make and deliver, and the plaintiff manufactured and shipped them in the belief that he would do so. It was not until after these four carloads had arrived at Golden, and not until December, 1903, that he first gave notice to the plaintiff that he would not accept them

because the bands previously shipped had been defective. The notice came too late. The vendee was estopped by his receipt of the three carloads after his knowledge of the vendor's default, by his failure to notify it of his intention not to receive the remainder of the contracted articles, and by the fact that the plaintiff had made and shipped them in reliance upon the contract which required it to do so, and upon the vendee's acts and silence, in the full belief that he would accept and pay for them, from relieving himself from liability for them on account of any previous default of the vendor." So in *Fullam v. Wright & Colton Co.*, 196 Mass. 474, 82 N. E. 711, where the contract was for 900 cords of wood "largely chestnut," to be shipped and paid for in instalments, the shipment of five cars of wood which was largely soft wood was held to justify a refusal to go on with the contract altogether, though the seller intended to make up the proper proportion of chestnut and hard wood in later shipments.

⁴⁸ See *Pope v. Porter*, 102 N. Y. 366, 7 N. E. 304, stated in note 42, *supra*.

to precede the other makes the later obligation conditional on the performance of the earlier obligation. It is quite another proposition, however, to assert that because the earlier obligation was not performed on time, the later obligation is excused altogether. This is to assert that not simply performance but the exact time of performance of the earlier obligation is a condition precedent. Whether time in a given case is so vital that a breach of the contract in point of time is a substantial or material default going to the essence of the contract is a question of fact. As has been seen,⁴⁹ time is generally of the essence in mercantile contracts. This does not, however, mean that the slightest default in time is fatal, but any considerable delay in delivering or accepting goods generally would be. It is in the case where the first breach consists of a failure to pay for one instalment at the time agreed that the distinction here suggested finds its most frequent application. Where the contract provides that one instalment shall be paid for before the next instalment of goods is delivered, it is a most unjust decision if the seller is required to deliver more goods until he has been paid for what he has already delivered.⁵⁰ It by no means follows, however, that as soon as default is made in payment for an instalment of goods the seller is entitled to rescind the contract or totally refuse further performance, even though the default in payment continues until the time for the next delivery of goods is due. It might well be that the seller, though entitled to delay further delivery until paid for what he had already delivered, would not be entitled to continue to refuse to deliver after payment was made. The seller's right to take the latter course must depend upon the materiality of the breach. It is probable that time in regard

⁴⁹ See *supra*, § 189.

⁵⁰ Thus in *Savannah Ice Co. v. American Refrigerator Co.*, 110 Ga. 142, 35 S. E. 280, the court rightly held that a stipulation making all bills payable monthly meant "that credit should be extended only as to such quantities of ice as it might require in a given month during that period, prompt settlement for which should be made at the end of the

month as a condition precedent to the extension of further credit." So in *Raabe v. Squier*, 148 N. Y. 81, 42 N. E. 516, it was held that the seller of goods under an instalment contract may refuse to deliver the third instalment until the first and second instalments have been paid for, the contract providing for payment of the price of each instalment on delivery.

to the payment of money on the day when it has been promised is not so vital as a failure to accept or deliver goods on the day promised.⁵¹ It is obvious, however, that this is merely a question of degree; delay in the performance of any contractual obligation sooner or later must become so material as to justify a refusal ever to continue performance.⁵² A question that has been somewhat discussed is whether it makes a difference if the breach of contract occurs in the first instalment. Such was the nature of the breach in one of the earliest English cases,⁵³ and the later English cases have been disposed to distinguish the earlier decision on this ground.⁵⁴ The American cases⁵⁵ have not generally been disposed to lay much stress upon such a distinction and it seems rightly. Though it is generally true that a breach at the outset of a contract need not be so material as a breach after part performance in order to justify rescission or refusal to continue performance by the injured party, the reason upon which this general rule is based has little application to the class of cases here under consideration. The reason for the rule is this—that after a contract has been partly performed it is unjust to make even a wrongdoer lose the benefit of the performance already rendered by not allowing him to become entitled to receive the counter-performance.⁵⁶ In a divisible contract, however, such performance as has been rendered must ordinarily be paid for at the contract price, irrespective of whether the rest of the contract is performed or not. There is, therefore, not the same equitable reason for allowing a wrongdoer to continue. A question of construction which sometimes arises where there has been a smaller amount of goods delivered or accepted in one or more instalments than the contract calls for also deserves attention. If an offer of further instalments

⁵¹ See *Beatty v. Howe Lumber Co.*, 77 Minn. 272, 79 N. W. 1013, stated *supra*, note 45. In this case the plaintiff asserted the right totally to rescind the contract that very day on which the defendant made a breach of its agreement to pay for an instalment of logs. It was rightly held that this was not permissible.

⁵² See the discussion in *National*

Machine & Tool Co. v. Standard Shoe Machinery Co., 181 Mass. 275, 63 N. E. 900, and the cases cited in note 44, *supra*.

⁵³ *Hoare v. Rennie*, 5 H. & N. 19.

⁵⁴ See note 38, *supra*.

⁵⁵ See notes 41, 43, 44, *supra*.

⁵⁶ See *Graves v. Legg*, 9 Ex. 709; *Bettini v. Gye*, 1 Q. B. D. 183.

according to the contract is thereafter made, the question arises, Is the offer to be construed as an offer to fulfill the obligation to deliver the remaining instalments according to the original terms of the contract, or is the construction rather that the whole amount of the goods are to be delivered, making the default only a delay in delivery or accepting some of the goods? This is a question of fact, and each case must be considered upon its own circumstances.⁵⁷

§ 468. Delivery to a carrier as fulfilment of the seller's obligation to deliver—Provisions of the Sales Act.—

Sec. 46. DELIVERY TO A CARRIER ON BEHALF OF THE BUYER.—(1.) Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in the cases provided for in section 19, Rule 5, or unless a contrary intent appears.

(2.) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and

⁵⁷ In *Hull Coal Co. v. Empire Coal Co.*, 113 Fed. Rep. 256, 51 C. C. A. 213, the seller agreed to sell the production of its coke ovens and the buyer to take his production of not less than 20,000 tons during the year that the contract was to run. Orders and deliveries of coke were to be made in as nearly as possible equal weekly instalments, the price to be paid on the 20th of each month, "the usual strike, accident, and transportation clauses to mutually govern." The usual clause referred to provided that in case of contracts deliveries might be suspended, or, at the option of the party not in default, might be immediately canceled during the continuance of the interruption. A strike occurred and

deliveries were suspended. It was held that the purchaser could not demand delivery of coke sufficient to make up a total of 20,000 after the expiration of the period originally fixed in the contract. In *Honek v. Muller*, 7 Q. B. D. 92, the court seemed to regard a failure of the buyer to take delivery of the first instalments of a contract extending over three months as amounting to a refusal to take the total amount of iron for which the contract called. The materiality of the breach may well depend upon which construction is proper. Ordinarily a failure to deliver or take the amount called for by the contract will be a more material breach than a delay in performance as to some instalments.

the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3.) Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows or ought to know that it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such transit.

This section follows, with slight changes, section 32 of the English Sale of Goods Act.⁵⁸

§ 469. **When the seller's obligation to deliver is fulfilled by delivery to a carrier.**—Where the seller is under a contract to sell goods to the buyer and ships them to him, the question whether the seller has thereby fulfilled all his obligations under the contract may be considered under two aspects: First, In relation to the transfer of the property in the goods; second, in reference to the liability of the seller upon the promises or obligations in his contract. The question more commonly arises under the first aspect, and has previously been fully considered.⁵⁹ The authorities there referred to also support the provisions of section 46 of the Sales Act in regard to the fulfillment of the seller's obligation to deliver the goods. For the validity of the seller's appropriation of the goods to the buyer is made to depend on the seller's fulfillment of the requirements of the buyer's order or contract. Where bills of lading are issued by the carrier, the question is necessarily affected by the rules governing such documents. If the bill of lading is a straight or non-negotiable bill it is, under

⁵⁸ In subsection (1) the English act has the words "prima facie" immediately before the word "deemed." The words "prima facie" are dropped in the American statute, and instead of them the last line and a half beginning with the word "except" has been added. In subsection (3), the words in the American act "under circumstances in which the seller knows, or ought to know that" do

not occur in the English act; the corresponding words in that act being: "By a route involving sea transit, under circumstances in which." It is said in Benjamin, Sale (5th Eng. ed.), 739, of this portion of the English section that "it is borrowed from the Scotch law and possibly has been extended."

⁵⁹ See *supra*. §§ 278, 279.

the Sales Act and by American business usage, merely evidence of the carrier's contract. In such a case, therefore, the bill of lading is simply evidence of whether the delivery to the carrier was a delivery to it as bailee for the buyer or for the seller. If, however, the bill of lading is an "order" bill, or by the statute made negotiable, the possession of the bill of lading is in effect possession of the goods, and though the title may pass to the goods on their delivery to the carrier, the goods cannot properly be regarded as delivered to the buyer until the bill of lading is transferred to him.⁶⁰

§ 470. Buyer's right of inspection—Provisions of the Sales Act.—

Sec. 47. RIGHT TO EXAMINE THE GOODS.—(1.)

Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2.) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

(3.) Where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words "collect on delivery," or otherwise, the buyer is not entitled to examine the goods before payment of the price in the absence of agreement permitting such examination.

The first two paragraphs of this section are taken verbatim from section 34 of the English Sale of Goods Act. Subsection (3) is new, and the effect of it, and the reason for it, will appear in the subsequent discussion.

⁶⁰ See the discussion of documents of title, *supra*, §§ 405-444; and also

United States *v.* Andrews, 207 U. S. 229.

§ 471. **Nature and effect of buyer's right of inspection.**— It is customarily said in cases and books on the law of sales that the buyer has a right to examine or inspect the goods unless it is otherwise agreed. But consideration is not often given to the exact nature of this right, nor how it harmonizes with other rules of the law of sales, especially with the presumption considered in a previous part of this work⁶¹ that the property passes as soon as the parties are agreed upon specific goods and on the terms of the bargain, and with the doctrine of appropriation by the seller, in conformity with authority given by the buyer. If the buyer's right of inspection were simply that of a promisee of an independent promise in a contract, the right would be of little service to him, for the damages recoverable on account of the seller's failure to allow inspection as distinguished from his failure to furnish the goods called for by the contract could be little more than nominal. To be useful the right of inspection must be not simply an obligation of the seller but a condition precedent qualifying the buyer's obligation either to take title or to pay the price, or a condition subsequent authorizing the return of the goods and the recovery of the price if title to the goods has passed, or the price has been paid. In the rule of presumption that the property passes at once, if the goods are specified and the terms of the bargain agreed upon, no qualification is made to the effect that the presumption is not applicable unless the goods have been inspected; and no such qualification is made in the rule that the property passes when the seller appropriates goods to the buyer in accordance with authority previously given by the buyer. In such cases, therefore, the inspection of the buyer cannot be a condition precedent to the transfer of the property in the goods. Where, however, by the terms of the bargain the property is not to pass until delivery to the buyer, the situation is different. A clear conception of the meaning and effect of the buyer's right of inspection requires separate consideration of the cases where the right is a condition precedent to the transfer of the property and of other cases.

§ 472. **Right of inspection as a condition precedent to transfer of the property.**— Where by the terms of the contract the property

⁶¹ See *supra*, § 264.

is not to pass until the goods are delivered to the buyer, the word "delivered" used in regard to the action of the seller connotes an assent to take on the part of the buyer. In other words, delivery when made directly from one party to the other requires assent to take as well as assent to give. Accordingly, the buyer, by refusing to take the goods, can always prevent delivery and thereby, where the property is not to pass until delivery, prevent it from passing. For this purpose it is quite immaterial why the buyer refuses to take the goods, or whether his reason is a just one.⁶² The situation must be distinguished from cases where the buyer has given authority to the seller to appropriate goods for him or deliver them to a third person for him. In such cases the previous assent of the buyer to this mode of dealing with the goods effects a transfer of the property when the seller carries out the authority given him. It might be urged that where the contract provides for the direct delivery of the goods to the buyer, there also the seller is given an authority, and the mere unloading them at the buyer's place of business would operate as a transfer of the property. But presumably because of the case of getting the immediate assent or dissent of the buyer in such a case, the law implies no authority on the part of the seller to transfer the property by the mere surrender of the goods at a place where they will be in the buyer's control. Nor does the mere assent of the buyer to take the goods into his physical control operate as a transfer of the property. He is entitled to examine the goods in order to decide whether he will become owner, and until the examination is completed or waived, the property will not pass.⁶³ The length of time which the buyer is entitled to retain

⁶² In many jurisdictions, however, the seller may virtually force title upon the buyer where the buyer's refusal is wrongful by suing for the price of the goods. See *infra*, § 562 *et seq.*

⁶³ *McNeal v. Braun*, 53 N. J. L. 617, 23 Atl. 687, 26 Am. St. Rep. 441. A barge load of coal had been ordered, to be delivered at Burlington, the buyer's residence. The barge arrived and the buyer directed that

it be laid alongside his wharf for unloading. This was done and the barge made fast to the wharf. The buyer's servants then prepared to unload the coal. Preparations were made and a small quantity of coal was actually unloaded. The workmen then quit work for the day and during the night the barge sank. The court held that the loss fell upon the seller because the buyer "was entitled to a reasonable opportunity to unload the

the goods in his possession without acceptance will be considered presently.⁶⁴ Since the buyer is entitled to inspect the goods before determining whether he will take them, a refusal on the part of the seller to allow opportunity for inspection justifies the buyer in refusing to fulfill the contract.⁶⁵ If the property in the goods has not passed prior to inspection, it follows that after inspection the buyer may refuse to take title.⁶⁶

§ 473. **Right of inspection as a condition precedent to paying the price after the property has passed.**—Where by the terms of the bargain the property was to pass before delivery to the buyer, “the buyer has a reasonable time after the delivery in which to examine the goods, and, if they are not of a kind and quality ordered, he may then refuse to accept them, and thereby rescind the contract; but this right does not prevent the title from passing nor a recovery by the seller in an action for goods sold and delivered, if in fact they do conform to the terms of the contract.”⁶⁷ The common illustration of this principle is where goods are

entire cargo for examination to ascertain whether the coal corresponded with his order and had arrived in good condition.” So in *Holmes v. Gregg*, 66 N. H. 621, 28 Atl. 17, the buyer was held entitled to unload for inspection lumber from box cars in which it had been shipped without being chargeable as having accepted the lumber. See also *Allyn v. Burns*, 37 Ind. App. 223, 76 N. E. 636; *Dunham v. H. D. Williams Cooperage Co.*, 83 Ark. 395, 103 S. W. 386.

⁶⁴ See *infra*, § 476.

⁶⁵ *Lorymer v. Smith*, 1 B. & C. 1; *Demens v. Le Moyne*, 26 Fla. 323, 8 So. 442; *Knoblauch v. Kronschnabel*, 18 Minn. 300; *Charles v. Carter*, 96 Tenn. 607, 36 S. W. 396. Compare *Hudson v. Germain Fruit Co.*, 95 Ala. 621, 10 So. 920. In this case a contract for the sale of fruit to be shipped from a distance to the buyer had been made, but the buyer's obligation to take the goods was made expressly conditional on in-

spection. The goods were shipped under a bill of lading making the goods deliverable to the consignor's order. This bill of lading was sent forward with a draft for the price to the buyer's residence. When the goods arrived the railroad refused to allow the buyer to inspect them because the buyer was not named in the bill of lading, nor was any permission for him to inspect written upon the bill. The buyer complained to the shipper's agent who said that he would obtain authority from the seller. He did so in two days, but the buyer refused to take the fruit. His refusal was held wrongful, the court saying the decision would have been otherwise had his right of inspection been absolutely refused. Compare also *Floyd v. Arky*, 89 Miss. 162, 42 So. 569.

⁶⁶ *Rheinstrom v. Steiner*, 69 Ohio St. 452, 69 N. E. 745, 100 Am. St. Rep. 699.

⁶⁷ *Brigham v. Hibbard*, 28 Or. 386, 388, 43 Pac. 383.

shipped by a carrier in accordance with an order or contract. As has been seen, the property passes in such a case to the buyer on shipment, if the authority given by the order or contract is observed.⁶⁸ It is often said in such cases that delivery to the carrier is a delivery to the buyer, and it may be urged that the buyer should exercise his right of inspection before such delivery to him, and that if he fails to do so, he waives his right; but whether or not the buyer is entitled to inspect the goods at the point of shipment, it is clear that the delivery to the carrier and the transfer of the property thereby to the buyer do not preclude a right of examination when the goods reach their destination,⁶⁹ although it is equally clear that the risk of loss and other incidents of ownership fall upon the buyer.⁷⁰ The principle appli-

⁶⁸ See *supra*, § 278.

⁶⁹ *Pope v. Allis*, 115 U. S. 363, 6 S. Ct. 69, 29 L. ed. 393 (in this case the court said: "The authorities cited sustain this proposition, that when a vendor sells goods of a specified quality, but not in existence or ascertained, and undertakes to ship them to a distant buyer when made or ascertained, and delivers them to the carrier for the purchaser, the latter is not bound to accept them without examination. The mere delivery of the goods by the vendor to the carrier does not necessarily bind the vendee to accept them. On their arrival he has the right to inspect them to ascertain whether they conform to the contract, and the right to inspect implies the right to reject them if they are not of the quality required by the contract"); *Elliott v. Howison*, 146 Ala. 568, 40 So. 1018; *Weil v. Stone*, 33 Ind. App. 112, 69 N. E. 698, 104 Am. St. Rep. 243; *McCarty v. Gordon*, 16 Kans. 35, 37; *Gill v. Kaufman*, 16 Kans. 571; *Lincoln v. Gallagher*, 79 Me. 189, 8 Atl. 883; *Alden v. Hart*, 161 Mass. 576, 37 N. E. 742; *Boothby v. Plaisted*, 51 N. H. 436, 12 Am. Rep. 140; *Holmes v.*

Gregg, 66 N. H. 621, 28 Atl. 17; *Salomon v. King*, 63 N. J. L. 39, 42 Atl. 745; *Pierson v. Crooks*, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831; *Sun Publishing Co. v. Minnesota Foundry Co.*, 22 Or. 49, 29 Pac. 6; *Wadhams v. Balfour*, 32 Or. 313, 328, 51 Pac. 642; *Eaton v. Blackburn*, Or. 96 Pac. 870; *Holt v. Pie*, 120 Pa. St. 425, 14 Atl. 389.

⁷⁰ This has been held in many cases in which the matter is disposed of by merely determining in whom the property is according to the principles considered *supra*, § 300 *et seq.* The point does not seem to have been much suggested that the buyer's right of inspection should defer the transfer of the property or keep the risk with the seller until inspection is completed, but in *Murphy v. The Sagola Lumber Co.*, 125 Wis. 363, 103 N. W. 1113, the point was raised. The contract was for the sale of lumber f. o. b. at the seller's residence. It was held that the buyer must pay for the lumber which was shipped, irrespective of what was received. The court said the buyer had a right to inspect the lumber when it reached its destination and reject it if it was not in accordance with the contract,

cable to the case of goods shipped by a carrier is also applicable where, for any reason, the property passes in uninspected goods before delivery.⁷¹

§ 474. **Right of inspection as a condition subsequent.**—The right of returning goods or rejecting goods on inspection is customarily regarded as based on a condition precedent in the buyer's obligation, and no doubt this mode of regarding the matter is accurate in most cases. Generally the right of the buyer may be defined as either a right to see the goods in order to determine whether he will become owner, or a right to see them in order to determine, before making payment, whether he has already become owner because of authority previously given the seller. But in some cases the operation of the right of inspection seems to be that of a condition subsequent, enabling the buyer to return goods of which he has already become owner, and to recover money which he has already paid. This seems to be the law where the property is transferred and the goods paid for without oppor-

but that this right would not prevent the transfer of title and of risk to the buyer.

⁷¹ Magee v. Billingsley, 3 Ala. 679, 698. In this case the court, referring to the effect of the right of inspection upon the rule of presumption that the property passes as soon as the parties are agreed upon the terms of the bargain, said: "The rule upon this point, then, which seems to us most consistent with principle, and in harmony with the general analogies of the law, is to consider the purchaser entitled to the goods and the seller entitled to the money, from the time the bargain is struck, giving to the former the right to refuse to receive them, or to reject them, if upon an examination made in a reasonable time after the sale, or receipt, they shall not agree with the sample. The property thus passing to the buyer, where no act is stipulated as a condition precedent to be performed by either party, the goods are immediately placed at his risk,

and the loss resulting from their destruction must be borne by him, if they were of the quality indicated by the sample. If they were not of that quality, their destruction cannot deprive him of the right of repudiating the contract, where a reasonable time had not elapsed for examination; nor can it revive that right, if such time had passed previous to their loss." Another illustration of a right of inspection which was not a condition of the transfer of the property may be found in *Isherwood v. Whitmore*, 11 M. & W. 347, where the court held that the defendants who had agreed for a certain sum of money to discharge a lien on certain property were entitled to inspect the property before performing their agreement. Parke, B., said: "There is here no question about the passing of the property; for inasmuch as the plaintiff claims only a lien upon the hats, they are admitted to have belonged to the defendants from the beginning."

tunity for inspection, unless it appears that the terms of the bargain were that the buyer should take the goods in such condition as they might happen to be in.⁷² In many cases, also, where the goods are taken into the buyer's possession and retained for a considerable time prior to examination,⁷³ it seems far more just to regard the condition imposed by the right of inspection as subsequent rather than as precedent. Where goods are taken into the buyer's possession and examination is deferred for his convenience until an indefinite time in the future, it is a harsh

⁷² In *Hudson v. Germain Fruit Co.*, 95 Ala. 621, 10 So. 920, stated *supra*, § 472, note 65, the court said that the buyer might have paid the draft which had been drawn upon him by the seller, and thereby obtained the bill of lading for the goods, got them from the railroad, examined them, and then if they were not what had been contracted for, returned them and recovered the price paid. Such a purchase of the bill of lading would, it seems, have involved a transfer of the property to the buyer whatever the condition of the goods. A later rejection of the goods would, therefore, operate as a condition subsequent. In *Giffen v. Selma Fruit Co.*, 5 Cal. App. 50, 89 Pac. 855, a draft sent forward with a bill of lading was paid before the arrival of the goods. The goods did not conform to sample as agreed and the buyer rejected them. The court rested its decision on the ground that the buyer's acceptance was necessary to transfer the property. This seems an error. Surely, if the goods had been as agreed and the buyer had paid the draft, the seller's creditors, or trustee in bankruptcy, could not have claimed the goods. The decision is sound, but should be rested on the exercise of a condition subsequent. So in *Weil v. Stone*, 33 Ind. App. 112, 69 N. E. 608, 104 Am. St. Rep. 243, 90 per cent. of the price was paid by

draft before receipt of the goods. Such payment would be strong evidence of an intent to take title to the specific goods shipped, even though not what the contract called for. The right of rejecting the goods which the court allowed the buyer would, therefore, be a condition subsequent. In *Heilbutt v. Hickson*, L. R. 7 C. P. 438, 456, Brett, J., said: "Besides the incidents attaching to a contract of sale by sample, and which have been enumerated by my Lord, I think there is also the following, that such a contract always contains an implied term that the goods may under certain circumstances be returned; and that such term necessarily contains certain varying or alternative applications. and, amongst others, the following, that, if the time of inspection, as agreed upon, be different from the place of delivery, the purchaser may, upon inspection at such time and place, if the goods be not equal to sample, return them *then and there* on the hands of the seller. Otherwise the right of inspection given to the purchaser would fail in its primary object." These remarks seem applicable irrespective of whether the price has been paid or other circumstances indicating a transfer of title have taken place.

⁷³ See cases cited in § 476, note 79, *infra*.

rule if the goods are held to be still the property of the seller and at his risk. It would be more just, and it would be inconsistent with no decisions, to hold that if the examination is deferred for the buyer's convenience beyond the time when the goods are delivered and could be examined, title passes, subject to the right of the buyer to throw back the title if the goods are not what the bargain required.⁷⁴

§ 475. **Testing.**—Not only is the buyer permitted a reasonable time within which to make examination of the goods, but if necessary, in order to determine whether they conform to the contract or order, the buyer may test the goods even though the test involve destruction of a portion of the goods.⁷⁵ If the nature of the goods "can be determined by inspection alone, the test is not necessary, and the use of the material, therefore, clearly unjustifiable."⁷⁶ It is always a question of fact whether a test is

⁷⁴ In *Doane v. Dunham*, 79 Ill. 131, there was evidence that it was not the custom among wholesale dealers in Chicago to examine sugar which they bought until the packages were opened to sell from to customers. The court held that if such was the uniform custom understood and acted upon by the trade in Chicago, it was a fair presumption that the parties acted upon it and they should be governed by it. If during the period before the goods are sold they are at the seller's risk, he is virtually insuring the buyer's stock in trade, a result that the parties can hardly have contemplated. The custom would be satisfied by treating the right of inspection as a condition subsequent. In *Doane v. Dunham*, the buyer ultimately opened the packages and finding the sugar defective notified the seller to remove it. The seller failed to do so and subsequently the sugar was destroyed by fire. The court held that, under such circumstances, the risk was upon the seller. There can be no doubt of the correctness of its decision; for even

if the property had passed to the buyer, his rejection of the goods and notice to the seller to remove them would transfer the property and the risk back to the seller.

⁷⁵ *Lucy v. Moufflet*, 5 H. & N. 229; *Philadelphia Whiting Co. v. Detroit Lead Works*, 58 Mich. 29, 24 N. W. 881; *Cream City Glass Co. v. Friedlander*, 84 Wis. 53, 54 N. W. 28, 36 Am. St. Rep. 895; *Zipp Mfg. Co. v. Pastorino*, 120 Wis. 176, 97 N. W. 904. See also *Mulcahy v. Dieudonne* (Minn.), 115 N. W. 636.

⁷⁶ *Cream City Glass Co. v. Friedlander*, 84 Wis. 53, 59, 54 N. W. 28, 36 Am. St. Rep. 895. In this case the buyer rejected the goods immediately on arrival and inspection. After some correspondence with the seller in which, however, no authority was given for testing, the buyer used about 1,500 pounds of the material in a test. This constituted about 1½ per cent. of the whole. The court held the seller had exercised an unmistakable act of ownership inconsistent with the claim that the material had been rejected and could

necessary, and whether a reasonable quantity only of the goods was used in making the test.⁷⁷ If the buyer goes beyond the necessities of the case, he thereby becomes owner of the goods with all right of rejection lost.⁷⁸

§ 476. **Time allowed for inspection.**—If the buyer receives goods into his possession and fails to inspect them within a reasonable time after he has had opportunity to do so, he thereby waives the condition, and is thereafter to be treated as having assented to take or keep title to the goods. In the early cases it seems to have been assumed that the time to inspect the goods was as soon as they were offered to the buyer; but it soon became apparent that goods were often of such a character or so packed that immediate examination was impossible; testing or opening the packages was essential. The courts have allowed the buyer,

not recover money paid for the price and freight of the goods.

⁷⁷ *Lucy v. Moufflet*, 5 H. & N. 229 (in this case it was held that the use of twenty gallons out of a hogshead of cider was more than sufficient to test the quality of the cider); *Philadelphia Whiting Co. v. Detroit Lead Works*, 58 Mich. 29, 24 N. W. 881 (in this case the subject of the bargain was 300 barrels of whiting, which was bought for the purpose of making putty. The buyer used forty-two barrels of the whiting for this purpose and sold the product to customers who soon complained. Thereupon the buyer complained to the seller twelve days after the receipt of the whiting, and nine days after such complaint notified the seller that the whiting would be stored at the seller's risk. It was held that the reasonableness of the buyer's conduct both in regard to time and in the quantity of whiting used was properly left to the jury).

⁷⁸ *Lucy v. Moufflet*, 5 H. & N. 229, 232. Bramwell, B., said: "If a wine merchant sends a customer a pipe of wine without orders, and the cus-

tomers takes out twenty gallons, must he not keep the whole? So, if the jury find that a person to whom, in pursuance of an order, goods are sent consumes more than is necessary to ascertain if they accord with the sample, must he not keep the whole? Can he set up that he is a wrongdoer?" In *Nelson v. Overman*, 19 Ky. L. R. 161, 38 S. W. 882, the action was for the price of a quantity of hemp which was in bales. The buyer opened the bales and used a portion of each. He set up the inferior quality in the interior of the bales as a defense, but it was held he should have rejected the goods after examining only so many of the bales as were sufficient to show the inferiority. In *Zipp Mfg. Co. v. Pastorino*, 120 Wis. 176, 97 N. W. 904, the action was for the price of vanilla sold to candy manufacturers and returned as unsatisfactory. It was apparent that a satisfactory test could be made by using a few ounces and defendant used four to six ounces daily from four to six weeks, and sold a large quantity of candy flavored therewith, though they found

under these circumstances, a reasonable time to make the examination. In some cases this has been carried very far.⁷⁹ No more definite rule can be laid down than that such a time as is reasonable, having regard to all the circumstances of the case, is permitted.⁸⁰ Custom is of importance in determining what is a reasonable time.⁸¹ Where not only inspection but testing is permitted the buyer either by the express terms of the contract or otherwise the same rule of reasonableness limits the time allowing for testing.⁸² A failure to inspect or test within the time permitted by the contract or the law is a waiver of the condition qualifying the buyer's obligation to become owner of the goods or to pay for

the vanilla unsatisfactory in the first test. It was held that the buyers had gone beyond what was reasonably necessary for a test and had thereby lost all right of rejection.

⁷⁹ In *Lucy v. Mouflet*, 5 H. & N. 229, the examination and rejection of a cask of cider, which was the subject of the sale, was about three weeks after the cider was sent. This was held to be not too great delay. In *Doane v. Dunham*, 79 Ill. 131, stated note 74, *supra*, a much longer time seems to have been regarded as permissible.

⁸⁰ See *Elliott v. Howison*, 146 Ala. 568, 40 So. 1018; *Armsby Co. v. Shewmake*, 113 Ga. 1086, 39 S. E. 473; *Henkel v. Welsh*, 41 Mich. 664, 3 N. W. 171; *Day Leather Co. v. Michigan Leather Co.*, 141 Mich. 533, 104 N. W. 797; *Knoblauch v. Kronschnabel*, 18 Minn. 300; *E. T. Burrows Co. v. Rapid Safety Filter Co.*, 49 N. Y. Misc. Rep. 539, 97 N. Y. Suppl. 1048; *Lenz v. Blake*, 44 Or. 569, 76 Pac. 356; *Gordon v. Waterous*, 36 U. C. Q. B. 321. In *Jones v. Bloomgarden*, 143 Mich. 326, 334, the court said: "The reasonable time allowed by the law for inspection depends upon the circumstances

of the case, and is usually a question of fact for the jury. 2 Mechem, Sales, § 1381. The vendee is required to act promptly. *George D. Sisson Lumber & Shingle Co. v. Haak*, 139 Mich. 383. This reasonable time must also depend more or less upon the character of the goods shipped, and the opportunity for inspection. A more prompt inspection of perishable property is required than of nonperishable property. This is based upon sound reason, but counsel cite no authorities upon the subject, and I have been unable to find any. A carload of perishable fruit or vegetables should receive more prompt attention than a carload of lumber." Where lumber was shipped in box cars the vendees were held entitled to take it to their yards, unload and examine before accepting it. *Holmes v. Gregg*, 66 N. H. 621, 28 Atl. 17.

⁸¹ *Doane v. Dunham*, 79 Ill. 131 (stated in note 74, *supra*); *Sanders v. Jameson*, 2 C. & K. 557 (a custom requiring objection to corn within one day after delivery was upheld).

⁸² *Tasker v. Crane Co.*, 55 Fed. Rep. 449 (C. C. A.); *Gray v. Consolidated Ice Co.*, 103 Ga. 115, 29 S. E. 604.

them, or of a condition subsequent authorizing return of the goods.⁸³

§ 477. **Expense of examination and testing.**—Since it is the duty of the seller to afford opportunity for examination it would seem that the seller must bear the expense of affording such opportunity, but the expense of the inspection itself is another matter. The buyer need not inspect unless he likes, and if he chooses to do so he must bear the cost.⁸⁴ If on inspection, however, it appears that the goods were not what the contract called for, it would seem to be a proper element of damage in an action against the seller for breach of his contract that reasonable expense had been incurred in examining the goods and detecting their insufficiency. So if a portion of the goods are used for testing, the buyer is under no liability for the value of the property destroyed if it fails to fulfill the requirements of the contract. A qualification should probably be added to this rule, however; namely, that if the buyer derives a benefit from the use of the goods which form the subject-matter of the test, he should be liable on principles of *quasi*-contract to the extent of the benefit thus received, even though the goods are not what the contract required.⁸⁵

⁸³ See cases cited in the notes to this section. See also section 48 of the Sales Act, *infra*, § . Prevention by the buyer of an agreed test has the same effect. *Smith v. Barber*, 153 Ind. 322, 53 N. E. 1014.

⁸⁴ In *Lincoln v. Gallagher*, 79 Me. 189, 8 Atl. 883, the subject-matter of the sale was a schooner. The buyer, after the bargain, wished to inspect the vessel and asserted that the seller should go to the expense of placing the vessel in a dry dock for examination. The court said: "There can be no doubt that, in offering delivery, the seller was under obligation to afford an opportunity to the purchaser to make the examination. But any expenses to be incurred thereby, beyond what would be necessary in putting the vessel in a proper place for de-

livery, would fall upon the buyer and not upon him. The seller was under no obligation to incur an unusual expense. He could not be called upon to place the vessel in a dry dock. He tenders the property as sound, according to the agreement upon which he acted. The buyer must accept or reject it at his risk. *Benjamin, Sales*, § 695; *Croninger v. Crocker*, 62 N. Y. 151."

⁸⁵ In *Philadelphia Whiting Co. v. Detroit Lead Works*, 58 Mich. 29, 28 N. W. 881, the court said on this point: "It is claimed the court should have allowed the plaintiff to recover for the value of the forty-two barrels used or sold by defendant in testing the article before he found out its inferiority. Had this been done, simple justice would have required the allowance to the defend-

§ 478. **Carriers must allow inspection.**— There are numerous decisions to the effect that a carrier must allow the owner or consignee of goods a reasonable opportunity to inspect them, and this right of inspection is a condition precedent to the obligation to pay freight.⁸⁶ It cannot safely be assumed, however, that the right of inspection which a carrier is bound to permit as a condition of requiring payment of freight and acceptance of the goods is identical with the right which the buyer is allowed as against the seller. It cannot be supposed that the buyer as against the carrier may take goods into his possession and test them as he may do as against the seller if testing is necessary in order to determine the conformity of the goods with the contract. Moreover the obligation of the carrier may be, and usually is, affected by express provisions in the bill of lading for the goods.⁸⁷

ant of the damages it sustained in the use it made of the plaintiff's goods in testing the quality, and this, according to the undisputed testimony, was at least \$1,000, so that it clearly appears the plaintiff has not been injured by the action of the court upon this point complained of. Certainly the defendant derived no benefit from the amount used. The article appears to have been, however, one which must be used before its quality can be ascertained. It was not apparent upon examination, and in such case it is the right of the defendant to make use of so much thereof as, under all the circumstances, may become actually necessary for that purpose, without liability for the value of the same if it fails in the test to fulfill the plaintiff's contract."

⁸⁶ *Great Western R. Co. v. Crouch*, 3 H. & N. 183; *American Express Co. v. Lesem*, 39 Ill. 312; *Meyer v. Lemcke*, 31 Ind. 208; *Old Colony R. R. Co. v. Wilder*, 137 Mass. 536; *Murray v. Warner*, 55 N. H. 546, 20 Am. Rep. 227; *McNeal v. Braun*, 53 N. J. L. 617, 23 Atl. 687; *Brand v. Weir*, 27 N. Y. Misc. Rep. 212, 57

N. Y. Suppl. 731; *Sloan v. Carolina, etc., R. Co.*, 126 N. C. 487, 36 S. E. 21; *Union R. R. Co. v. Riegel*, 73 Pa. St. 72.

⁸⁷ Thus in the form of bill of lading hitherto in general use in the eastern United States, this provision is made: "Owner, or consignee, shall pay freight at the rate herein stated and all other charges occurring on said property before delivery and according to weights as ascertained by any carrier herein. If, upon inspection, it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped and at the rates and under the rules provided for by published classifications." In the form of order bill of lading recommended by the Interstate Commerce Commission and adopted by most of the railroads of the United States at the close of the year 1908, the following provision is made: "Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading, or given

§ 479. **Circumstances showing inspection was not to be permitted before payment.**—The right of inspection may, of course, be waived and the waiver may not be in express terms. Any agreement, the performance of which, according to its terms is, or may be inconsistent with inspection before payment of the price, will operate as a waiver of the condition. A common illustration of such an agreement is a contract which provides for payment of the price on receiving documents of title. Such an agreement indicates the expectation of the parties that the goods would be in the hands of a bailee at the time the price became payable. The bailee could not be expected to allow inspection of the goods until after a buyer had become the owner of the document.⁸⁸ If the goods do not conform to the contract the buyer clearly may recover the price which he has paid. A common illustration of a bargain inconsistent with examination of the goods before payment is a contract by which goods are to be sent to the buyer C. O. D. It is the practice of the express companies not to permit examination before payment on such shipments. The contract must be assumed to have been made with this practice in mind. Accordingly there is no right of inspection.⁸⁹ If, however, the

in writing by the shipper." On the new form of straight bill recommended and put in effect at the same time nothing is contained in regard to inspection, and as to property covered by such bills, therefore, the rules of the common law govern.

⁸⁸ *Polenghi Bros. v. Dried Milk Co.*, 49 Sol. J. 120. See also *Dudley v. Chicago, etc., R. R. Co.*, 58 W. Va. 604, 52 S. E. 718, 3 L. R. A. (N. S.) 1135, 112 Am. St. Rep. 1027.

⁸⁹ *Wiltse v. Barnes*, 46 Iowa, 210. In this case the plaintiff had sent some bones to be made up into a skeleton which, when completed, was to be returned to the plaintiff by express C. O. D. This was done but the plaintiff refused to pay the charges until he had examined the work. The right to do this was denied him and he brought replevin for the skeleton. It was held the action

could not be maintained. The court referred to the rule of the express company upon the point, and said: "If this rule had been brought home to the knowledge of the shipper, then it would be presumed that he shipped pursuant to its provisions, and with the expectation that it would be observed. There is, however, no proof that the shipper knew of the existence of this rule; still, we think it was competent for him to stipulate as to the terms of shipment and the conditions under which delivery should be made to the consignee. It does not appear that any special contract was made at the time of shipment. It is, however, shown that before this action was commenced the consignor refused to allow an inspection of the property to be made and directed that unless plaintiff received the same and paid

transaction is an obvious fraud by which the buyer has been deceived into paying his money, it is the duty of the express company to return the money to the buyer if still in its hands.⁹⁰ And if the express company has reason to believe that, owing to injuries or defects of which the buyer does not bear the risk, the goods are not in the condition or of the quality they should be, the express company owes a duty to the purchaser to disclose its information before demanding and receiving payment.⁹¹ Though the buyer is not entitled to inspection, if the express company allows inspection and the buyer then refuses to take the goods because of their defective quality, the seller cannot sue the carrier for the price,⁹² or for conversion;⁹³ for the buyer would have been entitled to recover back the price if he had paid it without inspection of the goods. As sending goods forward with a draft attached to a bill of lading or C. O. D. involves the loss of the buyer's right of inspection, it is a breach of obligation for the seller to send forward goods in such a way where by the contract the buyer is entitled to inspection.⁹⁴ Where the contract does not

the amount at once defendant should ship it back to consignor. After receiving this direction the defendant had no right to deliver the property in violation of the orders of the consignor, nor had the consignee, as against the defendant, a right to the possession of it. The defendant, by obeying the orders of the consignor, did not render himself liable for the value of the property."

⁹⁰ *Herrick v. Gallagher*, 60 Barb. 566.

⁹¹ *Hardy v. American Express Co.*, 182 Mass. 328, 65 N. E. 375, 59 L. R. A. 731. In this case books ordered C. O. D. from Europe were so injured by water during transportation as to be practically worthless. The express company, knowing this, nevertheless, received the price and returned it to the shippers. The damage was not discovered by the buyers until about a fortnight after the goods had been received, and the

court held it a question of fact whether the purchaser gave notice of its claim within a reasonable time, and that if the jury determined this question in his favor the plaintiff would be entitled to recover. It will be noticed that this decision is based on the Massachusetts rule that goods sent C. O. D. are at the risk of the seller in transit. This is not the rule of the Sales Act. See *infra*, § 279. And as this Act is now in force in Massachusetts the previous decisions in that State on the subject can no longer be followed.

⁹² *Lyons v. Hill*, 46 N. H. 49, 88 Am. Dec. 189.

⁹³ *Dudley v. Chicago, etc., R. R. Co.*, 58 W. Va. 604, 52 S. E. 718, 3 L. R. A. (N. S.) 1135, 112 Am. St. Rep. 1027.

⁹⁴ *Erwin v. Harris*, 87 Ga. 333, 13 S. E. 513. The seller in this case was held under no obligation to pay a draft accompanying an order bill

specify whether inspection is to be allowed or not, it seems to be a question of fact whether the buyer has agreed that the goods may be shipped in a way that will preclude inspection.⁹⁵ Other forms of bargains may indicate by the time agreed upon for payment of the price or otherwise that an inspection of goods was not to be a condition precedent either to the transfer of the property or to the payment of the price.⁹⁶

§ 480. **Place of inspection.**—The place of inspection is *prima facie* the place where the goods are delivered to the buyer.⁹⁷ The contract may, however, provide for inspection at some other place,

of lading until inspection of the goods.

⁹⁵ *Louisville Lithographic Co. v. Schedler*, 23 Ky. L. Rep. 465, 63 S. W. 8. In this case a lithographic stone had been ordered from New York by a Kentucky buyer and was shipped C. O. D., but refused because examination was not allowed. The court said, at p. 467: "The contention of appellee is that he was entitled to ship the stone in question 'C. O. D.,' and that it was the duty of appellant to pay the charges and accept the same. He also contends that appellant never asked him to be allowed to examine the package sent, while appellant's contention is the reverse. It is contended for appellee that the universal custom and law is that the purchaser must pay for the goods on delivery, unless by agreement time is to be given. This contention may be true, but it does not follow that a party in New York may, when a party in Louisville has purchased a particular article, send the same so concealed that it cannot be examined marked 'C. O. D.,' thus requiring the purchaser to pay for an article which he has not had an opportunity to examine and determine whether it is the article purchased by him or not. Under all of the facts and circumstances proven in this case we do not think that appel-

lant was necessarily bound to accept the express package and pay for the same, and the question as to whether he should have done so or not should have been submitted to the jury."

⁹⁶ *Lawder Co. v. Mackie Grocery Co.*, 97 Md. 1, 54 Atl. 634. In this case a seller in Baltimore contracted to sell to a buyer in New Orleans a quantity of canned tomatoes "f. o. b. Baltimore," "terms cash," "buyer to give shipping instructions when requested by the seller." The buyer refused to pay until he had received the goods; whereupon the seller refused to ship. The buyer sued for breach of contract. It was held he could not recover, the court saying that the provision as to cash meant payment of cash when the goods were delivered to the carrier; and, further, that there was no reason why the goods might not have been inspected at the seller's place of business in Baltimore rather than at the destination of the goods, which in the case of each lot was to be wherever the buyer directed.

⁹⁷ *Perkins v. Bell*, [1893] 1 Q. B. 193; *Peace River Phosphate Co. v. Grafflin*, 58 Fed. Rep. 550; *Brownlee v. Bolton*, 44 Mich. 218, 6 N. W. 657; *Cefalu v. Fitzsimmons*, 65 Minn. 480, 67 N. W. 1018; *Pease v. Copp*, 67 Barb. 132; *Holt v. Pie*, 120 Pa. St. 425, 440, 14 Atl. 389.

and the nature of the contract may be such that even in the absence of express provision the law will hold some other place than that of delivery to be the point for inspection. The chief ground for such an implication seems to be that a reasonable examination cannot readily be made at the place of delivery. It is on this ground that where goods are shipped to the buyer inspection need not be made on delivery to the carrier, though title passes at that moment, and the carrier becomes bailee for the buyer.⁹⁸ Other cases resting upon the same principle may occur.⁹⁹ Difficult questions may arise here, especially where the contract requires shipment of the goods on the buyer's order. An important line of distinction seems to be this: If the goods are delivered to the buyer even though he immediately ships them to another destination, and it is expected that he shall do so, the general rule that the place of delivery is the place of inspection applies.^{99a} On the other hand, if the seller is to ship the goods,

⁹⁸ See *supra*, § 473.

⁹⁹ In *Grimoldby v. Wells*, L. R. 10 C. P. 391, tares were sold and delivery was made to the buyer half way between the houses of the buyer and seller. The buyer on getting the tares in his barn inspected them and thereupon rejected them. Brett, J., said, at p. 396: "There is here a contract for the sale of goods, and by agreement they are to be delivered before a fair opportunity for inspection arises; for it cannot properly be said that it would be reasonable to hold the defendant bound to examine them when they were delivered to him at halfway of the journey. * * * When there is a sale by sample, and the time for inspection is subsequent to delivery, and the place of inspection different from that of delivery, then if the goods are found on such inspection not to be equal to sample, the purchaser has a right to reject them then and there, and it is the duty of the vendor to get them back thence." So in *Heilbutt v. Hickson*, L. R. 7 C. P. 438, though the con-

tract expressly provided that the shoes which were the subject-matter of the bargain should be inspected and the quality proved before shipment, the seller was allowed to recover damages for the existence of paper in the soles of the shoes, though a similar defect existed in the sample which had been the basis of the bargain. The jury found that the defects could not be discovered by any reasonable inspection.

^{99a} *Perkins v. Bell*, [1893] 1 Q. B. 193 (in this case the plaintiff sold barley by sample to be delivered at a railway station near the seller's farm. The seller knew that the barley was bought for resale, but did not know to whom nor where the barley was to be sent. The buyer having had a reasonable opportunity of inspecting the barley at the railroad station shipped it to a brewing company to whom it had been resold. The brewing company rejected the barley as not equal to the original sample which had been shown to them. The defendant thereupon re-

the place of inspection in the absence of agreement to the contrary is the destination of the goods, even though shipping directions may be given to the seller to send the goods to places other than the buyer's residence.¹ Where specific goods are sold in the condition in which they may happen to be, the buyer taking the risk of their quality, there is obviously no right to inspect the goods in order to determine their quality but even in such a case the buyer is entitled to examine the goods in order to determine whether they are the particular goods bargained for, that is, to determine their identity as distinguished from their quality.²

§ 481. **Manifestation of acceptance—Provisions of the Sales Act.**—

Sec. 48. WHAT CONSTITUTES ACCEPTANCE.—

The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

This section is identical with section 35 of the English Sale of Goods Act. As will be seen from the following sections, it represents the American law also. Such difference of decision as there is in this country upon the matter relates to the effect of accept-

fused to pay the plaintiff, who sued for goods sold and delivered. It was held that the property in the barley had passed and the right of rejection was gone); *Brownlee v. Bolton*, 44 Mich. 218, 6 N. W. 657 (this was a contract for posts and poles to be delivered on vessels furnished by the buyer. It was held that the time for inspection was when the timber was delivered to the vessels, not when the vessels reached their destination).

¹ *Holt v. Pie*, 120 Pa. St. 425, 440, 14 Atl. 389. The case of *Molling v. Dean*, 18 Times L. R. 217, goes still farther. There books were sold in England, but the seller knew that

they were intended for America. The buyer without inspecting the books sent them forward to America where they were inspected and rejected as not of the quality agreed upon. The books were packed by the seller for transportation for the voyage to America and the court held that America was the proper place for inspection. The case must be distinguished from the case of *Perkins v. Bell*, [1893] 1 Q. B. 193, on the ground that the packing of the books by the seller showed an intention to postpone inspection.

² *Isherwood v. Whitmore*, 11 M. & W. 347.

ance rather than to the evidence indicating that acceptance has taken place.

§ 482. **Meaning of acceptance.**—The meaning of “acceptance” in a discussion of executory contracts is an assent to enter into a contract according to the terms of an offer. The proper meaning of “acceptance” in the law of sales is an assent to become owner of specific goods offered by the seller. This meaning has been departed from in England in cases relating to the Statute of Frauds,³ but in the United States both under the Statute of Frauds and in the matter of what constitutes performance of the contract, this is the prevailing meaning. It is the meaning of the word in the Sales Act. Acceptance has nothing to do with possession or delivery, for acceptance may precede delivery,⁴ and on the other hand delivery may take place without acceptance.⁵ For the purpose of satisfying the Statute of Frauds, acceptance cannot be made by the agency of the seller,⁶ but aside from the Statute of Frauds the buyer may accept in advance such goods as the seller may appropriate. But this, because of the buyer’s right of inspection, will not debar him from rejecting the goods if not in conformity with the contract when they come under his personal observation unless he waives his right.⁷ Much confusion has been caused in the law of some states by the assumption that acceptance of the goods means not only an assent to become owner of them, but also an agreement that the goods thus received fulfill in every respect the legal obligation of the seller. No such implication, however, is necessarily contained in the word “acceptance.”

§ 483. **How acceptance is indicated.**—Where the parties deal with the goods before them the assent to the bargain, of itself, operates as an acceptance of the goods. For the meaning of the transaction necessarily is that the buyer agrees to become owner of those specific goods. Where the bargain relates to specific goods where there is no opportunity of inspection, though the property may pass by the terms of the bargain,⁸ the acceptance of the goods

³ See *supra*, § 80.

⁶ See *supra*, § 81.

⁴ See cases under Statute of Frauds, *supra*, § 76.

⁷ See *supra*, § 474.

⁸ *Ibid.*

⁵ See *supra*, § 74.

is subject to a condition subsequent until the buyer has an opportunity for inspection, unless by the terms of the bargain he has waived that right. Where goods are sold by description the same is true. The property may pass before its inspection.⁹ But unless inspection is waived the acceptance of the goods is subject to the condition that they conform to the description. When the buyer has had opportunity of inspection, however, he may accept the goods though not in conformity with the terms of the contract. The ways of manifesting acceptance may be reduced to the three enumerated in the section of the Sales Act under consideration; namely, (1) Intimation of acceptance. (2) Exercising acts of ownership. (3) Retaining the goods. Under the first head will be included both cases where the buyer receives goods and expresses his acceptance of them; and also cases where by the terms of the bargain the buyer agreed to accept goods, whether specified at the time of the bargain or to be afterward selected by the seller, without inspection. In the second class of cases it is impossible to enumerate all ways in which acts of ownership may be exercised by the buyer. The commonest case is where he resells the goods. As such action would be improper except on the assumption that the buyer had acquired title, it indicates necessarily an assent on the part of the buyer to become the owner of the goods in question.¹⁰ The result is the same if the buyer merely attempts to resell the goods.¹¹ Likewise the use of the goods by the buyer, in a manner proper only on the assumption that the buyer is owner.¹² So mak-

⁹ *Ibid.*

¹⁰ *Chapman v. Morton*, 11 M. & W. 534; *Telford v. Albro*, 60 Ill. App. 359; *Wolf v. Dietzsch*, 75 Ill. 205; *Rock Island Plow Co. v. Meredith*, 107 Iowa, 498, 78 N. W. 233; *Delamater v. Chappell*, 48 Md. 244; *Warden v. Marshall*, 99 Mass. 305; *Brown v. Nelson*, 66 Vt. 660, 30 Atl. 94.

¹¹ *Parker v. Palmer*, 4 B. & Ald. 387; *Perkins v. Bell*, [1893] 1 Q. B. 193.

¹² *Harnor v. Groves*, 15 C. B. 667; *Lyon v. Bertram*, 20 How. 149; *Dodsworth v. Iron Works*, 66 Fed.

Rep. 483, 31 U. S. App. 292, 13 C. C. A. 552; *Electric Motor Co. v. Frisbie*, 66 Conn. 67, 33 Atl. 604; *Diversy v. Kellogg*, 44 Ill. 114, 92 Am. Dec. 154; *Mayers v. Rogers*, 47 Ill. App. 372; *Carondelet Iron Works v. Moore*, 78 Ill. 65, 70; *Brown v. Foster*, 108 N. Y. 387, 15 N. E. 608; *Chambers v. Lancaster*, 160 N. Y. 342, 54 N. E. 707; *Cream City Glass Co. v. Friedlander*, 84 Wis. 53, 59, 54 N. W. 28, 21 L. R. A. 135, 36 Am. St. Rep. 895; *Kingman v. Watson*, 97 Wis. 596, 612, 73 N. W. 438.

ing alterations in the goods^{12a} or doing any act proper only for an owner. The third class — retention of goods by the buyer — might perhaps be regarded as only an illustration of the second class, since retention of goods may be considered an exercise of dominion inconsistent with anything but ownership. As retention is merely a negative indication, however, it seems better stated as a separate class. There is no doubt that such retention is proof that the buyer has accepted the ownership of the goods.¹³ Cases, under the Statute of Frauds, relating to acceptance by dealing with the goods involve the same principle.¹⁴

§ 484. **Acceptance does not bar action for damages — Provisions of the Sales Act.**—

Sec. 49. ACCEPTANCE DOES NOT BAR ACTION FOR DAMAGES.— In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.

This section is not contained in the English act, but section 11 (1) (a) of that act authorizes the buyer to take title to goods which do not comply with the contract and, thereafter, hold the seller liable in damages. The latter part of the American section imposes a qualification of the buyer's rights which is justified by

^{12a} *Bascom v. Manufacturing Co.*, 182 Pa. St. 427, 38 Atl. 510.

¹³ *Heilbutt v. Hickson*, L. R. 7 C. P. 438, 451, 452; *Couston v. Chapman*, L. R. 2 Sc. App. 250; *Foss Brewing Co. v. Bullock*, 59 Fed. Rep. 83, 16 U. S. App. 311, 8 C. C. A. 14; *Treadwell v. Reynolds*, 39 Conn. 31; *Watkins v. Paine*, 57 Ga. 50; *Ellis v. Roche*, 73 Ill. 280; *Wolf v. Dietzsch*, 75 Ill. 205; *Pennell v. McAfferty*, 84 Ill. 364; *Hobbs v. Whip Co.*, 158 Mass. 194, 33 N. E. 495; *Foster v.*

Rowley, 110 Mich. 63, 67 N. W. 1077; *Schwartz v. Church of the Holy Cross*, 60 Minn. 183, 62 N. W. 266; *Gaff v. Homeyer*, 59 Mo. 345; *Woodward v. Emmons*, 61 N. J. L. 281, 39 Atl. 703; *Mason v. Smith*, 130 N. Y. 474, 29 N. E. 749; *Dailey v. Green*, 15 Pa. St. 118; *Indiana Mfg. Co. v. Hayes*, 155 Pa. St. 160, 26 Atl. 6; *McClure v. Jefferson*, 85 Wis. 208, 54 N. W. 777.

¹⁴ See *supra*, § 77.

business practice and by some decisions as well as by the law on the Continent of Europe.

§ 485. **Acceptance of goods does not indicate release of liability for defective performance.**—Much confusion exists in American law on the right of a buyer who has accepted goods thereafter to sue for damages because of their defective quality, or because of other defects in the seller's performance. The question involved is not peculiar to the law of sales. It arises in every branch of the law of contracts. The problem is simply this: Does one party to a contract who has a right to rescind the contract or refuse to go on with it, and who, nevertheless, allows the party in default to continue with the contract and accepts his defective performance, thereby manifest an agreement that the performance so received shall be taken as full satisfaction of all obligations? In the law of contracts, other than contracts to sell or sales, by the clear weight of authority this question must be answered in the negative. If a party in default on a contract is allowed to continue to perform, this is a waiver of any right of rescission or refusal to go on with the contract because of any known default that has already taken place, but the obligation of the party in default is not thereby terminated, nor his liability to pay damages for his insufficient performance.¹⁵ There is no reason why the rule in the law of sales should be different. When insufficient performance is received by the buyer he should not be debarred from recovering damages because of the insufficiency, unless he has agreed to accept what has been offered him as full satisfaction of all his rights. There seems no ground for saying that the mere fact that he has taken the goods indicates such assent. If ten barrels of flour are contracted for and five are sent, the fact that the buyer takes the five sent certainly does not indicate that he assents to the performance as a full satisfaction. It is a partial performance and partial satisfaction, and he takes it as such; nor is he bound to assume that the seller intended it otherwise. If all ten barrels are sent, but later than they should have been, the same reasoning is applicable. And in the common case where the defect in the performance is the inferior quality of the flour, it is also true that taking the flour does not prove

¹⁵ Page, Contracts, § 1509.

that the buyer agrees to accept it as full satisfaction. As the hypothesis is that the performance is not what the contract requires, the burden is upon the seller to prove an assent to receive it in satisfaction. Taking the flour does not necessarily show assent, in fact, to excuse the seller from his breach of contract, and there seems no reason for laying down as an absolute rule of law, which must in a measure be fictitious, that assent is to be conclusively presumed. The weight of authority supports the view here taken but less definitely in regard to the last proposition than the others. The authorities may now be particularly considered.

§ 486. ~~The seller may sue for defective quantity.~~—As has already been seen¹⁶ the buyer need not accept any performance if the goods offered are too many or too few to satisfy the contract. Sometimes, however, he does take what is offered to him, but in such a case it is safe to assume that it would generally be held in the absence of other evidence of waiver that the buyer could recover damages for the failure to deliver the quantity which the seller had agreed to deliver.¹⁷

§ 487. ~~The seller may sue for delay in performance.~~—Lord Blackburn in his treatise on the Law of Sales¹⁸ says: "The vendee may accept the goods and bring his action for any damages he may have actually suffered in consequence of the late delivery. He does not by accepting the late delivery waive any claim he may have for damages arising from the delay." This rule is acknowledged in most of the American decisions.¹⁹ There is no

¹⁶ See §§ 460, 461.

¹⁷ *Titley v. Enterprise Stone Co.*, 127 Ill. 457, 20 N. E. 71; *Harber v. Moffat Cycle Co.*, 151 Ill. 84, 37 N. E. 676; *Avery v. Willson*, 81 N. Y. 341, 37 Am. Rep. 503; *Kipp v. Meyer* 5 Hun. 111.

¹⁸ (2d ed.), 524. The doctrine of the text is supported by the later decision of *Clydebank Co. v. Yzquierdo y Castaneda*, [1905] A. C. 6.

¹⁹ *Phillips & C. Const. Co. v. Seymour*, 91 U. S. 646, 23 L. ed. 341; *Jeffrey Mfg. Co. v. Central Coal & I. Co.*, 93 Fed. 408; *Van Winkle v. Wilkins*, 81 Ga. 93, 7 S. E. 644, 12

Am. St. Rep. 299; *Poland Paper Co. v. Foote Co.*, 118 Ga. 458, 45 S. E. 374; *Hansen v. Kirtley*, 11 Iowa, 565; *Medart Pulley Co. v. Dubuque Mill Co.*, 121 Iowa, 244, 96 N. W. 770; *Johnson v. No. Baltimore Glass Co.*, 74 Kans. 762, 88 Pac. 52, 7 L. R. A. (N. S.) 1114; *Bagby v. Walker*, 78 Md. 239, 27 Atl. 1033; *Buick Motor Co. v. Reid Mfg. Co.*, 150 Mich. 118, 113 N. W. 591; *Whalon v. Aldrich*, 8 Minn. 346; *Redlands Orange Growers' Assn. v. Gorman*, 161 Mo. 203, 61 S. W. 820, 54 L. R. A. 718; *Wall v. St. Joseph Storage Co.*, 112 Mo. App. 659, 87

doubt, however, that it is possible for the buyer to accept delayed performance as full satisfaction of the seller's obligation, but some evidence other than mere acceptance of the goods is necessary to warrant this conclusion.²⁰ Payment of the price in full has been held sufficient evidence.²¹ So giving a note for the price after the delayed receipt of the goods.²² A few cases, however, hold that the acceptance of the goods involves an acceptance of them as full satisfaction of the contract and waives any right to damages for the delay.²³ In a few other decisions the same rule is laid down, but subject to the qualification that the buyer's acceptance to have this effect must be without making objection on the ground of delay.²⁴ Acceptance of goods prematurely offered may more readily warrant the conclusion of acceptance as full satisfaction, since if the buyer preferred to have the goods strictly at the time when performance was due, he could probably secure this result by a refusal to receive them earlier.²⁵

§ 488. **Right of the seller to sue for defective quality.**—In the discussion of the seller's liability for defective quality of goods

S. W. 574; *Beyer v. Henry Huber Co.*, 100 N. Y. Suppl. 1029; *Crocker-Wheeler Co. v. Varick Realty Co.*, 104 N. Y. App. Div. 568, 94 N. Y. Suppl. 23; *Perry Tie Co. v. Reynolds*, 100 Va. 264, 40 S. E. 919.

²⁰ See cases cited in the preceding note; also *Ramsey v. Tully*, 12 Ill. App. 463; *Belcher v. Sellards*, 19 Ky. L. Rep. 1571, 43 S. W. 676; *Merrimac Mfg. Co. v. Quintard*, 107 Mass. 127; *Industrial Works v. Mitchell*, 114 Mich. 29, 72 N. W. 25; *Murmann v. Wissler*, 116 Mo. App. 397, 92 S. W. 355; *Rockwell Mfg. Co. v. Cambridge Springs Co.*, 191 Pa. St. 386, 43 Atl. 327; *Strain v. Pauley Mfg. Co.*, 80 Tex. 622, 16 S. W. 625; *Schweichhart v. Stuewe*, 71 Wis. 1, 36 N. W. 605, 5 Am. St. Rep. 190.

²¹ *Medart Pulley Co. v. Dubuque Mill Co.*, 121 Iowa, 244, 96 N. W. 770; *Roby v. Reynolds*, 65 Hun, 486, 20 N. Y. Suppl. 386. But see *contra*, *Clydebank Co. v. Yzquierdo y Castaneda*, [1905] A. C. 6. See also

Gilmore v. Williams, 162 Mass. 351, 38 N. E. 976.

²² *Reid v. Field*, 83 Va. 26, 1 S. E. 395.

²³ *Fraser v. Ross*, 1 Pennew. 348, 41 Atl. 204; *Jones v. Bloomgarden*, 143 Mich. 326, 106 N. W. 891; *Burrowes Co. v. Rapid Safety Filler Co.*, 97 N. Y. Suppl. 1048; *Baker v. Henderson*, 24 Wis. 509. In *Lee v. Bangs*, 43 Minn. 23; s. c., *sub nom.*, *Sole Leather Over Mfg. Co. v. Bangs*, 44 N. W. 671, acceptance of goods prematurely sent was said to conclude the buyer's rights.

²⁴ *Baldwin v. Farnsworth*, 10 Me. 414; *Minneapolis Threshing Machine Co. v. Hutchins*, 65 Minn. 89, 67 N. W. 807; *Bock v. Healy*, 8 Daly. 156; *Jones v. Nat. Printing Co.*, 13 Daly, 92.

²⁵ *Lee v. Bangs*, 43 Minn. 23; s. c., *sub nom.*, *Sole Leather Over Mfg. Co. v. Bangs*, 44 N. W. 671. See also *Rosenthal v. Rambo*, 165 Ind. 584, 76 N. E. 404, 3 L. R. A. (N. S.) 678.

which have been accepted by the buyer, it must be borne in mind that the question cannot arise unless the seller has broken a promise. If the seller's performance fulfills his obligation in regard to the quality of goods whether because the seller made no promises in regard to their quality or because such promise as he did make has been fulfilled, no question can arise as to his liability. The hypothesis is, therefore, that the goods which the seller tenders in his performance of the contract might have been refused by the buyer on account of the seller's failure to fulfill his obligation. The obligation of the seller may have been stated either in adjective form as part of the description of the goods (what has been called a condition by some writers and judges),²⁶ or the broken promise may have been in the form of a collateral warranty, or it may have been a warranty implied by law. It is to be noticed that all these possible forms of obligations are equally possible where the seller's breach of duty is a delay in time. The obligation to perform within a certain time, though not naturally stated as part of the description of the goods, may be so stated. It is more naturally and commonly stated as a collateral stipulation. If no provision in regard to time is stated in the contract, the obligation to perform within a reasonable time will be implied.²⁷ In the cases relating to default in time, referred to in the preceding section, the results reached do not seem to have been made to depend on the way in which the seller bound himself to perform within a certain limit of time. It is hard to see why any greater importance should be given to such distinctions where the seller's breach of duty relates to the defective quality of the goods. It is doubtful if the intention of the parties varies with the form in which the promise is put, whether as part of the description of the goods, or as a strictly collateral warranty. No doubt it is possible, however, for the buyer not merely to accept title to the goods offered, but to accept the transfer of title as full satisfaction of all the seller's obligations under the contract. Whether the buyer thus agrees to waive deficiencies in performance is logically and should, it seems, be legally a question of fact in each case. What is here insisted upon is that the mere

²⁶ See criticism on this nomenclature, *supra*, § 179.

²⁷ See *supra*, § 104.

fact that title to the goods has been accepted does not, of itself, warrant the conclusion that the buyer has agreed to surrender a claim against the seller because the latter failed to perform his promise. The view here advocated, that acceptance of title does not as matter of law indicate a waiver of claims for inferior quality of the goods, is supported by a large number of decisions in this country,²⁸ and is the unquestioned law of England.²⁹ While merely taking title to the goods does not warrant the conclusion that the buyer has agreed to take the goods in full satisfaction of all the seller's obligations, the retention and use of the goods for a considerable period without any complaint warrants a strong in-

²⁸ *English v. Spokane Commission Co.*, 48 Fed. Rep. 196; *Hodge v. Tufts*, 115 Ala. 366, 22 So. 422; *Frith v. Hollan*, 133 Ala. 583, 32 So. 494, 91 Am. St. Rep. 54; *Underwood v. Wolf*, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40; *Morris v. Wilbaux*, 159 Ill. 627, 43 N. E. 837; *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582, 54 N. E. 987 (but see *Eureka Steel Co. v. Morden Frog Works*, 23 Ill. App. 591; *Barker v. Turnbull*, 51 Ill. App. 226, 229; *McLeod v. Andrews*, 116 Ill. App. 646, where the Illinois Court of Appeals, misinterpreting *Titley v. Enterprise Stone Co.*, 127 Ill. 457, 20 N. E. 71, fails to follow the doctrine of the Illinois Supreme Court); *Hege v. Newson*, 96 Ind. 426, 431; *Graff v. Osborne*, 56 Kans. 162, 42 Pac. 704; *Payne v. Lumber Co.*, 110 La. 750, 34 So. 763; *Campion v. Marston*, 99 Me. 410, 59 Atl. 548; *Taylor v. Cole*, 111 Mass. 363; *Gilmore v. Williams*, 162 Mass. 351, 38 N. E. 976; *St. Louis Brewing Assn. v. McEnroe*, 80 Mo. App. 429; *Edwards v. Noel*, 88 Mo. App. 434; *Huber Mfg. Co. v. Hunter*, 99 Mo. App. 46, 72 S. W. 484; *Spiers v. Halsted*, *Haines & Co.*, 74 N. C. 620; *Lewis v. Rountree*, 78 N. C. 323; *Kester v. Miller*, 119 N. C. 475, 26 S. E. 115 (but see *Parker v. Fenwick*, 138 N. C. 209, 50 S. E. 627);

Northwestern Cordage Co. v. Rice, 5 N. Dak. 432, 67 N. W. 298; *Morse v. Union Stock Yards*, 21 Or. 289, 28 Pac. 2, 14 L. R. A. 157; *Best v. Flint*, 58 Vt. 543, 56 Am. Rep. 570; *Tacoma Coal Co. v. Bradley*, 2 Wash. 600, 27 Pac. 454, 26 Am. St. Rep. 890. See also *Smith v. Mayer*, 3 Colo. 207; *Shupe v. Collender*, 56 Conn. 489, 15 Atl. 405, 1 L. R. A. 339; *Central Trust Co. v. Arctic Mfg. Co.*, 77 Md. 202, 26 Atl. 493; *Dayton v. Hooglund*, 39 Ohio St. 671.

²⁹ In *Benjamin, Sale* (5th ed.), 1006, it is said: "The second proposition that the buyer may, after receiving and accepting the goods, bring his action (or set up his counterclaim, per *Brett, L. J.*, in *Thomson v. S. E. Ry. Co.*, [1882] 9 Q. B. D. 320, at 330) for damages in case the quality is inferior to that warranted by the seller, needs no authority. It is (so enacted by the Code, § 11 [1] [a], and § 53 [1]), taken for granted in all the cases, there being nothing to create an exception from the general rule that an action for damages lies in every case of a breach of promise made by one man to another for a good and valuable consideration. See the opinions of the judges in *Poulton v. Latimore*, [1829] 9 B. & C. 259."

ference that the goods are either what the contract called for, or that the buyer is satisfied to accept them instead of such goods. Accordingly in many of the decisions to which reference has been made, stress is rightly laid on the importance of giving prompt notice of defects.³⁰ But in other jurisdictions this seems less insisted upon.³¹ The Supreme Judicial Court of Maine has well stated the doctrine which apart from statute seems sound on principle.³² "The fact of acceptance, however, as a matter of evidence, may have great weight on the question of satisfactory or sufficient performance. In the first place, it raises considerable presumption that the article delivered actually corresponded with the agreement. In the next place, it is some evidence of a waiver of any defect of quality, even if the article did not so correspond—evidence of more or less force according to the circumstances of the case. If the goods be accepted without objection at the time or within a reasonable time afterward, the evidence of waiver, unless explained, might be considered conclusive. But if, on the other hand, objection is made at the time, and the vendor notified of the defects, and the defects are material, the inference of waiver would be altogether repelled. But acceptance accompanied by silence is not necessarily a waiver. The law permits explanation and seeks to know the circumstances which induced acceptance. It might be that the buyer was not

³⁰ *Hodge v. Tufts*, 115 Ala. 366, 22 So. 422; *Babcock v. Trice*, 18 Ill. 420, 68 Am. Dec. 560; *Titley v. Enterprise Stone Co.*, 127 Ill. 457, 20 N. E. 71; *Morse v. Moore*, 83 Me. 473, 22 Atl. 362, 13 L. R. A. 224; *Parker v. Fenwick*, 138 N. C. 209, 50 S. E. 627; *Minnesota Thresher Mfg. Co. v. Hanson*, 3 N. Dak. 81, 54 N. W. 311; *Morse v. Union Stock Yards*, 21 Or. 289, 28 Pac. 2, 14 L. R. A. 157. But the notice need not point out the particular defects. *Elliott v. Howison*, 146 Ala. 563, 40 So. 1018.

³¹ In *Taylor v. Cole*, 111 Mass. 363, the court held that though one for whom a kettle had been made examined it and knew that it leaked

but ordered it to be delivered without objection, and notwithstanding the fact that it continued to leak gave his promissory note for the price without objection, there was not conclusive evidence of waiver of all claims to damages. A finding of the jury for the buyer was, therefore, not set aside. See also *Richardson v. Grandy*, 49 Vt. 22; *Tacoma Coal Co. v. Bradley*, 2 Wash. 600, 27 Pac. 454, 26 Am. St. Rep. 890; *Larson v. Aultman & Taylor Co.*, 86 Wis. 281, 56 N. W. 915, 39 Am. St. Rep. 893.

³² *Morse v. Moore*, 83 Me. 473, 481, 22 Atl. 362, 13 L. R. A. 224, 23 Am. St. Rep. 783. This extract is quoted with approval in *English v. Spokane Commission Co.*, 48 Fed. Rep. 196.

competent to act upon his own judgment, or had no opportunity to do so, or declined to do so as a matter of expediency, placing his dependence mainly, as he has a right to do, upon the warranty of the seller. Upon this question the facts are generally for the jury under the direction of the court." The Sales Act for this question of fact substitutes a rule of law. The merits of the statutory rule are its certainty and the limitation of time for disputing the correctness of the seller's performance.

§ 489. **In some States acceptance of title waives right of damages for inferior quality.**—In some States the views which have been expressed in the preceding sections are not supported by the decisions. Especially in New York has it been held that taking title to the goods indicates an assent to accept the goods in full satisfaction of the seller's obligations as to the quality of the goods;³³ and the doctrine of the New York courts has been followed in other jurisdictions.³⁴ In jurisdictions like New York

* *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305; *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515; *Brigg v. Hilton*, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; *Studer v. Bleistein*, 115 N. Y. 316, 22 N. E. 243, 5 L. R. A. 702; *Pierson v. Crooks*, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831; *Gentilli v. Starace*, 133 N. Y. 140, 30 N. E. 660; *Waeber v. Talbot*, 167 N. Y. 48, 60 N. E. 288, 82 Am. St. Rep. 712; *Lifshitz v. McConnell*, 80 N. Y. App. Div. 289; *Staiger v. Soht*, 191 N. Y. 527, 84 N. E. 1120, affg. 116 N. Y. App. Div. 874, 102 N. Y. Suppl. 342.

* *Carleton v. Jenks*, 80 Fed. Rep. 937, 47 U. S. App. 734, 26 C. C. A. 265; *Oakland Mill Co. v. Wolf Co.*, 118 Fed. Rep. 239, 55 C. C. A. 93; *Henderson Elev. Co. v. North Georgia Mfg. Co.*, 126 Ga. 279, 55 S. E. 50; *Springer v. Indianapolis Brewing Co.*, 126 Ga. 321, 55 S. E. 53; *Miller v. Moore*, 83 Ga. 684, 10 S. E. 360, 6 L. R. A. 374, 20 Am. St. Rep. 329; *Maynard v. Render*, 95 Ga. 652, 23 S. E. 194; *Underwood*

v. Caldwell, 102 Ga. 16, 29 S. E. 164; *Allison v. Vaughan*, 40 Iowa, 421; *Hirshhorn v. Stewart*, 49 Iowa, 418; *Mackey v. Swartz*, 60 Iowa, 710, 15 N. W. 576; *Schopp v. Taft*, 106 Iowa, 612, 76 N. W. 843; *Keniston v. Todd*, Iowa, , 117 N. W. 674; *Jones v. McEwan*, 91 Ky. 373, 16 S. W. 81, 12 L. R. A. 399; *Albin Co. v. Kentucky Table Co.*, 23 Ky. L. Rep. 2261, 67 S. W. 13; *Talbot Paving Co. v. Gorman*, 103 Mich. 403, 61 N. W. 655, 27 L. R. A. 96; *Williams v. Robb*, 104 Mich. 242, 62 N. W. 352; *Henderson Co. v. Stilwell*, 130 Mich. 124, 80 N. W. 718; *Brown v. Harris*, 139 Mich. 372, 102 N. W. 960; *Buick Motor Co. v. Reid Mfg. Co.*, 150 Mich. 118, 113 N. W. 591; *Lee v. Bangs*, 43 Minn. 23; s. c., *sub nom.*, *Sole Leather Over Mfg. Co. v. Bangs*, 44 N. W. 671; *Rosenfield v. Swenson*, 45 Minn. 190, 47 N. W. 718; *Stilwell Co. v. Biloxi Co.*, 78 Miss. 779, 29 So. 513; *Roman v. Bresler*, 32 Neb. 240, 49 N. W. 368; *Havens v. Grand Island Light, etc., Co.*, 41 Neb. 153, 59 N. W.

where acceptance of the goods (barring the excepted cases hereafter considered) precludes subsequent remedy for inferiority, and where the law also denies the buyer of goods under an executed sale the right of rescission for breach of warranty,³⁵ a buyer to whom goods are tendered is in a difficult position. If the property in the goods has already passed the buyer will be committing a breach of his obligation if he fails to take the goods even though they do not conform to the warranty. He must take the goods and seek redress in a cross-action or by a counterclaim, when sued for the price. On the other hand, if the property has not passed the buyer must not take the goods if they do not conform to the contract, for if he does so he will thereby extinguish all claims on account of such inferiority. It is frequently a very difficult question to determine whether the property has passed in a given case — a question of doubt even for lawyers and courts. To require a business man offhand to determine whether a contract is executory or whether the property in the goods has already passed, and to impose a severe penalty upon him if he guesses wrong, is certainly an unfortunate state of the law, which should not be tolerated if, as in the matter under consideration it is not necessary.³⁶ In New York and the jurisdictions that follow the New York decisions it is conceded that the rule that acceptance of the goods precludes subsequent objection of the quality does not apply to all

681; *Hazen v. Wilhelmie*, 68 Neb. 79, 93 N. W. 920; *Patrick v. Norfolk Lumber Co.* (Neb.), 115 N. W. 780; *Brooke v. Laurens Milling Co.*, 78 S. C. 200, 58 S. E. 806; *Parks v. O'Connor*, 70 Tex. 377, 390, 8 S. W. 104; *Olson v. Mayer*, 56 Wis. 551, 14 N. W. 640; *Northern Supply Co. v. Wangard*, 117 Wis. 624, 94 N. W. 785, 98 Am. St. Rep. 963; *Northfield Nat. Bank v. Arndt*, 132 Wis. 383, 112 N. W. 451; 12 L. R. A. (N. S.) 82. See also *Smith v. New Albany Mill Co.*, 50 Ark. 31, 6 S. W. 225.

³⁵ As to this, see *infra*, § 608.

³⁶ The New York court itself seems not much disposed to defend the rules which have become established

in that State upon the matter. In *Heath Dry Gas Co. v. Hurd*, 124 N. Y. App. Div. 68, 108 N. Y. Suppl. 410, after quoting from *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305, a passage to the effect that a warranty, though express, if no other than the law would imply in the absence of words of express contract, would not survive acceptance, the court said: "Whatever may be said for or against the principle thus enunciated as formulating one amongst other somewhat refined rules governing the subject of warranties, it seems to have been recognized and to have passed without criticism in later cases."

cases; but the excepted cases do not seem to coincide exactly in all jurisdictions; and it is a matter of extraordinary difficulty to distinguish under this rule in what cases the acceptance is not a waiver. The excepted cases may be divided into two classes — the exception in the first class depending upon the character of the seller's promise or warranty, and the exception in the second class depending upon the difficulty of discovering the defect. As to the first class, according to some authorities the test is simply between executory contracts to sell and executed sales. If the original contract is executory, whatever its form, it is intimated in some cases the buyer by accepting the goods loses all right. Whereas in case of an executed sale a subsequent action or counterclaim because of inferiority is permitted.³⁷ Sometimes the rule is laid down that an express warranty will survive acceptance,³⁸ or in some States perhaps any warranty.³⁹ But in Georgia no warranty whatever

³⁷ *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515. "It is not intended to express an opinion as to the rule in case there were latent defects, or those which could not be discerned at the time of the delivery or acceptance of the articles. But in the absence of fraud or latent defects, an acceptance of the articles sold upon an executory contract, after an opportunity to examine it, is a consent and agreement that the quality is satisfactory and as conforming to the contract, and bars all claim for compensation for any defects that may exist in the article. The party cannot, under such circumstances, retain the property and afterward sue or counterclaim for damages under pretense that it was not of the character and quality or description called for by the agreement." So in later New York decisions reference is made to the distinction as being between executory contracts and executed sales. *Stuart v. Manhattan Bath-tub Co.*, 68 N. Y. Suppl. 816; *Waerber v. Talbot*, 167 N. Y. 48, 57, 59 N. Y. Suppl. 396, 82 Am. St. Rep. 712. In view of the New York decisions cited

in the following notes it is probable, however, that the law of New York permits the buyer, in case of some executory contracts, to receive the goods and yet recover damages for their inferior quality.

³⁸ *Rubin v. Sturtevant*, 80 Fed. Rep. 930, 51 U. S. App. 286, 26 C. C. A. 259; *Day v. Pool*, 52 N. Y. 416, 11 Am. Rep. 719; *Parks v. Morris Ax. & Tool Co.*, 54 N. Y. 586; *Dounce v. Dow*, 57 N. Y. 16; *Brigg v. Hilton*, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. Rep. 753; *Staiger v. Soht*, 191 N. Y. 527, 84 N. E. 1120, affg. 116 N. Y. App. Div. 874, 102 N. Y. Suppl. 342. See also *Smith v. Mayer*, 3 Colo. 207; *Shupe v. Collender*, 56 Conn. 489, 15 Atl. 405, 1 L. R. A. 339; *Dayton v. Hooglund*, 39 Ohio St. 671.

³⁹ *Best v. Flint*, 58 Vt. 543, 5 Atl. 192, 56 Am. Rep. 570; *Talbot Paving Co. v. Gorman*, 103 Mich. 403, 61 N. W. 655, 26 L. R. A. 96; *Parks v. O'Connor*, 70 Tex. 377, 389, 8 S. W. 104.

will survive acceptance of the goods if the buyer knows of their defective quality when he accepts them, though an express warranty will excuse examination of the goods even for obvious defects.⁴⁰ The distinction between express warranties and other promises, it will be observed, is inconsistent with the view that the matter depends on whether the contract is executory or not, unless it is said that there can be no express warranty in an executory contract. But this is not generally so held, certainly not in New York. What is meant in that State by the use of the term "express warranty" in regard to an executory contract is not clear. Any express promise in regard to the quality of the goods might well be so called.⁴¹ But it is clearly established that an express

⁴⁰ *Henderson Elevator Co. v. North Georgia Mlg. Co.*, 126 Ga. 279, 55 S. E. 50; *Springer v. Indianapolis Brewing Co.*, 126 Ga. 321, 55 S. E. 53. In the former case the court said: "A vendee who has exacted of the seller a warranty as to quality and knowingly accepts goods deficient in the quality warranted will be denied to subsequently assert their defective quality. His duty is to reject the article and his acceptance with knowledge of the defect amounts to a waiver of the warranty as to such defect. *Miller v. Moore*, 83 Ga. 692, 10 S. E. 360. There is no duty resting upon the purchaser who has bought goods under an express warranty to inspect the article purchased or exercise care in discovering any defects. He may rely on the contractual obligation of the seller that he will deliver goods of the quality warranted. *Haltiwanger v. Tanner*, 103 Ga. 314, 29 S. E. 965; *Moultrie Repair Co. v. Hill*, 120 Ga. 730, 48 S. E. 143. If subsequently to acceptance the buyer discovers that the goods do not come up to the warranty, he may rely on the warranty and plead partial failure of consideration. * * * Applying these principles to the case at

bar, if the purchaser knew that the corn was not of the quality contracted for and accepted the same, such acceptance will be a waiver of the warranty. But if he accepted the goods without inspection, and they were of defective quality, he was entitled to an abatement in the purchase price for the breach of warranty." See also *Polhemus v. Heiman*, 45 Cal. 573, 579; *Browning v. McNear*, 145 Cal. 272, 78 Pac. 722; *North Georgia Milling Co. v. Henderson Elevator Co.*, 130 Ga. 113, 60 S. E. 258. Compare with the statement quoted above the following from *Parks v. O'Connor*, 70 Tex. 377, 389, 8 S. W. 104: "The buyer may accept an article sold with a warranty, though he may know it is not such as is warranted and may recover damages for the breach."

"This is the usage of the term in the Sales Act and in this work. See *supra*, § 181. And in *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. Rep. 753, this seems to have been the usage of the court. By the contract in that case the plaintiff represented and agreed to furnish the defendants beef that had not been heated before being killed; that should be

promise which imposes no other obligation upon the seller than that which would have been implied had no express promise been made as to the quality of the goods will not survive acceptance.⁴² Where a promise or warranty in an executory contract in regard to the quality of the goods is something other than that which the law would imply, the New York rule is not so clear. Doubtless where the word "warrant" is used as part of a promise which goes beyond that which the law would imply, the promise would be held collateral, and in all jurisdictions where any warranties in executory contracts survive acceptance, such a promise would survive; but what promises other than those where the word "warranty" is used may be held so collateral in form or effect as to sustain an action is open to doubt.⁴³ In New York it is held that in a sale by sample a warranty that the bulk

thoroughly chilled before being loaded on the cars; that it should be in first-class condition in every respect and merchantable. The court defines a warranty as an express or an implied statement of something which a party undertakes shall be part of the contract and, though part of the contract, collateral to the express object, and held that as there was an express warranty in the case at bar the acceptance of the meat did not preclude the buyer from setting up a counterclaim in an action for the price on account of the defective quality of the meat. The court said: "But where there is an express warranty it is unimportant whether the sale be regarded as executory or *in presenti*, for it is now well settled that the same rights and remedies attach to an express warranty in an executory as in a present sale." A decision similar in principle is *Bull v. Bath Iron Works*, 75 N. Y. App. Div. 380, 78 N. Y. Suppl. 181.

⁴² This was first laid down in *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec.

305, where an executory contract for tobacco provided that it was "to be delivered well cured and in good condition," and it was held that no liability for breach of this promise survived acceptance. The doctrine was followed in *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515, where the contract provided that the goods were "to be of the best quality and suitable to the purpose designed." It may be observed that the court seems to have been in error in holding in this case that the express promise was no more than the law would imply. The law implies an obligation to furnish goods of merchantable quality, but never implies an obligation to furnish them of "the best quality." In *Heath Dry Gas Co. v. Hurd*, 124 N. Y. App. Div. 68, 108 N. Y. Suppl. 410, the contract was for the manufacture of goods which were "to be constructed in a careful workmanlike, and skillful manner;" and here also it was held that the warranty did not survive acceptance.

⁴³ See *Parks v. O'Connor*, 70 Tex. 377, 389, 8 S. W. 104.

equals the sample survives acceptance,⁴⁴ but this is denied in Minnesota.⁴⁵ Not uncommonly courts which follow the doctrine that acceptance of title in general imports a waiver of all claims of defective quality have been driven to express the exception as including all cases in which there is "a warranty manifestly intended to survive acceptance."⁴⁶ Such a definition as this is obviously very difficult to apply. An implied warranty is not within the excepted class of obligations which survive acceptance in New York and some other States.⁴⁷ The second exception to the rule, that acceptance of title operates as satisfaction, arises where the defect in the goods is one which cannot be discovered by inspection. In such a case whether the seller's breach of promise is of an express warranty, an implied warranty, or, under the terminology of the court, of a promise not properly classified as a warranty, the buyer may recover damages.⁴⁸ But here, too, a differ-

"*Brigg v. Hilton*, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; *Kent v. Friedman*, 101 N. Y. 616, 3 N. E. 905; *Zabriskie v. Central Vt. R. R. Co.*, 131 N. Y. 72, 29 N. E. 1006. See also *Pennock v. Stygles*, 54 Vt. 226. But in *Smith v. Coe*, 55 N. Y. App. Div. 585, it was said that the term "sale by sample" properly included only executed sales (as to this see *supra*, § 250); and that, therefore, in case of an executory contract to manufacture goods like a sample, the acceptance of the goods barred all subsequent objection to their quality. The case of *Brigg v. Hilton*, *supra*, however, seems to have been a case of the same sort, yet there the New York Court of Appeals held the warranty survived acceptance.

⁴⁴ *Lee v. Bangs*, 43 Minn. 23; *s. c.*, *sub. nom.*, *Sole Leather Over Mfg. Co. v. Bangs*, 44 N. W. 671.

⁴⁵ *Schopp v. Taft*, 106 Iowa, 612, 613, 76 N. W. 843; *Stilwell Co. v. Biloxi Co.*, 78 Miss. 779, 29 So. 513; *Studer v. Bleistein*, 115 N. Y. 316, 22 N. E. 243, 5 L. R. A. 702.

⁴⁶ *Waeber v. Talbot*, 167 N. Y. 48, 60 N. E. 258, 82 Am. St. Rep. 712. This was a contract for the sale of canned peas. The court assumed that there was an implied warranty that the peas should be merchantable. They were not merchantable, but as they had been accepted and as there was a mode of inspection well known to the trade by which the difficulty might have been discovered, the court held the acceptance amounted to a waiver of all rights upon the warranty. See also *De Loach Mfg. Co. v. Tutweiler Coal Co.*, 2 Ga. App. 493, 58 S. E. 790; *Buick Motor Co. v. Reid Mfg. Co.*, 150 Mich. 118, 113 N. W. 591. Compare *Talbot Paving Co. v. Gorman*, 103 Mich. 403, 61 N. W. 655, 26 L. R. A. 96.

⁴⁷ *Miller v. Moore*, 83 Ga. 684, 10 S. E. 360, 20 Am. St. Rep. 329; *Jones v. Bloomgarden*, 143 Mich. 326, 335, 106 N. W. 891; *Zabriskie v. Central Vt. R. R. Co.*, 131 N. Y. 72, 29 N. E. 1006; *Bell v. Mills*, 78 N. Y. App. Div. 42; *White Mfg. Co. v. De La Vergne Co.*, 84 N. Y. Suppl. 192; *Buffalo Co. v. Phillips*, 67 Wis.

ence of opinion must be noted. In Georgia at least the question seems to turn, not on whether the defect might have been discovered, but on whether it was in fact discovered.⁴⁹ For the same reason that acceptance of goods with latent defects does not bar redress, it has been held that, if the price is paid in advance or without opportunity to inspect the goods, the subsequent acceptance of title does not bar a claim for damages.⁵⁰ Likewise if complaint is made when the goods are delivered and the seller promises to rectify the defect, acceptance of the goods does not excuse the seller.⁵¹

§ 490. **Damages recoverable by the buyer.**—If it be admitted that the acceptance of the goods does not debar the buyer from complaining of the inferior quality of the goods, it is none the less true that the seller has a right of action for the price. The inferior quality of the goods is not an absolute defense.⁵² As will be seen hereafter, where a rescission of an executed sale is allowed as a remedy for breach of warranty, the buyer may return the goods and thereby defeat all right on the part of the buyer to recover any part of the price.⁵³ But where the buyer retains the goods, his only redress, assuming that his acceptance of the goods is not a bar to all redress whatever, is an action or counterclaim for damages

129, 30 N. W. 295; *Northern Supply Co. v. Wangard*, 117 Wis. 624, 94 N. W. 785, 98 Am. St. Rep. 963. See also *Henderson Elevator Co. v. North Georgia Mfg. Co.*, 126 Ga. 279, 55 S. E. 50; *Brooke v. Laurens Milling Co.*, 78 S. C. 200, 58 S. E. 806. The severity with which this rule would be applied would, perhaps, vary in different jurisdictions. In *Gentilli v. Starace*, 133 N. Y. 140, 30 N. E. 660, wine was delivered under a contract and accepted. The wine did not conform to the requirements of the contract, and the defect was only discoverable at the time of delivery by chemical analysis. Nevertheless, the buyer was held precluded from claiming damages when the wine afterward fermented, owing to its inferior quality.

⁴⁹ *Burr v. Atlanta Paper Co.*, 2 Ga. App. 52, 58 S. E. 373.

⁵⁰ *Munford v. Kevil*, 109 Ky. 246, 58 S. W. 703; *Holloway v. Jacoby*, 120 Pa. St. 583, 15 Atl. 487, 6 Am. St. Rep. 737.

⁵¹ *Burr v. Atlanta Paper Co.*, 2 Ga. App. 52, 58 S. E. 373; *Wallace v. Knoxville Mills*, 25 Ky. L. Rep. 1445, 78 S. W. 192; *Osborne v. Carpenter*, 37 Minn. 331, 34 N. W. 163; *Fitzpatrick v. Osborne*, 50 Minn. 261, 52 N. W. 861.

⁵² *Dalton v. Bunn*, 137 Ala. 175, 34 So. 841; *Trippe v. McLain*, 87 Ga. 536, 13 S. E. 523; *American Theater Co. v. Siegel*, 221 Ill. 145, 77 N. E. 588, 4 L. R. A. (N. S.) 1167; *Barkalow v. Pfeiffer*, 38 Ind. 214; *Mackey v. Swartz*, 60 Iowa, 710, 15 N. W. 576.

⁵³ See *infra*, § 608.

suffered because of the inferior quality or a recoupment from the price.⁵⁴ If, however, the goods received are worthless for any purpose whatever, it is obvious that the recoupment allowed the buyer would equal the agreed price. In such a case therefore, and in such a case only, is defective quality of the goods an absolute defense to action for the price.⁵⁵ Even in jurisdictions where the ~~seller's~~ acceptance of title does not bar subsequent action for inferiority of the goods or recoupment on account of such inferiority in an action for the price, it may be important to determine whether the buyer knew or ought to have known the defective quality of the goods before he used them. If he knew of the defect or ought to have known of it he cannot recover consequential damages caused by using the goods.⁵⁶

§ 491. **Express provisions of the contract.**—Though the mere acceptance of title to the goods should not necessarily be regarded as an agreement to accept the goods in full satisfaction of the seller's obligations, by the express terms of the contract such a result may be brought about. It is not uncommon for contracts to provide for special inspection of the goods, not simply as a preliminary to the buyer's ownership of the goods, but as a final de-

⁵⁴ See cases cited, § 488, *supra*.

⁵⁵ *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Kerr v. Haymaker*, 20 Mo. App. 350; *McCormick Harvesting Mach. Co. v. Brady*, 67 Mo. App. 292; *Heimann v. Hatcher Mercantile Co.*, 106 Mo. App. 438, 80 S. W. 729; *Hallwood Cash Register Co. v. Berry*, 35 Tex. Civ. App. 554, 80 S. W. 857. See also *Buick Motor Co. v. Reid Mfg. Co.*, 150 Mich. 118, 113 N. W. 591.

⁵⁶ *Day v. Mapes-Reeve Construction Co.*, 174 Mass. 412, 54 N. E. 878. In this case the contract called for "common hard brick." The buyer had an inspector who rejected some brick but the inspector permitted some soft brick to be accepted and used. The defects could have been detected and indeed the inspector knew that some soft brick was being

used. The buyer claimed damages for the expense of substituting hard brick for the soft brick which had been used. The court refused to allow this, and rightly, for the injury of which the plaintiff complained was due to his own fault in using the soft brick, knowing or having reason to know its character. The seller, however, was only entitled to the value of soft brick and this value was all that he obtained. This case is sometimes mistakenly cited as supporting the view that acceptance of inferior goods operates as matter of law as a satisfaction of all the seller's obligations. See also *Henderson Elevator Co. v. North Ga. Milling Co.*, 126 Ga. 279, 55 S. E. 50; *Wright v. Computing Scale Co.*, 47 Wash. 107, 91 Pac. 571.

termination or arbitration of the question whether the seller has performed his contract.⁵⁷ Again, the contract may provide for a certain period of trial, and thereby imply that if after such trial the buyer concludes to take the goods he shall take them as full performance of the seller's obligation.⁵⁸ The obligation of the seller may also be made conditional upon certain performance by the seller. A warranty may by its express terms be enforceable only by returning the goods,⁵⁹ or the right to sue on the warranty may be made conditional upon the prior payment of the purchase price.⁶⁰

§ 492. **Rescission of acceptance.**—Whether acceptance by the buyer is merely an assent to become owner or is an agreement that the transfer of the property shall be a complete satisfaction of the seller's obligations, the acceptance is subject to the universal rule that assent procured by fraud or given under a mutual mistake of fact of both parties may be rescinded.⁶¹ The remedy of rescission for breach of warranty which is allowed by the Sales Act and by the law of many States also is important to consider in this connection. The extent and limitations of the doctrine will be considered hereafter.⁶² But if the parties agree either at the time of making the original bargain, or subsequently, that specific goods with whatever qualities they may have shall be taken in full satisfaction of the seller's obligation, the transaction obviously cannot be rescinded in the absence of fraud or mistake.

⁵⁷ See for example, *Heyworth v. Hutchinson*, L. R. 2 Q. B. 447; *Carleton v. Lombard*, 149 N. Y. 137, 43 N. E. 422.

⁵⁸ See *supra*, § 272.

⁵⁹ This is a common provision in sales of machinery. *Davis v. Robinson*, 67 Iowa, 355, 25 N. W. 280; *McCormick Harvesting Machine Co. v. Brower*, 88 Iowa, 607, 55 N. W. 537; *Hefner v. Haynes*, 89 Iowa, 616, 57 N. W. 421; *Acker v. Kimmie*, 37 Kans. 276, 15 Pac. 248; *Champion Machine Co. v. Mann*, 42 Kans. 372, 22 Pac. 417; *Walters v. Akers*, 31 Ky. L. Rep. 259, 101 S. W. 1179; *Guhy v. Nichols & Shepherd Co.*, 33

Ky. L. Rep. 237, 109 S. W. 1190; *Jasper County Bank v. Barts*, Mo. App. , 109 S. W. 1057; *Sandwich Mfg. Co. v. Feary*, 34 Neb. 411, 51 N. W. 1026; *Davis v. Iverson*, 5 S. Dak. 295, 58 N. W. 796. As to waiver of a notice in the manner required by a condition in a warranty, see *Buchanan v. Minneapolis Threshing Machine Co.*, N. Dak. , 116 N. W. 335.

⁶⁰ *Case Threshing Machine Co. v. Smith*, 16 Or. 381, 18 Pac. 641. Compare, however, *Campbell v. Lodge*, 76 Kans. 400, 92 Pac. 53.

⁶¹ See *infra*, § 623 *et seq.*

⁶² See *infra*, § 608 *et seq.*

§ 493. **Acceptance of part of the goods.**—In considering questions of partial acceptance, it is important to distinguish between instalment contracts where by the terms of the contract a partial delivery was contemplated and cases where the contract contemplated but one delivery of the full amount of the goods contracted for. As to the former kind of case, it has already been considered how far a delivery of one or more instalments of defective quality justifies the buyer in refusing to accept further instalments under the contract, even though the later instalments are of proper quality.⁶³ It may be added here that even if the buyer assent to receive some instalments of inferior goods, this is not equivalent to an assent to receive subsequent instalments of similarly inferior goods.⁶⁴ But if the terms of the contract are ambiguous, acceptance of goods of a certain quality is evidence that goods of that quality fulfill the seller's obligation.⁶⁵ Though but a single delivery of several things is bargained for there may, nevertheless, be separate contracts. Where a number of distinct articles having no relation to each other, and having a distinct price fixed for each, are ordered, and the order accepted, the implication is, if nothing more is stated, that a separate contract is made as to each article. Accordingly the buyer may accept such of the articles tendered as fulfill the seller's obligation and reject those which do not.⁶⁶ And some courts have admitted evidence that a separate price was agreed for each article, and have then treated the transaction as several contracts, though the ultimate bargain was for a lump sum.⁶⁷ It is difficult to accept this result. If it be granted that the contract is divisible so that the delivery of one article would give rise to a debt, that does not enable the buyer to take some and reject others. To justify that there must be several contracts.⁶⁸ The

⁶³ See *supra*, § 467.

⁶⁴ *American Pail Co. v. Oakes*, 64 Mo. App. 235. See also *Van Valkenburgh v. Gregg*, 45 Neb. 654, 63 N. W. 949; *Bradley Currier Co. v. Bernz*, 55 N. J. Eq. 10, 35 Atl. 832; *Gardner v. Clark*, 21 N. Y. 399, stated *supra*, § 467.

⁶⁵ *Maynard v. Render*, 95 Ga. 652, 23 S. E. 194.

⁶⁶ *Rubin v. Sturtevant*, 80 Fed. Rep. 930, 51 U. S. App. 286, 26 C. C. A.

259; *Cohen v. Pemberton*, 53 Conn. 221, 2 Atl. 315, 5 Atl. 682, 55 Am. Rep. 101; *Spring v. Slayden-Kirksey Mills*, 106 Ill. App. 579; *Young & Conant Mfg. Co. v. Wakefield*, 121 Mass. 91; *Schiller v. Blyth & Fargo Co.*, 15 Wyo. 304, 88 Pac. 648.

⁶⁷ *Field v. Austin*, 131 Cal. 379, 63 Pac. 692; *Aultman & Taylor Co. v. Lawson*, 100 Iowa, 569, 69 N. W. 865; *Buckeye Buggy Co. v. Montana Stables*, 43 Wash. 49, 85 Pac. 1077.

most troublesome situation is where there is an acceptance of part of a lot of goods delivered at one time under an entire contract. An acceptance of part is, it seems, some evidence of acceptance of the whole; that is, such acceptance tends to indicate in fact that the buyer assents to the delivery;⁶⁹ but the circumstances may plainly show in a given case that the buyer, while accepting part, means to reject the rest. Even though the contract is entire the buyer has been allowed to take this course, and the result may be defended if the acceptance of part will diminish damages and there is nothing in the terms of the contract or in the surrounding circumstances to indicate that the seller would prefer that all the goods should be rejected rather than those which are in conformity with the contract should be accepted and the rest rejected.⁷⁰ The right of the ~~seller~~ to take this course might not, however, be universally admitted.⁷¹

§ 494. **Rule of civil law.**—In the civil law it seems to be the rule that acceptance of the goods does not involve a release of the seller's obligation — at least if the buyer expressly gives notice of his claim as soon as the defect is discovered. A French writer,⁷² writing of the German law prior to the passage of the *Bürgerliches Gesetzbuch* and the present *Handelsgesetzbuch*, says: "In the first place it is very certain that if the defendant not only has re-

⁶⁹ See *supra*, § 466. If the buyer can accept some and reject others, the seller must equally be at liberty to make a valid tender of some and not others.

⁷⁰ *Maynard v. Render*, 95 Ga. 652, 23 S. E. 194; *Wolf v. Dietzsch*, 75 Ill. 205; *Telford v. Albro*, 60 Ill. App. 359; *Buckeye Buggy Co. v. Montana Stables*, 43 Wash. 49, 85 Pac. 1077.

⁷¹ In *Molling v. Dean*, 18 Times L. R. 217, the plaintiff had contracted to supply the defendants with a number of books, and supplied the defendants under this contract with a parcel of 40,000 books. The defendants, finding some of the books not of the quality agreed, notified the plaintiffs that they intended to reject all which were not saleable. The defendant accordingly accepted 13,000

of the books and rejected the remainder. The chief justice said: "It was argued that the defendants, having picked out and sold 13,000 books, could not reject the rest of the parcel. In a contract of the nature of the one in question, where every one of the articles had to be up to standard, the purchaser was entitled to keep some and reject others, and thereby reduce the damages to be paid by the vendor in respect of the breach of contract." See also *Cohen v. Pemberton*, 53 Conn. 221, 2 Atl. 305, 5 Atl. 682, 55 Am. Rep. 101; *Holmes v. Gregg*, 66 N. H. 621, 28 Atl. 17.

⁷² See *Simon v. Wood*, 17 N. Y. Misc. Rep. 607, 40 N. Y. Suppl. 675.

⁷³ *Raymond Saleilles*, 7 *Annales De Droit Commercial*, Pt. 2, 42 (1893).

ceived delivery but has accepted and approved it as regular and perfect, he has thereby recognized that the performance is in conformity with the contract, and he is debarred, whatever happens, from testing its validity. But what is necessary to observe is that as a basic rule the simple receipt, and by receipt is not meant a delivery made without the knowledge or participation of the recipient, does not of itself imply approval of the performance and recognition of its validity. Therefore, the simple fact does not take away from the creditor the rights which belong to him because of inadequate performance. It may be, and it is an opinion which has been upheld, that if one sets up after apparent performance of the contract a refusal to pay because of bad quality or defective performance, the fact that performance has been received must involve a change in the burden of proof, but this is an entirely different question. What is necessary to understand thoroughly now is that receipt of performance as a basic rule and by itself does not take away from the one who receives delivery the rights which belong to him at common law of nonperformance." In a note to this passage the author adds that the jurisprudence of France is settled to the same effect. By provision of the German Commercial Code⁷³ if goods are sent from another place prompt examination must be made and immediate notice of the defects given. Failure to do this is conclusive in regard to patent defects and notice of latent defects must be given as soon as the defects are discovered.

§ 495. **Waiver of defect in tender by making wrong objection.**—It has been held in a New York case⁷⁴ that where a buyer on tender

⁷³ *Handelsgesetzbuch*, Art. 377 (Art. 347 in old *Handelsgesetzbuch*).

⁷⁴ *Littlejohn v. Shaw*, 159 N. Y. 188, 53 N. E. 810. In this case the contract called for twenty five tons of "No. 1 cube gambier." The buyer rejected a tender of the goods "for two reasons; first, because they are not good merchantable quality, and, again, because they are not in good merchantable condition." On suit by the seller to recover damages it was insisted that he must prove fulfilment of all terms of the contract. The court held this was unnecessary, that all other objections than those stated

must be regarded as waived. The actual decision of the case may be supported, it would seem, on the ground that the statement of objection by the buyer at least is some evidence that in other respects the goods actually fulfilled the contract and that in the absence of evidence showing that there were other elements in which the contract had not been fulfilled, there was sufficient proof to sustain the burden upon the plaintiff, but the ground upon which the court rests its decision is open to the objections stated in the text.

of goods being made to him objects to the tender on specified grounds all other objections are waived, and the seller in order to recover the price need only prove compliance with the contract in the particulars to which the objections related. This decision has been followed elsewhere.⁷⁵ The result, however, seems contrary to principle and a considerable weight of authority upon closely allied questions. Upon principle if goods are open to more than one objection and the buyer when they are tendered contents himself with giving one reason, it is hard to see why he thereby conclusively admits that there is no other reason. His conduct may afford some evidence that the goods are subject only to the one objection stated, but no more than this can be said. This criticism is strengthened by authorities bearing on the same question as applied to contracts other than those of sale. In contracts of service the general rule is established that when a servant is discharged on insufficient grounds and sues his employer, the master may prove that a sufficient cause existed which was not specified or even known at the time of the discharge.⁷⁶ And in other cases of contracts it has been held that "the legal effect of an act amounting to breach of contract must be the same whether it is known or unknown to the opposite contracting party."⁷⁷ The only proper

⁷⁵ *Ginn v. W. C. Clark Co.*, 143 Mich. 84, 106 N. W. 867, 107 N. W. 904. This case, unlike the New York decision, did not present the mere point of burden of proof. The buyer refused to accept coal tendered on the ground that it was not of the variety he purchased, and on being sued he offered evidence that the coal rejected was not of a merchantable quality. This evidence was rejected, and the Supreme Court held it rightly rejected, on the ground that the objection to the variety of coal waived all objection to the quality.

⁷⁶ *Willets v. Green*, 3 C. & K. 59; *Spotswood v. Barrow*, 5 Ex. 110; *Boston Deep Sea Fishing Co. v. Ansell*, 39 Ch. D. 339; *Abendpost Co. v. Hertel*, 67 Ill. App. 501; *Odeneal v. Henry*, 70 Miss. 172, 12 So. 154;

Allen v. Aylesworth, 58 N. J. Eq. 349, 44 Atl. 178; *Green v. Edgar*, 21 Hun, 414; *Arkush v. Hanan*, 60 Hun, 518; *Baillie v. Kell*, 4 Bing. N. C. 638; *McIntyre v. Hockin*, 16 Ont. App. 498; *Tozer v. Hutchison*, 12 N. B. 540, 548. But see *Cussons v. Skinner*, 11 M. & W. 161; *Strauss v. Meertief*, 64 Ala. 299, 310, 38 Am. Rep. 8; *Sheahan v. Barry*, 27 Mich. 217.

⁷⁷ *Williams Cooperage Co. v. Scofield*, 115 Fed. Rep. 119 (C. C. A.). In this case the defendant had contracted to supply the plaintiff with all barrels the latter needed for a year. The defendant refused to fill an order and was held excused because the plaintiff had ordered barrels beyond their needs for the current year, although the de-

qualification of the doctrine here advocated arises where the objection set up at the trial might have been obviated by the seller had he not supposed that the buyer's objection related only to the matter specifically referred to.⁷⁸ The cases in which it has been held that a tender of money if objected to on one ground cannot later be objected to on another, rest on this principle. In the leading case⁷⁹ Bayley, B., said: "If you objected expressly on the ground of the quality of the tender, it would have given the party the opportunity of getting other money and making a good and valid tender; but by not doing so and claiming a larger sum, you delude him."

§ 496. Buyer need not return goods—Provisions of Sales Act.—

Sec. 50. BUYER IS NOT BOUND TO RETURN GOODS WRONGLY DELIVERED.—Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them.

This provision is identical with section 36 of the English Sale of Goods Act.

§ 497. The buyer need not return goods at common law.—If goods have been sent to a buyer of a kind or quality which he never

fendant was not aware of this. See also *Gray v. Smith*, 83 Fed. Rep. 824, 48 U. S. App. 581, 28 C. C. A. 168; *Crummey v. Raudenbush*, 55 Minn. 426, 56 N. W. 1113. In the case last cited the refusal to deliver possession on a ground which did not entitle the defendant to refuse was held not to bar the defendant from setting up when sued another and sound reason to justify the retention.

⁷⁸ Thus in *Higgins v. Eagleton*, 155 N. Y. 466, 472, 50 N. E. 287 (an action by one entitled to a conveyance of real estate), the court said: "The plaintiff, on the law day, having made specific objections to the title, which were unfounded, could not subsequently raise a new objec-

tion, even if it were valid *where, as in this case, it was one that could have been obviated by the defendant.* *Benson v. Cromwell*, 6 Abb. Pr. Cas. 83, 85." Similarly in *Lathrop v. O'Brien*, 57 Minn. 175, 179, 58 N. W. 987, the court said of a defect in a title of real estate: "The defendant, having placed his refusal solely on a certain other specified objection, is precluded from now raising another objection, trifling in its character, and which, if made at the time, could have been easily remedied by the plaintiff." See also *Paisley v. Wills*, 18 Ont. App. 210.

⁷⁹ *Polgass v. Oliver*, 2 C. & J. 15, collecting earlier authorities. American cases are collected in 28 Am. & Eng. Encyc. (2d ed.) 34.

agreed to take, the seller is a mere volunteer and the buyer is in the position of a bailee who has had goods thrust upon him without his assent. Doubtless a buyer in such a position must take reasonable care of the goods,⁸⁰ but nothing more than that can be demanded of him. Accordingly he is under no obligation to return the goods to the seller, and after notice that the goods have not been and will not be accepted the seller must assume the burden of removing them.⁸¹ While the goods remain in the buyer's possession, under these circumstances, they are of course at the seller's risk.⁸²

§ 498. **Resale of goods by the buyer.**—It not infrequently happens that the seller, when notified that the goods are not in conformity with the contract and when requested to remove them, fails to do so, claiming that the contract has been properly fulfilled. Under these circumstances it may be clearly the best thing to do, from a business standpoint, for the buyer in whose possession the goods are to sell them at once and leave the question whether the goods fulfilled the terms of the contract or not to subsequent determination. Where goods are perishable or expensive to keep, or of fluctuating value, any other course is attended with loss to one party or the other. Accordingly it has been held, and it seems reasonable, that the buyer though refusing to take title because the goods are not what he bargained for may, after notifying the seller of his rejection and requesting him in vain to remove the goods, resell them on the account of the seller.⁸³

⁸⁰ *Dailey v. Green*, 15 Pa. St. 118, 126.

⁸¹ *Grimoldby v. Wells*, L. R. 10 C. P. 391; *Lucy v. Mouflet*, 5 H. & N. 229; *Gray v. Consolidated Ice Mach. Co.*, 103 Ga. 115, 29 S. E. 604; *Doane v. Dunham*, 65 Ill. 512; *Hunt v. Wyman*, 100 Mass. 198; *Alden v. Hart*, 161 Mass. 576, 581, 37 N. E. 742; *McCormick Harvesting Machine Co. v. Cochran*, 64 Mich. 636, 31 N. W. 561; *McCormick Harvesting Machine Co. v. Chesrown*, 33 Minn. 32, 21 N. W. 846; *Mulcahy v. Dieudonne*, Minn. , 115 N. W. 636; *Straus v. Furniture Co.*, 76 Miss.

343, 24 So. 703; *Spaulding v. Hans Com*, 67 N. H. 401; *Starr v. Torrey*, 22 N. J. L. (2 Zabriskie) 190, 196; *Smalley v. Hendrickson*, 29 N. J. L. (5 Dutch.) 371; *Rheinstrom v. Steiner*, 69 Ohio St. 452, 69 N. E. 745; *Gibson v. Vail*, 53 Vt. 476; *Exhaust Ventilator Co. v. Chicago Ry. Co.*, 66 Wis. 218, 57 Am. Rep. 257, 69 Wis. 454, 34 N. W. 509. Compare *Elliott v. Howison*, 146 Ala. 568, 40 So. 1018.

⁸² *Doane v. Dunham*, 79 Ill. 131.

⁸³ *Rubin v. Sturtevant*, 80 Fed. Rep. 930, 51 U. S. App. 286, 26 C. C. A. 259; *Jones v. Bloomgarden*, 143

§ 499. Damages for failure to accept delivery—Provisions of the Sales Act.—

Sec. 51. BUYER'S LIABILITY FOR FAILURE TO ACCEPT DELIVERY.—When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. If the neglect or refusal of the buyer to take delivery amounts to a repudiation or breach of the entire contract, the seller shall have the rights against the goods and on the contract hereinafter provided in favor of the seller when the buyer is in default.

This section follows section 37 of the English Sale of Goods Act. The last sentence, however, is slightly changed in form.⁸⁴

Mich. 326, 106 N. W. 891. The same rule is also stated in Story, Sale, § 409, but none of the cases cited in support of the section are in point. In *Rubin v. Sturtevant*, the court said, of the position of the buyers: "By the refusal of the plaintiffs to receive the returned goods they found themselves in the custody of the goods at a distant city. It then became proper for them, if it was not obligatory, to take such measures as would be most expedient to save unnecessary loss to the plaintiffs. If they had stored them they would have been entitled to recover the reasonable expenses. If it was more expedient to sell them, and if they exercised reasonable diligence in selling them, they only became responsible for the proceeds." In *Chapman v. Morton*, 11 M. & W. 534, goods had been shipped to the buyer which were not satisfactory to him and he gave notice that if no directions were given by the sellers he would sell the goods for the best price he could get and apply the proceeds in part satis-

faction of his damages. The sellers' reply indicated that they considered a valid sale had been made and that the buyer was liable for the price. Later the defendant advertised the goods and sold them in his own name to a third person. In an action by the sellers for the price the buyer was held liable. Lord Abinger, however, said: "If the defendant intended to renounce the contract, he ought to have given the plaintiffs distinct notice at once that he repudiated the goods and that on such a day he should sell them by such a person for the benefit of the plaintiffs." It is probably true, as said in *Smith, Mercantile Law* (10th ed.), 660, quoted in *Benjamin, Sale* (5th Eng. ed.), 752, note 1, that a sale by the buyer on behalf of the seller "is a dangerous course to pursue and never ought to be resorted to without necessity."

⁸⁴In the English act the last sentence is as follows: "Provided that nothing in this section shall affect the rights of the seller where

§ 500. **Distinction between a partial and a total breach of contract.**—In the civil law a sharp distinction is observed between *mora*, or delayed performance by one under a duty, and an actual breach of the duty. The distinction is not so sharply defined in our law and it is obvious that delay under some circumstances is equivalent to a total breach. But it is not every breach of contract which justifies the injured party in refusing to perform on his part though every breach of contract does give rise to a right of action. If a breach of contract, whether due to delay in performance or any other cause, is so slight as not to justify a refusal of the injured party to continue with the contract, it is clear that his damages must be calculated on the basis of the injury caused by the delay or defect only. Again, it often happens that though a delay has taken place which would justify the injured party in refusing to continue under the contract, both parties in fact continue to perform. It is for such cases that section 51 of the Sales Act provides. It is immaterial whether the property in the goods has passed to the buyer or not. If the property has not passed, the contract is wholly executory, but even if the property has passed, so far as the buyer's obligation to take delivery is concerned, the contract still remains unperformed.⁸⁵ The case is more difficult

the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract." Instead of simply withdrawing such a case from the operation of the section it seemed better to make a positive statement as to the rights of the seller in case of repudiation, and in the American act, therefore, the wording was changed. It seems also that a breach of the entire contract would have the same effect as repudiation and, therefore, that contingency was added as an alternative to repudiation.

⁸⁵ *Greaves v. Ashlin*, 3 Campb. 426. Lord Ellenborough says: "If the buyer does not carry away the goods bought within a reasonable time, the seller may charge him warehouse room; or he may bring an action for

not removing them should he be prejudiced by the delay." This was a case of an executed sale; but in *Dibble v. Corbett*, 5 Bosw. 202, the same rule was applied where the property had not passed. Hoffman, J., said: "If a buyer's neglect of this character does not entitle the seller to put an end to the contract (3 Campb. 427), he has no redress for the injury done him and expenses incurred by him through the purchaser's fault, but by an action of this nature; and to hold that the subsequent performance of the bargain which he could not prevent shall rob him of this redress would be a conclusion as manifestly unjust as we think it untenable." The rule in the civil law is the same. Pothier Contract of Sale, §§ 291-293.

where the delay in performance or the errors in performance by the party in default are so great as to justify the injured party in refusing to go on with the contract, and both parties do not assent to continued performance. An analogous situation arises if one party totally repudiates the contract. Under such circumstances it is clear that the injured party may bring an action in which he will recover damages calculated on the loss of the entire contract. This right is covered by sections 64 and 67 of the Sales Act.⁸⁶ Must the injured party, however, take this course or may he, with or without suing for such damages as he has already suffered, continue to hold himself ready to perform and later bring an action if the party in default continues to refuse to perform the contract?

§ 500-a. **One action only allowed for a single breach of contract.**—

In laying down rules to govern this matter the law seems to have had two objects in view; first, the restriction of suits to such a number as is absolutely necessary for purposes of justice and, second, the minimising of damages to the defendant so far as is possible, without denying to the injured party compensation for the wrong which he has suffered. Accordingly there can be but one action for a single breach.⁸⁷ Nonperformance by one party will give rise to a cause of action as soon as there is a day's delay in performance beyond the period stipulated for in the contract, for it is fundamental that for any actual failure to do as agreed the injured party has a remedy. In such an action the injured party must recover all the damages which he can ever get for the failure to deliver on the agreed day. Accordingly it may not be wise for him to bring his action immediately because the breach of contract may at the time not be such a breach as will involve the nonperformance of the contract altogether, and the damages recovered will, therefore, be calculated on the assumption that the contract will be carried out in the future. A distinction must here be observed between an obligation to pay money and an obligation to deliver goods or, indeed, do anything other than pay money. Where there is an absolute obligation to pay money even though an action be brought by the creditor immediately after maturity, whatever the cause or nature of the debtor's delay in pay-

⁸⁶ See *infra*, §§ 580, 597.

⁸⁷ Numerous cases illustrating this principle in its application to various

kinds of obligations in tort and contract are collected in *Sutherland, Damages* (3d ed.), § 306.

ment, the plaintiff will recover the full amount of the debt with interest; for the payment of money is what the defendant ought to do according to the contract and the judgment is in effect like a decree for specific performance. Where the promise is anything other than to pay money, however, the court in giving damages is not giving what was bargained for but a money equivalent as nearly as can be calculated. Unless the contract is totally broken it is not desirable that a money equivalent should be given instead of what the parties bargained for. It is often better that the contract should be carried out a little late or defectively rather than that the parties should be deprived of the opportunity of performance altogether and that a money equivalent should be substituted which, in the nature of the case, is more or less imperfect relief. It should be observed, however, that this distinction between an obligation to pay money and do other things is only applicable where the money is absolutely due. When money is promised in exchange for something else which has not been given, and where, therefore, no debt has arisen, a breach of the promise to pay the money for the performance to be exchanged for it is ground for the payment of damages, not for the recovery of the full sum promised. In such a case the same considerations are applicable as in the case of obligations to deliver goods or render services. In case of a breach of contract other than the nonpayment of a sum of money absolutely due, where there is not a total breach of contract, the damages of the plaintiff will be such an amount as will compensate the plaintiff for the late or defective performance of the defendant.⁸⁸ It may, however, appear subsequently that the defendant will never perform, either because of his own permanent unwillingness to do so, or because his delay is so great before he becomes willing to perform that the plaintiff is justifiably unwilling to allow him to perform thereafter. If, however, the plaintiff has already recovered in an action on the same breach of promise damages, based on the assumption that the contract is to be carried out in the future he can bring no further action. He has already sued upon this cause of action and but one action is allowed him, although the damages he received in that action have proved inadequate compen-

⁸⁸ In early times the plaintiff seems to have recovered entire damages. *Badger v. Titcomb*, 15 Pick. 409, 414.

sation. Had he deferred bringing action until it appeared that a consequence of the breach of contract was that the contract would never be performed at all, not simply that its performance would be delayed, he might have recovered damages sufficient to compensate him for the total loss of his bargain.

§ 500-b. **Sometimes one action only allowed for several breaches of contract.**—Sometimes, however, the contract may provide for more than one performance by a promisor. In such a case it seems the breach of each promise is a separate breach of contract rendering the promisor liable, and an immediate action upon a breach of one promise will not involve an inability to sue subsequently on later breaches of the same contract, for the causes of action are different.⁸⁹ After more than one breach of the same contract has occurred, however, the injured party must join in any action brought all breaches which have theretofore taken place; since to bring separate actions for each breach is unnecessarily vexatious to the defendant without giving the plaintiff any advantage.⁹⁰ This rule is based on motives of policy and has even been applied to entirely distinct bargains where they constitute a running account between the parties. Though each item of such an account must in law be regarded as a separate transaction, it is frequently held that the plaintiff must bring a single action for whatever is due on the account at the time action is brought unless some good reason for a contrary course exists.⁹¹ Further, one or more breaches of a bilateral contract may be so serious that the injured party is justified in refusing to perform further; or the wrongdoer may totally repudiate or abandon a bilateral contract. In such a case undoubtedly the injured

⁸⁹ *Beecher v. Conradt*, 13 N. Y. 108, 64 Am. Dec. 535; *Eddy v. Davis*, 116 N. Y. 247, 22 N. E. 362; *Seed v. Johnston*, 63 N. Y. App. Div. 340, 71 N. Y. Suppl. 579.

⁹⁰ *Manton v. Gammon*, 7 Ill. App. 201; *Bandernagle v. Cocks*, 19 Wend. 207. In *Seed v. Johnston*, 63 N. Y. App. Div. 340, 343, 71 N. Y. Suppl. 579, the court said: "It is a well-established proposition of law that if a contract provides for payment by instalments, due at different times, the instalments may, of course, be

successively sued on as they become payable (*Wells, Res. Adj.* 203), but each action should include every instalment due when it is commenced, unless a suit is, at the time, pending for the recovery thereof or other special circumstances exist. *Lorillard v. Clyde*, 122 N. Y. 41."

⁹¹ *Lee v. Tannenbaum*, 62 Ala. 501; *Avery v. Fitch*, 4 Conn. 362; *Robbins v. Conley*, 47 Mo. App. 502 (compare *Alkire Grocer Co. v. Tagert*, 60 Mo. App. 389); *Guernsey v. Carver*, 8 Wend. 492, 24 Am. Dec. 60; *Bander-*

party may sue and in one action recover damages based on the entire value of the contract,⁹² for a consequence of the breach already committed is that the whole contract will not be performed. It may happen, however, that the injured party will prefer not to exercise his right to refuse to continue performance but rather to hold himself ready to perform the remainder of the contract and demand performance from the other party, from time to time, as it may become due. This course though it seems allowed in England is not generally allowed in this country. If the breach is such that the injured party may treat it as an entire breach of the contract, it seems that he must do so or, rather, that if he fails to do so he can bring no new action after the first in which he claimed and recovered damages for the partial breach only. The reason of this is that it sufficiently protects the plaintiff in that he is allowed to recover full damages and, at the same time, it minimises the damage of the defendant by not allowing him to be vexed with a number of separate suits.⁹³

nagle v. Cocks, 19 Wend. 207, 32 Am. Dec. 448. But see *contra*, *Seddon v. Tuto*, 6 T. R. 607; *Badger v. Titcomb*, 15 Pick. 409, 26 Am. Dec. 611; *Beck v. Devereaux*, 9 Neb. 109; *McLaughlin v. Hill*, 6 Vt. 20.

⁹² It is not intended to intimate that a repudiation before the time for performance will give rise to an immediate cause of action. As to this, see *infra*, § 585.

⁹³ So far as the matter of repudiation is concerned the question is covered by section 64 (4) of the Sales Act. See *infra*, §§ 580, 588, 589. In regard to a case where there has been a material breach but no repudiation, the case is not so clear either on principle or on authority, but in such a case, also, it seems that the plaintiff, unless the circumstances show that the defendant intends to continue performance, not only may but must recover all damages in his action which he can ever recover. *Pakas v. Hollingshead*, 184 N. Y. 211, 77 N. E. 40, 3 L. R. A. (N. S.) 1042,

112 Am. St. Rep. 601. In this case the defendants agreed to sell and deliver to the plaintiff 50,000 pairs of bicycle pedals in instalments. Two thousand six hundred and eight pairs were delivered, but the defendant wrongfully failed to make further delivery. After a time, when about 19,000 pairs of pedals should have been delivered, the plaintiff brought action, seeking damages for the failure of the seller to deliver that number. The plaintiff recovered judgment in this action. Subsequently after the time within which the remainder of the pedals should have been delivered, according to the terms of the contract, the plaintiff brought action for the failure of the defendant to deliver them. The Appellate Division of the Supreme Court held that the plaintiff was debarred by his former action from further recovery, and this decision was confirmed by the Court of Appeals. Compare *Gall v. Gall*, 126 Wis. 390, 105 N. W. 953.

PART IV.

RIGHTS OF AN UNPAID SELLER AGAINST THE GOODS.

CHAPTER XIV.

AN UNPAID SELLER'S LIEN.

- Section 501. Definition of an unpaid seller in the Sales Act.
502. When a seller is unpaid.
503. Who is entitled to the remedies of an unpaid seller.
504. Remedies of an unpaid seller under the Sales Act.
505. Remedies of an unpaid seller at common law.
506. When the seller has a lien under the Sales Act.
507. When the seller's lien arises.
508. Lien not lost by part delivery — Provisions of the Sales Act.
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510. Loss of lien — Provisions of the Sales Act.
511. Lien is lost by delivery to the buyer.
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513. Lien lost where goods are in a public place.
514. Lien is lost when goods are in the possession of the buyer.
515. Agreement for continuance of a lien.
516. Waiver of lien.

§ 501. **Definition of an unpaid seller in the Sales Act.**—The fourth part of the Sales Act deals with the rights of the unpaid seller against the goods, and the opening section of this part is as follows:

Sec. 52. DEFINITION OF UNPAID SELLER.—(1.) The seller of goods is deemed to be an unpaid seller within the meaning of this act —

- (a.) When the whole of the price has not been paid or tendered.
- (b.) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer, or otherwise.

(2.) In this part of this act the term “seller” includes an agent of the seller to whom the bill of lading has been endorsed, or a

consignor or agent who has himself paid, or is directly responsible for, the price, or any other person who is in the position of a seller.

This section is identical with section 38 of the English Sale of Goods Act, except that in (1) (b) the words "has been broken" have been substituted for the words "has not been fulfilled." And in the last line of the same sub-section the additional words "the insolvency of the buyer" have been inserted. The first of these changes is made because the rights of an unpaid seller do not arise where a negotiable instrument is given until there has been default in the condition. Presumably the words in the English act would be construed as meaning "has not been fulfilled after the time for performance has arrived;" but it seemed better to make the meaning clear by stating that the condition must have been broken. The words relating to the insolvency of the buyer were inserted because one of the commonest reasons for the seller's reassertion of a lien upon the goods after a negotiable note has been given for the price is the insolvency of the maker. Although the words "or otherwise" in the statute would make it easy for a court to protect the seller in such a case, it seemed best to make an express provision for the case.

§ 502. **When a seller is unpaid.**—Although tender of performance is not the same as performance, and a seller to whom the price of goods has been tendered is strictly unpaid, and can, therefore, bring an action subsequently for the price which he has refused, yet tender destroys the seller's lien.¹ Accordingly, within the meaning of the statute as at common law, after tender the seller is not an unpaid seller. Payment of a part only of the price, however, does not destroy a seller's lien.² Where the seller has accepted a note or bill of exchange in payment for the goods, his rights depend upon whether the obligation was accepted as conditional or as absolute payment. If, as is commonly the case, the document was accepted as payment only subject to the condition that it should be honored at maturity, the seller may assert all the

¹ *Martindale v. Smith*, 1 Q. B. 389; *Mirabita v. Imperial Ottoman Bank*, 3 Ex. D. 164. See also *Clark v. Mauran*, 3 Paige, 373; *Cory v. Barnes*, 63 Vt. 456, 21 Atl. 384.

² *Hodgson v. Loy*, 7 T. R. 440;

Feise v. Wray, 3 East, 93; *Van Casteel v. Booker*, 2 Ex. 691, 702, 709; *Ex parte Chalmers*, L. R. 8 Ch. App. 289; *Owens v. Weedman*, 82 Ill. 409; *Bradley v. Michael*, 1 Ind. 551; *Newhall v. Vargas*, 13 Me. 93,

rights of an unpaid seller against the goods if the buyer makes default in paying the obligation.³ Similarly, where the buyer becomes insolvent before the bill or note matures, the buyer is regarded as having broken a condition upon which the obligation was accepted for the price.⁴ And if the seller has not so far parted with the possession of the goods as to have lost his rights thereby, he has the same rights against the goods as an ordinary unpaid seller.⁵ In most of the cases presenting this question the negotiable paper given for the price was still in the hands of the seller at the time he sought to assert a lien, but it has been held that even though the paper has been negotiated if the seller has indorsed it he may assert a lien upon the insolvency of the buyer; his liability upon the indorsement making this necessary for his protection.⁶ If on the maturity of notes given for the price new notes are taken, it is a question of fact whether the lien which

108, 29 Am. Dec. 489, 15 Me. 314, 33 Am. Dec. 617; Ware River R. R. Co. v. Vibbard, 114 Mass. 447, 458.

³ Feise v. Wray, 3 East, 93; Griffiths v. Perry, 28 L. J. Q. B. 204; *Ex parte* Lambton, L. R. 10 Ch. App. 405; Gunn v. Bolckow, L. R. 10 Ch. App. 491, 501; *Ex parte* Stapleton, 10 Ch. D. 586 (C. A.); McElwee v. Metropolitan Lumber Co., 69 Fed. Rep. 302, 37 U. S. App. 266, 16 C. C. A. 232; Tuthill v. Skidmore, 124 N. Y. 148, 26 N. E. 348; Wanamaker v. Yerkes, 70 Pa. St. 443. The fact that a receipt for the price has been given does not necessarily conclude the seller. Arnold v. Carpenter, 16 R. I. 560, 18 Atl. 174.

⁴ It may be observed that such a condition is imposed by law on principles of justice rather than based on a construction of the bargain which the parties actually made.

⁵ Miles v. Gorton, 2 Cr. & M. 504, 512; Gunn v. Bolckow, L. R. 10 Ch. App. 491, 503; Moses v. Rasin, 14 Fed. Rep. 772, 774; *Re* Manuel J. Portuondo Co., 135 Fed. Rep. 592; Milliken v. Warren, 57 Me. 46;

Arnold v. Delano, 4 Cush. 33, 50 Am. Dec. 754.

⁶ McElwee v. Metropolitan Lumber Co., 69 Fed. Rep. 302, 308, 37 U. S. App. 266, 16 C. C. A. 232. The court there said: "This revesting of the lien is not affected by the fact that the seller had received conditional payment by promissory notes or bills of exchange, nor by the fact that such notes or bills had been negotiated so that they were outstanding when they matured, or unmatured and outstanding when the insolvency occurred. Benjamin, Sales (Corb. ed.), §§ 1130-1185, and note 4; Valpy v. Oakeley, 16 Q. B. 941; Griffiths v. Perry, 1 E. & E. 680; Grice v. Richardson, L. R. 10 A. C. 319; White v. Welsh, 38 Pa. St. 396, 420; Wanamaker v. Yerkes, 70 Pa. St. 443; Arnold v. Delano, 4 Cush. 33; Townley v. Crump, 4 Ad. & E. 58. The liability of defendant in error as indorser on such notes as had been negotiated operated to continue the relation of an unpaid vendor. The right of retention is not a right of rescission,

revived on the maturity of the notes is again waived by the extension of a further period of credit, or whether the understanding of the parties was that the goods should remain pledged for the price until the renewal notes were paid.⁷

§ 503. Who is entitled to the remedies of an unpaid seller?—

The ground upon which an unpaid seller is allowed a lien and kindred remedies is because of the inherent injustice of depriving him of goods with which he has not finally parted where it is evident that he has not been or will not be paid the price for them when it is due. The same principle of justice is applicable in every case where a possessor of goods is entitled to receive a price on the surrender of the goods. Accordingly the term "unpaid seller" in the Sales Act, and at common law in this connection, has a wider meaning than the literal language would import. A factor or other agent who has advanced money in the purchase of goods, or has made himself primarily liable for the price for his principal, is thus entitled to the same rights against the goods as a seller.⁸ So a principal under obligation to consign goods to a factor on the insolvency of the latter may exercise the rights of an unpaid seller though the factor has made advances.⁹ So a surety who has paid the price because of the buyer's default;¹⁰ but a surety has not this right unless he has paid the price.¹¹ It is not material that the property in the goods has not passed. Generally the retention of title by the seller will of itself enable him to protect himself; but it increases the security of the seller to retain

and it is not essential to the revival of the lien that the notes of the purchaser shall be delivered up or ready for delivery, though in *Arnold v. Delano*, cited above, it seems to have been so regarded." Similarly in *Brewer Lumber Co. v. Boston, etc., R. Co.*, 179 Mass. 228, 60 N. E. 548, 88 Am. St. Rep. 375, the seller of goods was allowed the right of stoppage *in transitu* on tendering back notes given for the price, though in the meantime they had been negotiated. Compare with this the decision of *Siffken v. Wray*, 6 East, 371, where a surety for the buyer who had not paid the price was held

not entitled to the protection of an unpaid seller.

⁷ *McElwee v. Metropolitan Lumber Co.*, 69 Fed. Rep. 302, 37 U. S. App. 266, 16 C. C. A. 232.

⁸ *Tucker v. Humphrey*, 4 Bing. 516; *Feise v. Wray*, 3 East, 93; *Ireland v. Livingston*, L. R. 5 H. L. 395, 408, 409; *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489, 15 M. 314, 33 Am. Dec. 617; *Seymour v. Newton*, 105 Mass. 272.

⁹ *Kinloch v. Craig*, 3 T. R. 119; *Newson v. Thornton*, 6 East, 17.

¹⁰ *Imperial Bank v. London Dock Co.*, 5 Ch. D. 195.

¹¹ *Siffken v. Wray*, 6 East, 371.

possession as well as title, and where necessary a seller who has done this can invoke by virtue of his possession the remedies allowed where title has passed.¹²

§ 504. Remedies of an unpaid seller under the Sales Act.—

Sec. 53. REMEDIES OF AN UNPAID SELLER.—

(1.) Subject to the provisions of this act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has —

(a.) A lien on the goods or right to retain them for the price while he is in possession of them.

(b.) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them.

(c.) A right of resale as limited by this act.

(d.) A right to rescind the sale as limited by this act.

(2.) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and coextensive with his rights of lien and stoppage “in transitu” where the property has passed to the buyer.

This section of the Sales Act is identical with section 39 of the English Sale of Goods Act, except that in (1) after the first six words of the section, the English act has these words: “And of any statute in that behalf.” And in the English act (1) (d) is not found. The reference in the English act to “any statute in that behalf” relates to the English Factors’ Act. There seemed no occasion for introducing by these words an uncertainty into the American act as to possible other statutes giving the seller a lien. As will be seen subsequently,¹³ subsection 1 (d) though it does not represent the English law is an accurate statement of American doctrine.

§ 505. Remedies of an unpaid seller at common law.—If an unpaid seller retains both title and possession of the goods, there can be no question as to his legal capacity to deal effectively with them. Accordingly if the buyer is so seriously in default as to

¹² *Jenkyns v. Osborne*, 7 M. & G.

¹³ See *infra*, § 555.

678. Section 53 (2) of the Sales Act so provides.

justify the seller in refusing to continue with the contract, the seller may obviously make any disposition of the goods that pleases him. Indeed even though the buyer is not in default under the contract, the seller may likewise dispose of the goods. He will be liable on the contract if he does so in violation of the buyer's rights, but as an owner in possession of goods his ability to make what disposition of them he sees fit cannot be questioned. Still, if it is material for the seller's protection he may invoke the remedies ordinarily appropriate for a seller who has parted with the property in the goods.¹⁴ But the case in the main to be considered is where the property in the goods has passed to the buyer, but the possession remains with the seller. In such a case the seller's remedies to secure payment of the price may be considered under the four headings which are enumerated in section 53 of the Sales Act, namely: (1) A lien, strictly so-called; that is, a right to hold the goods; (2) a right to stop the goods *in transitu*; (3) a right to resell them; (4) a right to rescind the transfer of the property. These different remedies may be now considered.

§ 506. When the seller has a lien under the Sales Act.—

UNPAID SELLER'S LIEN.

Sec. 54. WHEN RIGHT OF LIEN MAY BE EXERCISED.—(1.) Subject to the provisions of this act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:

(a.) Where the goods have been sold without any stipulation as to credit.

(b.) Where the goods have been sold on credit, but the term of credit has expired.

(c.) Where the buyer becomes insolvent.

(2.) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

This section is identical with section 41 of the English Sale of Goods Act.

¹⁴ *Jenkyns v. Osborne*, 7 M. & G. App. 289; *Crummey v. Raudenbush*, 678; *Ex parte Chalmers*, L. R. 8 Ch. 55 Minn. 426, 56 N. W. 1113.

§ 507. **When the seller's lien arises.**—It is a fundamental principle based on justice that unless the buyer and seller make a contrary agreement, the seller is entitled to the price at the same time that he transfers the possession of the goods.¹⁵ Accordingly the seller always has a lien upon the goods which he sells until payment or tender of the price, unless the terms of the bargain indicate a contrary agreement. The various terms which indicate such a contrary agreement may all be summed up in the single expression of sale on credit. The very meaning of these words is that the seller binds himself to give the goods over to the buyer without receiving at that time pay for them.¹⁶ But even where the parties agree upon a sale on credit, the seller's lien may revive. By the nature of such a sale, the buyer may take possession of the goods without paying the price; but if he fails to do so until the term of the credit has expired and the price becomes due, he loses the right which he theretofore had.¹⁷ It may be urged that the original agreement shows that the seller did not rely upon his lien in such a case; but the existence of a lien does not depend upon the construction of the contract, but upon a rule of law which is imposed by reason of its inherent justice. After the term of credit has expired, the buyer is by the terms of the contract bound immediately to pay the price and the seller to deliver the goods; and it is a general principle of contracts that wherever the parties to a bilateral agreement are each under an immediate obligation to perform, the performances are concurrently conditional.¹⁸ The insolvency of the buyer also revives the lien of the

¹⁵ See *supra*, §§ 342, 447.

¹⁶ *Spartali v. Benecke*, 10 C. B. 212, 223; *Abraham v. Karger*, 100 Wis. 387, 76 N. W. 330.

¹⁷ *Bunney v. Poyntz*, 4 B. & Ad. 568; *New v. Swain*, 1 Dans. & L. 193; *McElwee v. Metropolitan Lumber Co.*, 69 Fed. Rep. 302, 37 U. S. App. 266, 16 C. C. A. 232; *Leahy v. Lobdell*, 80 Fed. Rep. 665, 667, 54 U. S. App. 35, 26 C. C. A. 75; *Robinson v. Morgan*, 65 Vt. 37, 25 Atl. 899.

¹⁸ An illustration of the same principle may be found in *Beecher v.*

Conradt, 13 N. Y. 108, 64 Am. Dec. 535, and similar cases. These cases relate to sales of land, but the principles are equally applicable to sales of personal property. In *Beecher v. Conradt*, the plaintiff agreed to sell a piece of land for a price payable in five annual instalments, which the buyer promised to pay. The conveyance was to be made at the time the last instalment was paid. No instalments were paid, but the buyer brought no action until after all were due. The court held that though the seller might have sued

seller, even though the time for payment of the price has not yet arrived.¹⁹ This doctrine is only an application of a general principle in the law of contracts that when one party to a bilateral contract is incapacitated from performing his part of the agreement, the other party also is excused from performing.²⁰ It should

for each instalment as it became due, or for four instalments prior to the time when the fifth became due, without making any tender of performance on his own part, after that time his performance was concurrently due with the buyer's, and an action for the price could not be maintained without a tender of a conveyance. So *Hill v. Grigsby*, 35 Cal. 656; *McCroskey v. Ladd*, 96 Cal. 455, 31 Pac. 558; *Irwin v. Lee*, 34 Ind. 319; *Soper v. Gabe*, 55 Kans. 646, 41 Pac. 969; *Brentnall v. Marshall*, 10 Kans. App. 488, 63 Pac. 93; *Eddy v. Davis*, 116 N. Y. 247, 22 N. E. 362; *Shelly v. Mikkelson*, 5 N. Dak. 22, 63 N. W. 210; *Boyd v. McCullough*, 137 Pa. St. 7, 16; *First Nat. Bank v. Spear*, 12 S. Dak. 108, 80 N. W. 166; *Hogan v. Kyle*, 7 Wash. 595, 35 Pac. 399, 38 Am. St. Rep. 910. See also *McElwee v. Bridgeport Land Co.*, 54 Fed. Rep. 627, 13 U. S. App. 195, 4 C. C. A. 525. Some decisions, however, mostly early ones, are opposed to this result, holding that by the original terms of the contract the obligation to pay the preliminary instalment is absolute and will not be affected by the delay in enforcement. *Weaver v. Childress*, 3 Stew. 361; *Hays v. Hall*, 4 Port. 374, 387, 30 Am. Dec. 530; *White v. Beard*, 5 Port. 94, 100, 30 Am. Dec. 552; *Duncan v. Charles*, 5 Ill. 561; *Sheeran v. Moses*, 84 Ill. 448; *Gray v. Meek*, 199 Ill. 136, 139, 64 N. E. 1020; *Allen v. Sanders*, 7 B. Mon. 593; *Coleman v. Rowe*, 6 Miss. 460, 37 Am. Dec. 164; *Clopton v. Bolton*, 23 Miss. 78; *McMath v. Johnson*, 41

Miss. 439; *Bowen v. Bailey*, 42 Miss. 405, 2 Am. Rep. 601; *Biddle v. Coryell*, 3 Harr. (N. J. L.) 377, 38 Am. Dec. 521. See also *Loud v. Pomona Land Co.*, 153 U. S. 564, 580, 38 L. ed. 822; *Bean v. Atwater*, 4 Conn. 3, 10 Am. Dec. 91; *White v. Atkins*, 8 Cush. 367; *Kettle v. Harvey*, 21 Vt. 301.

¹⁹ *Bloxam v. Sanders*, 4 B. & C. 941; *Bloxam v. Morley*, 4 B. & C. 951; *Griffiths v. Perry*, 1 E. & E. 680; *Ex parte Chalmers*, L. R. 8 Ch. App. 289; *McElwee v. Lumber Co.*, 69 Fed. Rep. 302, 37 U. S. App. 266, 281, 16 C. C. A. 232; *Owens v. Weedman*, 82 Ill. 409, 417, 418; *Rapplee v. Racine Seeder Co.*, 79 Iowa, 220, 44 N. W. 363, 7 L. R. A. 139; *Thompson v. Railroad Co.*, 28 Md. 396; *Arnold v. Delano*, 4 Cush. 33, 50 Am. Dec. 754; *Keeler v. Goodwin*, 111 Mass. 490, 492; *Ware River R. R. Co. v. Vibbard*, 114 Mass. 447, 454; *Lennox v. Murphy*, 171 Mass. 370, 373, 50 N. E. 644; *Crummey v. Raudenbush*, 55 Minn. 426, 56 N. W. 1113; *Benedict v. Field*, 16 N. Y. 595; *Pardee v. Kanady*, 100 N. Y. 121, 2 N. E. 885; *Tuthill v. Skidmore*, 124 N. Y. 148, 26 N. E. 348; *Diem v. Koblitiz*, 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531; *White v. Welsh*, 38 Pa. St. 396; *Wanamaker v. Yerkes*, 70 Pa. St. 443; *Arnold v. Carpenter*, 16 R. I. 560, 18 Atl. 174, 5 L. R. A. 357; *Robinson v. Morgan*, 65 Vt. 37, 25 Atl. 899; *Bohn Mfg. Co. v. Hynes*, 83 Wis. 388, 53 N. W. 684.

²⁰ See *Wald's Pollock, Contracts* (3d ed.), pp. 354, 355.

be noticed that insolvency does not dissolve the bargain; it merely revives the seller's lien. Accordingly the legal situation is the same that exists in other cases where the seller has a lien, and he has the usual remedies for its enforcement. Until he has taken remedies which are inconsistent with the completion of the sale, the insolvent or his trustee in bankruptcy may, by paying the price, entitle himself to the goods.²¹ It has indeed been held that the seller is bound to tender the goods on the chance that the price will be paid by the insolvent or his representative in bankruptcy,²² but this decision seems wrong, and it is doubtful whether it would be followed. The insolvency of the buyer indicates that it is so probable that the bargain will not be completed that the seller should be justified in awaiting a tender or request from the buyer or his representative.²³ It is immaterial that the seller holds the goods as bailee for the buyer. Indeed this is always the situation where the seller's lien is in question; for the property having passed, the seller is necessarily holding the buyer's goods and, therefore, acting as bailee for him.²⁴ And though the seller

²¹ *Ex parte Stapleton*, 10 Ch. D. 586; *Mess v. Duffus*, 6 Comm. Cas. 165.

²² *Gibson v. Carruthers*, 8 M. & W. 321. This was a case of considerable hardship. The seller had agreed to ship a cargo of linseed at Odessa for London. Owing to the failure of the buyer the seller did not ship the linseed. He was held liable for not doing so, and a plea that the assignees in bankruptcy did not within a reasonable time give notice of their adoption of the contract was held no defense.

²³ In *Ex parte Chalmers*, L. R. 8 Ch. App. 289, the court, after saying that beneficial contracts of the bankrupt might be adopted and a sufficient portion of the assets might be allowed to be taken by the court for the purpose of completing the contract, added: "If this were done and due notice was given to the

vendor, I entertain no doubt that he would be bound to complete the contract on his part." See further, *Ex parte Tondeur*, L. R. 5 Eq. 160; *Ex parte Agra Bank*, L. R. 9 Eq. 725; *New England Iron Co. v. Gilbert R. R. Co.*, 91 N. Y. 153; *Pardee v. Kanady*, 100 N. Y. 121, 2 N. E. 885; *Vandegrift v. Cowles Engineering Co.*, 161 N. Y. 435, 55 N. E. 941, 48 L. R. A. 685; *Diem v. Koblitz*, 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531.

²⁴ *Townley v. Crump*, 4 A. & E. 58; *Grice v. Richardson*, L. R. 3 A. C. 319, 324; *McElwee v. Lumber Co.*, 69 Fed. Rep. 302, 37 U. S. App. 266, 287, 288, 16 C. C. A. 232; *Perrine v. Barnard*, 142 Ind. 448, 41 N. E. 820; *Thompson v. Railroad Co.*, 28 Md. 396, 407; *Arnold v. Delano*, 4 Cush. 33, 38, 50 Am. Dec. 754; *Conrad v. Fisher*, 37 Mo. App. 352, 8 L. R. A. 147; *White v. Welsh*, 38 Pa. St. 396, 420.

has charged the buyer storage for the goods, the lien still may be asserted.²⁵

§ 508. **Lien not lost by part delivery—Provisions of the Sales Act.**—

Sec. 55. LIEN AFTER PART DELIVERY.—Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an intent to waive the lien or right of retention.

This provision is identical with section 42 of the English Sale of Goods Act.

§ 509. **When part delivery is a surrender of lien.**—When part of the goods are delivered the seller has a lien upon the remainder, not simply for the proportion of the price which is due on account of the goods so retained, but for whatever portion of the price is unpaid.²⁶ It is said in the cases that if delivery of the part is “intended as a symbolical delivery of the whole, and a waiver as to any right of retention as to the remainder, the lien is lost.”²⁷ Doubtless it is possible for a seller to agree to give up his lien, but it is probable that the intent to make such an agreement would need to be pretty explicit in order to deprive the seller of his right. The case must be distinguished where the part delivery is made to a subpurchaser. As will be seen,²⁸ the seller’s lien is destroyed if he agrees to hold as bailee for a subpurchaser, and delivery of a part to a subpurchaser would be strong evidence of an assent to hold as bailee for him.²⁹ On the other hand, as has been said, an

²⁵ *Miles v. Gorton*, 2 Cr. & M. 504.

²⁶ *Bunney v. Poyntz*, 4 B. & Ad. 568; *Dixon v. Yates*, 5 B. & Ad. 313, 341; *Miles v. Gorton*, 2 Cr. & M. 504, 512; *Ex parte Chalmers*, L. R. 8 Ch. App. 289; *McElwee v. Metropolitan Lumber Co.*, 69 Fed. Rep. 302, 37 U. S. App. 266, 293, 16 C. C. A. 232; *Haskell v. Rice*, 11 Gray, 240; *Ware River R. R. Co. v. Vibbard*, 114 Mass. 447, 458; *Williams v. Moore*, 5 N. H. 235; *McFarland v. Wheeler*, 26 Wend.

467; *Wanamaker v. Yerkes*, 70 Pa. St. 443.

²⁷ *McElwee v. Metropolitan Lumber Co.*, 69 Fed. Rep. 302, 316, 37 U. S. App. 266, 16 C. C. A. 232.

²⁸ See Sales Act, § 62; also *infra*, § 558.

²⁹ *Kemp v. Falk*, 7 A. C. 573, 586. Lord Blackburn said: “It is said that delivery of a part is delivery of the whole. It may be a delivery of the whole. In agreeing for the de-

agreement by the seller to hold as bailee for the buyer does not deprive the seller of his lien.³⁰ Whether the agreement to hold as such bailee be called a constructive delivery or not, it is not such a delivery as destroys the seller's lien.

§ 510. Loss of lien — Provisions of the Sales Act.—

Sec. 56. WHEN LIEN IS LOST.—(1.) The unpaid seller of goods loses his lien thereon —

(a.) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the property in the goods or the right to the possession thereof.

(b.) When the buyer or his agent lawfully obtains possession of the goods.

(c.) By a waiver thereof.

(2.) The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained judgment or decree for the price of the goods.

This section follows, with one slight change, section 43 of the English Sale of Goods Act. In (1) (a) the closing clause of the English statute is, "without reserving the right of disposal of the goods." The reason for the change is because of the terminology adopted in the American act in regard to bills of lading. The English act uses the phrase "right of disposal" for all cases where the shipper retains a hold upon the goods by means of the bill of lading. The American act distinguishes cases where the seller, by the form of the bill of lading, reserves the property in the goods, and cases where the possession merely is reserved.³¹

§ 511. **Lien is lost by delivery to the buyer.**— Lord Hardwicke stated that an unpaid factor ought to have a lien upon the goods, at least if the principal became bankrupt, even though the goods

livery of goods with a person, you are not bound to take an actual corporeal delivery of the whole in order to constitute such a delivery, and it may very well be that a delivery of part of the goods is sufficient to afford strong evidence that it is intended as a delivery of the whole. If both parties intend it as a delivery

of the whole, then it is a delivery of the whole; but if either of the parties does not intend it as a delivery of the whole, if either of them dissents, then it is not a delivery of the whole."

³⁰ See *supra*, § 507.

³¹ See *supra*, § 282, note 72.

had been delivered.³² It may be supposed that he would have been disposed to apply the same doctrine in favor of an unpaid seller. And in some States statutes have given sellers of materials on certain conditions liens upon the materials after delivery.³³ But it has long been settled that, apart from such statutes, if the buyer gets both title and possession from the seller, the lien is lost.³⁴ And it is not revived if the goods are redelivered to the seller for a special purpose, as for packing.³⁵ But the wrongful taking of the goods by the buyer without the assent of the seller does not destroy the lien.³⁶ And if the agreement between the parties contemplates payment on delivery, and the goods are delivered in contemplation of simultaneous payment of the price, which is not made, the seller may treat the buyer as guilty of conversion.³⁷ If the seller is induced by fraud voluntarily to consent to the surrender of possession of goods to the buyer who already is the owner of the property, the legal lien is on principle lost, for the seller has consented to surrender it. If, therefore, the buyer should dispose of the goods after having thus obtained them to a *bona fide* purchaser for value without notice, the latter should hold the property free of lien.³⁸ As against the buyer himself, however, the seller would be able to rescind the delivery of possession and become entitled to the possession of the goods again. When the seller regained possession his legal lien would be restored.³⁹ If goods on which the seller has a lien are put into the possession of

³² Snee v. Prescott, 1 Atk. 245. "Though goods are even delivered to the principal, I could never see any substantial reason why the original proprietor, who never received a farthing, should be obliged to quit all claim to them, and come in as a creditor only for a shilling perhaps in the pound, unless the law goes upon the general credit the bankrupt has gained by having them in his custody."

³³ See First Bank v. William R. Trigg Co., 106 Va. 327, 56 S. E. 158, 117 Am. St. Rep. 1014.

³⁴ Holland's Assignee v. Cincinnati Co., 97 Ky. 454, 30 S. W. 972; Thompson v. Conover, 32 N. J. L.

466. See also Power v. Wells. Cowp. 818; Emanuel v. Dane, 3 Campb. 299; Neal v. Boggan, 97 Ala. 611, 11 So. 809; Indian Cont. Act., § 121.

³⁵ Valpy v. Gibson, 4 C. B. 837.

³⁶ Bush v. Bender, 113 Pa. St. 94, 4 Atl. 213. See McGill v. Chilhowee Lumber Co. (Tenn.), 82 S. W. 210. See also Woolsey v. Axton, 192 Pa. St. 526, 530, 43 Atl. 1029.

³⁷ Starnes v. Roberts, 128 Ga. 718, 58 S. E. 348; Lamb v. Utley, 146 Mich. 654, 110 N. W. 50.

³⁸ See McFarland v. Wheeler, 26 Wend. 467.

³⁹ Ames v. Moir, 130 Ill. 582, 22 N. E. 535. See also Allyn v. Willis, 65 Tex. 65.

the buyer merely for the purpose of allowing the latter to examine them, this would not amount to an assent to a surrender of the lien.⁴⁰ But if the seller permitted a buyer who thus obtained possession of the goods to retain them without taking steps to resume possession, this acquiescence would amount to an assent to surrender the lien.⁴¹

§ 512. Lien is lost by delivery to an agent or bailee for the buyer.

—An unconditional delivery to an agent or bailee for the buyer is, so far as the seller's lien is concerned, the same as delivery to the buyer himself.⁴² As will be seen, the seller has, under appropriate circumstances, a right to stop the goods *in transitu* after delivery to a bailee for the buyer, but this right is dependent on the buyer's insolvency, and until the goods are actually stopped it cannot be said that the seller has any lien upon them. Attention must be directed to the effect of bills of lading and warehouse receipts given by carriers or warehousemen in retaining in the consignor or depositor of goods a right against the goods. This subject has been previously considered in detail.⁴³

§ 513. Lien is lost where goods are in a public place.—Sometimes when goods are sold they are at a place where either the seller or buyer can readily obtain access to them, and the possession of either party is rather based on a theory of law than on actual physical control. While the seller retains title in such a case, it is clear that the goods must legally be regarded as in his possession, since no one is asserting physical control over them in opposition to the seller's legal title. But when the goods have been sold and title passed, the legal possession would, for the ~~same~~ reason, be in the buyer.⁴⁴

§ 514. Lien is lost when goods are in the possession of the buyer.

—If the goods are already in possession of the buyer at the time of the bargain, it is plain that when the property is transferred

⁴⁰ *Leven v. Smith*, 1 Denio, 571, 573; *Canadian Bank v. McCrea*, 106 Ill. 281, 298; *Ames v. Moir*, 130 Ill. 582, 591, 22 N. E. 535.

⁴¹ *Leatherbury v. Connor*, 54 N. J. L. 172, 23 Atl. 684, 33 Am. St. Rep. 672; *Bowen v. Burk*, 13 Pa. St. 146.

⁴² *Dutton v. Solomonson*, 3 Bos. &

Pul. 582, 584; *Bolton v. Railway Co.*, L. R. 1 C. P. 431, 439; *Schmertz v. Dwyer*, 53 Pa. St. 335, 338.

⁴³ See *supra*, §§ 282-286; also § 404 *et seq.*

⁴⁴ *Tansley v. Turner*, 2 Bing. N. C. 151; *Cooper v. Bill*, 3 H. & C. 722.

the seller has no lien.⁴⁵ The inquiry here is not whether the seller has delivered the goods,⁴⁶ but simply whether he has the possession necessary for a lien.

§ 515. **Agreement for continuance of a lien.**— Even though the goods are delivered to the buyer an agreement may be made that the seller shall retain a lien. Such an agreement would be binding at least between the parties.⁴⁷ As against third persons it would be invalid both on account of the common-law rule that a lienor or a pledgee must retain possession, and because of the words or the policy of statutes requiring the record of chattel mortgages as a condition of their validity, except as between the parties to them.⁴⁸

§ 516. **Waiver of lien.**— The seller may waive his lien either by express agreement to that effect or by such conduct as estops him from asserting it. No comprehensive statement can be made covering every case, but it has been held that where the buyer was allowed to alter the character of the goods and make them much more valuable, the seller could not assert a lien.⁴⁹ So if a seller should take part in bankruptcy proceedings of the buyer as an unsecured creditor, proving for the full amount of the price, it would, it seems, be a waiver of the lien.⁵⁰ It is sometimes laid down broadly that one having a lien waives it by asserting mistakenly a greater right than the law allows him. The true doctrine, however, is doubtless that stated by the Supreme Court of Minnesota: "An examination of the authorities on the subject, from the early case of *Boardman v. Sill*,^{50a} down, satisfies us that they all proceed upon principles essentially of

⁴⁵ See *Harman v. Anderson*, 2 Campb. 243; *Hawes v. Watson*, 2 B. & C. 540; *Dodsley v. Varley*, 12 A. & E. 632; *Cooper v. Bill*, 3 H. & C. 722.

⁴⁶ Compare the question that arises when the Statute of Frauds is in question. See *supra*, § 90.

⁴⁷ *Gregory v. Morris*, 96 U. S. 619, 24 L. ed. 740; *De Witt v. Prescott*, 51 Mich. 298, 16 N. W. 656.

⁴⁸ *McFarland v. Wheeler*, 26 Wend. 467.

⁴⁹ *Douglas v. Shumway*, 13 Gray, 498. Timber had been cut into firewood on the seller's premises, in pursuance of the contract with the seller.

⁵⁰ In *Rhodes v. Mooney*, 43 Ohio St. 421, 4 N. E. 233, the contrary was held in a case arising under a common-law assignment, but under the bankruptcy rule as to secured creditors the result stated in the text would seem law.

^{50a} 1 Campb. 410, note.

equitable estoppel, and limit the application of the doctrine invoked by counsel to cases where the refusal to deliver the property was put on grounds inconsistent with the existence of a lien, or on grounds entirely independent of it, without mentioning a lien. Thus it has been repeatedly held that a lien is not waived by mere omission to assert it as the ground of refusal, or by a general refusal to surrender the goods, without specifying the ground of it, except in certain cases, where the lien was unknown to the person making the demand, and that fact was known to the person on whom the demand was made. In such cases, if the ground of the refusal is one that can be removed, the other party ought in fairness to have an opportunity to do so."⁵¹ A conversion of the goods by the lienholder extinguishes his right;⁵² and an attachment by the lienholder of the goods as of the property of the general owner is a waiver of the lien;⁵³ but where the goods are seized as the property of the general owner at the instance of a third party, the lienholder does not lose his rights, and if to protect himself he buys the goods at execution sale, there is still no waiver.⁵⁴ Giving credit either at the time of the original bargain or at any time subsequently is a waiver of the lien;⁵⁵ as is also assent to a resale by the buyer.⁵⁶ The taking of security for the price does not waive the lien unless the circumstances are such as to indicate an agreement to rely solely upon the security taken.⁵⁷ And a judgment obtained for the price does not destroy the lien.⁵⁸

⁵¹ *Crummey v. Raudenbush*, 55 Minn. 426, 56 N. W. 1113. See also *Bierce v. Hutchins*, 205 U. S. 340, 51 L. ed. 828, 27 S. Ct. 524; *Loewenberg v. Railway Co.*, 56 Ark. 439, 19 S. W. 1051; *Fowler v. Parsons*, 143 Mass. 401, 9 N. E. 799; *Folsom v. Barrett*, 180 Mass. 439, 62 N. E. 723, 91 Am. St. Rep. 320. Compare *Bean v. Bolton*, 3 Phila. 87; *Stephenson v. Lichtenstein*, 72 N. J. L. 113, 59 Atl. 1033.

⁵² *People's Bank v. Frick Co.*, 13 Okla. 179, 73 Pac. 949.

⁵³ *Legg v. Willard*, 17 Pick. 140, 28 Am. Dec. 282. But see *contra*, *Allyn v. Willis*, 65 Tex. 65. So the express reservation of a lien will ex-

clude a lien by operation of law. *Re Leith's Estate*, L. R. 1 P. C. 296, 305.

⁵⁴ *Brown v. Petersen*, 25 D. C. App. 359.

⁵⁵ See *supra*, § 507.

⁵⁶ See Sales Act, § 62; also *infra*, § 558.

⁵⁷ See *Angus v. McLachlan*, 23 Ch. D. 330; *Kimball v. Costa*, 76 Vt. 289, 56 Alt. 1009, 104 Am. St. Rep. 937.

⁵⁸ *Houlditch v. Desanges*, 2 Stark. 337; *Serivener v. Great Northern Ry. Co.*, 19 W. R. 388. See also *Wade v. Moffett*, 21 Ill. 110, 74 Am. Dec. 79.

CHAPTER XV.

STOPPAGE IN TRANSITU.

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§ 517. The right to stop in transitu — Provisions of the Sales Act.
— The Sales Act Provides:

STOPPAGE IN TRANSITU.

Sec. 57. SELLER MAY STOP GOODS ON BUYER'S INSOLVENCY.—Subject to the provisions of this act, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods at any time while they are in transitu, and he will then become

entitled to the same rights in regard to the goods as he would have had if he had never parted with the possession.

This section follows section 44 of the English Sale of Goods Act with two exceptions. In the last clause the English act reads, "and may retain them until payment or tender of the price." But the seller under such circumstances has also the right to resell, and under this draft the right to rescind the sale. It is, therefore, more accurate to provide, as the American statute does in fact, that the seller is revested with his lien. The other alteration from the English statute consists of the insertion of the words "is or" in the second line, in order to make it clear that the seller's right exists even though the buyer were insolvent at the time of the sale.

§ 518. *Stoppage in transitu* — Nature and origin of the right.— The essential basis of the right of stoppage *in transitu* is clearly the injustice of allowing the buyer to have property when he has not paid and, owing to his insolvency, cannot pay the price which was to be given in return for the goods. In other words, the fundamental doctrine supporting the right is the doctrine of failure of consideration. This doctrine, however, has not been universally applied in the law of sales. Though a buyer who pays in advance the price for goods can recover the price, if for any reason the goods are not furnished him, in spite of the ownership of the money having passed to the seller,¹ it is not generally true that an owner of goods who has transferred the property to the buyer can recover the goods if the price is not paid.² If our law had generally undertaken to enforce specifically obligations in regard to chattels, it is conceivable that the seller might have been allowed to recover his goods as freely as the buyer is allowed to recover his money. Where the goods have not got into the physical possession of the buyer himself, there is less practical difficulty in enforcing the return of the specific goods to the seller than where the buyer is personally in possession. Perhaps for this reason the English law has permitted an exception to its general denial of the seller's right to recover goods after the property and possession have passed, on account of nonpayment of the price,

¹ See *supra*, § 600.

² See *supra*, § 511.

present or prospective. The seller's right seems first to have been admitted by courts of equity.³ But since the latter part of the eighteenth century, his right to proceed at law has not been questioned, and unless there were peculiar circumstances in the case rendering equitable relief necessary, it is probable that to-day a court of equity would hold that there was a clear and adequate remedy at law.

§ 519. **Existence of the right in the civil law.**—The Roman Law did not recognize the doctrine of stoppage *in transitu* and had little need so to do. The property did not pass by the contract nor, necessarily, even by delivery. If the goods were delivered without credit given by the seller, or security for payment, the property did not pass and the seller could recover possession by action *in rem*.⁴ And even if credit were given by the seller or security taken, he might by special agreement reserve either the ownership absolutely, or the right to the goods in case of the buyer's insolvency.⁵ The modern law of Europe, with the exception of England, was based on these rules, but within the past century considerable change has been made in them. In France, prior to the enactment of the Code Napoleon, it seems that even though the seller gave credit, he was entitled to reclaim the goods from the buyer in case of the latter's insolvency; a much more universal right than the right to stop the goods *in transitu*. Under the modern codes in France and Germany and presumably, on account of the wide influence of the French Code, in other European States, the property in goods passes on delivery, or by the

³ In *Gibson v. Carruthers*, 8 M. & W. 321, 338, Lord Abinger, C. B., said: "In courts of equity it has been the received opinion that it (the right of stoppage *in transitu*) was founded on some principle of common law. In courts of law it is just as much a practice to call it a principle of equity, which the common law has adopted." That the latter view is correct is apparent from the decisions. *Wiseman v. Vandeputt*, 2 Vern. 203 (decided in 1690); *Snee v. Prescott*, 1 Atk. 245 (decided in 1743). It was not until

1759, in *Burghall's Assignees v. Howard*, 1 H. Bl. 366, note, that a court of law seems to have adopted the doctrine. In that case Lord Mansfield said that he "had known it several times ruled in chancery * * * and that this was ruled, not upon principles of equity only, but the laws of property." In *D'Aquila v. Lambert*, 1 Amb. 399 (decided in 1761), chancery again took jurisdiction.

⁴ *Moyle, Contract of Sale in the Civil Law*, 151.

⁵ *Ibid.*, 154.

terms of the contract itself, as in England and America.⁶ Whether because of this change in the law or not, a right analogous to the English right of stoppage *in transitu* is now recognized in France,⁷ in Germany,⁸ and presumably in other European countries.⁹

§ 520. **Requirements for the existence of the right.**—In order that the seller shall have the right to stop goods in transit, these circumstances must concur: (1) There must be an unpaid seller; (2) the title to the goods must have passed; (3) goods must be in transit from the seller to the buyer; (4) the buyer must be insolvent; (5) a resale of the goods by the buyer must not have cut off the right. The nature of an unpaid seller, both under the Sales Act and the common law, has already been stated,¹⁰ but the other requirements must now be examined.

§ 521. **Title must not be in the seller.**—The peculiarity of the doctrine of stoppage *in transitu* is that the right is allowed the

* In France, by the Code Civil, Art. 711, property passes by the bargain itself. In Germany, Bürgerliches Gesetzbuch, § 446, by delivery of the goods; and, similarly in Austria, Gesetzbuch, §§ 1048–1050, 1064.

⁷ Code de Commerce, Art. 578. This section allows the seller to stop goods while in transit and not delivered to the purchaser's warehouse or the warehouse of his commission agent. The goods cannot be stopped if before arrival they have been sold on the faith of invoices, bills of lading, or shipping receipts. The right exists only in case of the buyer's bankruptcy. By the modern French law, the seller also has the right of reclaiming goods in the buyer's hands, within a brief period, in certain specified cases. Code Civil, Arts. 2101, 2102; Code de Com., Arts. 550, 575, 576.

⁸ Konkursordnung, (1898) § 44; Konkursordnung, (1878) § 36. "The seller or factor can demand the surrender of goods which have been sent from another place to the bankrupt and have not been fully paid for by

the bankrupt, so far as the goods have not already reached the place of delivery before the beginning of the bankruptcy and come into the possession of the bankrupt or another person for him." It has been said by Seuffert, Deutsches Konkursprozessrecht, (1899) 94, note 12: "This right has been recognized a long time;" citing earlier ordinances of Hamburg, Bremen, Bavaria, and Prussia. References are also given to the law of France and other foreign countries.

⁹ In *Gibson v. Carruthers*, 8 M. & W. 321, 339, Lord Abinger said, after speaking of the history of the doctrine of stoppage *in transitu*: "The cases I have already referred to show that it was practiced in the Italian States. That it existed in Holland was proved in a case tried by Lord Loughborough and mentioned by him in his judgment in the case of *Lickbarrow v. Mason*, 1 H. Bl. 357. That it is the law of Russia was also proved in the cases of *Inglis v. Usherwood*, 1 East, 515, and of *Bohtlingk v. Inglis*, 3 East, 381.

¹⁰ See *supra*, § 503.

seller after the property has passed. Before that time the seller's ownership of the goods is sufficient to protect him. Though he may reclaim the goods, therefore, when the property has not passed, this right is not properly called a right of stoppage *in transitu*.¹¹ The importance of emphasizing the point that the property must have passed is not because the seller would have any less right if title still remained in him, but because he would have a larger right. If title is in the seller, no limit can be set to his power over the goods. Even though the buyer is solvent and it is a breach of contract to fail to ship or to deliver the goods, the seller may stop or retain them, though he thereby makes himself liable in damages. 'It may be supposed, however, that the reason why the property has not passed to the buyer is because title has not vested in the seller and that in reality what the seller has sold is his interest in the contract of a third person to sell goods to him. In such a case the seller has no right of ownership which will protect him, and yet he may be irretrievably damaged if the insolvent buyer gets possession of the goods. The right to stop them, therefore, is admitted.¹² Sometimes when a seller has been defrauded of his goods and, discovering the fraud before the goods have been delivered by the carrier to the purchaser, directs the carrier not to deliver them, the seller is said to stop the goods *in transitu*. Such a case must not be confused with the right of the seller to stop the goods on account of insolvency. For in case of fraud, nothing but the transfer of the goods to a *bona fide* purchaser for value, or his own acquiescence, will determine the seller's right to rescind the transaction and recover his goods.¹³ The technicalities of what constitutes the transit will have no application.

¹¹ *Fraser v. Witt*, L. R. 7 Eq. 64. "The doctrine of stoppage *in transitu* is that a vendor may stop the goods which he has sold to and which have become the property of the purchaser at any time before they have got into his possession if he has become insolvent." See also *Bolton v. Railway Co.*, L. R. 1 C. P. 431.

¹² *Jenkyne v. Osborne*, 7 M. & G. 678. In this case the seller had

agreed to buy a portion of a cargo of beans consisting of 1,442 sacks, but these sacks had not been severed from the rest of the cargo. The plaintiff, while the goods were in transit, sold the 1,442 sacks to which he was entitled to one Thomas, who became insolvent before the arrival of the vessel. It was held that though the property in the goods had never vested in the plaintiff, but

§ 522. **Insolvency of the buyer.**— The Sales Act defines insolvency as follows: “A person is insolvent within the meaning of this act who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he is insolvent within the meaning of the Federal Bankruptcy Law or not.”¹⁴ This definition probably expresses accurately the rule of the common law. The ground of the seller’s right is that circumstances are such that he is unlikely to get paid for the goods if the buyer obtains them. The meaning of insolvency, therefore, should be nothing narrower than this—that the buyer, in fact, is unable to pay, or has justified the seller in so believing, by ceasing to pay his obligations. The evidence of insolvency may be of various sorts. The effect of the evidence is to be determined as a question of fact and in disputed cases should properly be left to the jury. It is obviously sufficient evidence if the buyer has stopped payment in the business sense of those words.¹⁵ The protest of a single note is not, however, conclusive evidence of insolvency.¹⁶ Stoppage of payment is not the only sufficient evidence; the essential question is whether the buyer is in fact unable to pay, and this may be proved by any convincing evidence; even the nonpayment of a single debt may, in some cases, be sufficient.¹⁷ It is enough also if the buyer

only a right to take them when separated from the remainder of the cargo, the right of stoppage might lawfully be exercised by him.

¹⁴ See *infra*, § 648. The distinction is pointed out in *James Music Co. v. Bridge*, Wis., 114 N. W. 1108.

¹⁵ Section 76 (3).

¹⁶ *Vertue v. Jewell*, 4 Campb. 31; *Newson v. Thornton*, 6 East, 17; *Dixon v. Yates*, 5 B. & Ad. 313; *Bird v. Brown*, 4 Ex. 786; *O’Brien v. Norris*, 16 Md. 122, 77 Am. Dec. 284; *Inslee v. Lane*, 57 N. E. 454; *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

¹⁷ *Rex Buggy Co. v. Ross*, 80 Ark. 388, 97 S. W. 291.

¹⁷ *Jeffris v. Fitchburg R. Co.*, 93 Wis. 250, 67 N. W. 424, 33 L. R. A. 351. The court said: “Strict proof of insolvency is not required in order to justify the exercise of the right of stoppage *in transitu*. ‘By the word “insolvency” is meant a general inability to pay one’s debts; and of this inability the failure to pay one just and admitted debt would probably be sufficient evidence.’ Benjamin, Sales, § 837; Smith, Mercantile Law, 550, and note.” In *Bloomington v. Memphis, etc., R. R.*, 6 Lea, 616, the court said: “The purchaser may not have actually failed—not have gone to protest—yet it might be clear that he was

admits his inability to pay,¹⁸ but neither such admission nor any overt act indicating insolvency is necessary if insolvency in fact exists.¹⁹ It was held in an early Connecticut case,²⁰ that there was no right to stop the goods if the insolvency of the buyer existed at the time of the sale; but this is opposed to both reason and authority, if the insolvency was unknown to the seller. In such a case there is the same injustice in allowing the buyer to have the goods that there is if insolvency happens after the sale, and such is the view the courts of other states have taken.²¹ If, however, the seller knew of the insolvency at the time of the sale, he cannot subsequently stop the goods.²²

hopelessly insolvent and would be totally unable to pay when the debt fell due." See also *Daniels v. Palmer*, 35 Minn. 347, 29 N. W. 162; *Bowersox's App.*, 100 Pa. St. 434, 45 Am. Rep. 387.

¹⁸ *Secomb v. Nutt*, 14 B. Mon. 324 ("it would seem that the vendee's own admission of the fact [inability to pay his debts] to his vendor, would be sufficient to authorize the latter to act upon it, and should, unless disproved, sustain his claim to stop the goods *in transitu*"); *Diem v. Koblit*, 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531 (it is sufficient if before the stoppage *in transitu* he was ever in fact insolvent, or had by his conduct in business afforded the apparent evidence of insolvency).

¹⁹ *The Constantia*, 6 Rob. Adm. 321; *The Tigress*, 32 L. J. Adm. 97; *O'Brien v. Norris*, 16 Md. 122, 77 Am. Dec. 284; *Benedict v. Schaettle*, 12 Ohio St. 515; *Hays v. Mouille*, 14 Pa. St. 48. The contrary decision of *Rogers v. Thomas*, 20 Conn. 53, must be regarded as unsound. It may be questioned whether the court in *Smith v. Barker*, 102 Ala. 679, 15 So. 340, did not violate this principle in holding that the fact that the buyer had absconded was not suffi-

cient to justify the seller in stopping the goods. The fact that the buyer's property has been attached, however, does not seem sufficient to indicate such financial embarrassment as to justify stoppage *in transitu*. *Bayonne Knife Co. v. Umbenhauer*, 107 Ala. 496, 18 So. 175, 54 Am. St. Rep. 114; *Gustine v. Phillips*, 38 Mich. 674.

²⁰ *Rogers v. Thomas*, 20 Conn. 53.

²¹ *The Constantia*, 6 Rob. Adm. 321, 326; *Loeb v. Peters*, 63 Ala. 243, 35 Am. Rep. 17; *Bayonne Knife Co. v. Umbenhauer*, 107 Ala. 496, 498, 18 So. 175, 54 Am. St. Rep. 114; *Blum v. Marks*, 21 La. Ann. 268, 99 Am. Dec. 725; *O'Brien v. Norris*, 16 Md. 122, 77 Am. Dec. 284; *Kingman v. Denison*, 84 Mich. 608, 48 N. W. 26, 11 L. R. A. 347, 22 Am. St. Rep. 711; *Crummey v. Raudenbush*, 55 Minn. 426, 428; *Walsh v. Blakely*, 6 Mont. 194, 9 Pac. 809; *Reynolds v. B. & M. R. R.*, 43 N. H. 580; *Farrell v. Richmond, etc., R. Co.*, 102 N. C. 390, 9 S. E. 302, 3 L. R. A. 647, 11 Am. St. Rep. 760; *Benedict v. Schaettle*, 12 Ohio St. 515.

²² *Fenckhausen v. Fellows*, 20 Nev. 312, 21 Pac. 886, 4 L. R. A. 732; *Benedict v. Schaettle*, 12 Ohio St. 515, 519.

§ 523. What is meant by transit—Provisions of the Sales Act.—The Sales Act provides:

Sec. 58. WHEN GOODS ARE IN TRANSIT.—(1.) Goods are in transit within the meaning of section 57:

(a.) From the time when they are delivered to a carrier by land or water, or other bailee for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee;

(b.) If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, even if the seller has refused to receive them back.

(2.) Goods are no longer in transit within the meaning of section 57:

(a.) If the buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination;

(b.) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent, that he holds the goods on his behalf and continues in possession of them as bailee for the buyer, or his agent; and it is immaterial that a further destination for the goods may have been indicated by the buyer;

(c.) If the carrier or other bailee wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf.

(3.) If goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent of the buyer.

(4.) If part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement with the buyer to give up possession of the whole of the goods.

This section is based on section 45 of the English Sale of Goods Act, but a number of changes in wording or arrangement have been made.²³

²³ The section of the English act is deemed to be in course of transit as follows: "45. (1) Goods are from the time when they are deliv-

§ 524. **Character of bailment necessary for transit.**— Some confusion of thought often exists in regard to the nature of the bailment necessary for stoppage *in transitu*. On the one hand it is said that the transit ends and the right of stoppage ceases when the goods reach the hands of the buyer, or of an agent for the buyer; and, on the other hand, in decisions concerning the transfer of the property in the goods it is constantly said that delivery to a carrier in accordance with the terms of a contract or order is a delivery to the buyer.²⁴ The fact of course is that the right of stoppage exists until the goods have been delivered to the buyer personally, or to some agent whose obligation to him is not confined to the single duty of carrying or delivering the goods to him. A typical case of an agent of the latter sort, is a carrier, but it makes no difference whether the bailee is "a carrier, a warehouse keeper, a wharfinger, packer, or other depositary, or an agent for the purpose of forwarding, nor by which of the parties to the sale he was employed. He may be the agent of the purchaser, designated, paid, and employed by him; yet if the purpose of his employment is to expedite the property toward its destination, or to aid those engaged in forwarding it, the seller's right to stay

red to a carrier by land or water, or other bailee, for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee. (2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end. (3) If, after arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer, or his agent, that he holds the goods on his behalf, and continues in possession of them as bailee for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer. (4) If the goods are rejected by the buyer, and the carrier or other bailee continues

in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back. (5) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer. (6) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end. (7) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods."

²⁴ See *supra*, § 278.

the final delivery continues. But, however clearly the general principle may be stated, the circumstances of commercial dealings are so various that cases are apt to arise in which its application is a matter of extreme difficulty.”²⁵ Illustrations of the applications of the doctrine to warehousemen are not infrequent.²⁶ It may safely be said that whatever the agency adopted to transmit the goods to the buyer will make no difference.²⁷

§ 525. **Transit must be from seller to buyer.**—If the underlying principle of stoppage *in transitu* is to be regarded as equitable there seems no reason in justice why the right to stop the goods should not be exercised by any person who is affected by the insolvency of the buyer. But practical difficulties may render so broad a principle unwise. Especially a question has arisen where the goods are shipped to the buyer, not by the person from whom they were ordered, but upon his credit and request by another person. It will be noticed that in this case the shipper is not affected by the insolvency of the buyer since the shipper looks for his pay to the person from whom the goods were originally ordered. The latter, however, will suffer if the buyer becomes insolvent, since he will have to pay the shipper and will not receive payment from the buyer. Probably because of the practical difficulty in requiring a carrier to observe orders to stop given by a person with whom the carrier has never had any relations, the right to stop is not allowed in such cases.²⁸ The same question

²⁵ *Harris v. Pratt*, 17 N. Y. 249, by Denio, J.

²⁶ *McEwan v. Smith*, 2 H. L. Cas. 309; *Griffiths v. Perry*, 1 E. & E. 680; *In re Batchelder*, 2 Low. 245; *Thompson v. Baltimore, etc., R. Co.*, 28 Md. 396; *Keeler v. Goodwin*, 111 Mass. 490; *Conrad v. Fisher*, 37 Mo. App. 352, 8 L. R. A. 147 (in this case the warehouse was a government warehouse).

²⁷ *Johnson v. Eveleth*, 93 Me. 306, 45 Atl. 35. In this case logs were being driven down stream from the seller to the buyer. The logs were kept moving by the agency of a log driving company which broke the

jams and kept the logs moving. “So far as a mass of logs in a river is susceptible of possession, to that extent the log driving company was in possession of these logs for the purpose of transporting them.” The court held the seller entitled to exercise the right of stoppage, saying: “The character of the possession of the log driving company is only important as it shows that the logs had not come into the possession of the vendee and were still in transit.”

²⁸ *Memphis, etc., R. Co. v. Freed*, 38 Ark. 461. The court said that stoppage *in transitu* was only allowable directly between seller and buyer.

arises in a slightly different form where the original buyer resells the goods before shipment, and at his request the seller ships the goods to the subpurchaser.²⁹ Similarly an agent who has not been paid for goods and who ships them on behalf of his principal to the buyer cannot stop the goods because of his principal's insolvency.³⁰

§ 526. **End of transit.**—The normal termination of the transit comes with the arrival of the goods at their destination and the delivery of them to the buyer. The mere arrival of the goods at the fixed terminus does not, however, end the transit, for the goods are still in the possession of the intermediate bailee, as such, and as it is immaterial whether this intermediate bailee was originally carrier or warehouseman, so it is immaterial that a carrier which was the intermediate bailee has ceased to hold the goods as carrier and holds them as warehouseman. The bailee is still an intermediary for the purpose of getting the goods from the seller to the buyer and the right to stop them still exists.³¹ Nor does the payment of freight show conclusively that the transit is ended.³²

§ 527. **Interception of goods.**—The right of stoppage *in transitu* is nothing for which the seller bargains, and the law allows

The same doctrine is expressed in the leading opinion in *Neimeyer Lumber Co. v. Burlington, etc., R. Co.*, 54 Neb. 321, 74 N. W. 670. See also *Gwyn v. Richmond, etc., R. Co.*, 85 N. C. 429, 39 Am. Rep. 708.

²⁹ In the case of *Ex parte Golding*, 13 Ch. D. 628, the seller was allowed in such a case not to stop the goods but to stop the proceeds of the sale due from the subpurchaser to the original buyer. The court seems to have thought the goods themselves could not be stopped. Even to this limited extent *Ex parte Golding* does not seem to be law in England (*Kemp v. Falk*, 7 A. C. 573, 577); or in America (*Eaton v. Cook*, 32 Vt. 58).

³⁰ *Gwyn v. Richmond, etc., R. Co.*, 85 N. C. 429, 39 Am. Rep. 708. See

also *Lake Shore, etc., R. Co. v. National Live Stock Bank*, 178 Ill. 506, 53 N. E. 326.

³¹ *Jacobs v. Bentley*, Ark. , 110 S. W. 594; *Brewer Lumber Co. v. Boston & Albany R. Co.*, 179 Mass. 228, 60 N. E. 548, 51 L. R. A. 435, 88 Am. St. Rep. 375; *Reynolds v. Boston & Maine R. Co.*, 43 N. H. 580; *Farrell v. Richmond, etc., R. Co.*, 102 N. C. 390, 9 S. E. 302, 11 Am. St. Rep. 760; *Wheeling & Lake Erie R. Co. v. Koontz*, 61 Ohio St. 551, 56 N. E. 471, 76 Am. St. Rep. 435; *Hoover v. Tibbits*, 13 Wis. 79; *Jeffris v. Fitchburg R. Co.*, 93 Wis. 250, 67 N. W. 424, 33 L. R. A. 351, 57 Am. St. Rep. 919; *Howell v. Alport*, 12 U. C. C. P. 375.

³² *Coventry v. Gladstone*, L. R. 6 Eq. 44; *Reynolds v. Boston & Maine*

it to him only while circumstances render it feasible; that is, while the goods are in transit. The seller has no cause to complain if the transit is ended sooner than might have been expected, since he loses nothing to which he was entitled; but the possibility of protecting him, in spite of his complete transfer of title to the goods, ceases. Accordingly if the buyer intercepts the goods at a point before the destination originally fixed, the seller's right is gone.³³ It has been said that the right is gone even though the goods are taken from the carrier's possession without his consent.³⁴ This statement, however, has been questioned by very high authority.³⁵ At least after a proper notice to stop goods has been given, the delivery of them to the buyer at an immediate point will not determine the seller's right.³⁶ To determine it, however, it is not necessary that the carrier should actually deliver the goods to the buyer at the intermediate point. As appears from the following section, the attornment of the carrier so that it becomes the agent of the buyer, not to transport to the original destination, but for any other purpose, is an effectual termination of the transit; and this is true of an attornment or change in the character of possession which takes place at an intermediate point as well as of such a change at the ultimate destination.³⁷

R., 43 N. H. 580; *Howell v. Alport*, 12 U. C. C. P. 375.

³³ *Whitehead v. Anderson*, 9 M. & W. 518, 534; *London, etc., Ry. Co. v. Bartlett*, 7 H. & N. 400; *Kendal v. Marshall*, 11 Q. B. D. 356, 369; *Secomb v. Nutt*, 14 B. Mon. 324, 328; *Eaton v. Cook*, 32 Vt. 58.

³⁴ *Whitehead v. Anderson*, 9 M. & W. 518, 534.

³⁵ *Blackburn, Sale* (2d ed.), 375; *Benjamin, Sale* (5th Eng. ed.), 903. Benjamin argues from the decision of *Bird v. Brown*, 4 Ex. 786, which held that a tortious refusal to give possession on the part of the carrier could not continue the seller's right to stop, that a tortious taking by the purchaser could not determine that right. So in *Poole v. Houston*, etc., Ry. Co., 58 Tex. 134, 140, Bon-

ner, J., in a concurring opinion, resting the case, however, on a ground not referred to by the majority of the court, intimated that a stoppage of goods was effectual in spite of the fact of a prior delivery and change of marking when this was fraudulently done to prevent stoppage of the goods.

³⁶ *Poole v. Houston, etc., Ry. Co.*, 58 Tex. 134. Where interception of the goods is possible it may be by an agent of the buyer or by a sub-purchaser.

³⁷ *Whitehead v. Anderson*, 9 M. & W. 518. In this case the assignee in bankruptcy of the buyer went on board the vessel in which the goods, which consisted of timber, were being carried, and told the captain he had come to take possession of the timber.

§ 528. **Attornment by bailee.**— The right to stop the goods may be determined, not simply by delivery to the buyer, but by an attornment of the bailee to the buyer.³⁸ The nature of the attornment necessarily must be carefully observed. At the time when a carrier first receives goods consigned to the buyer the carrier is agent for the buyer, and subsequent recognition of this agency by the carrier in a statement or letter to the buyer would not, it seems, terminate the seller's right to stop. In order to have that effect the attornment must be a recognition of an agency other than one of carrying out the transit between seller and buyer.³⁹

The captain said that he would deliver the cargo when satisfied about his freight. The assignee and the agent then went ashore and the seller, going aboard the vessel, gave notice to the mate to stop the cargo. It was held that the buyer's assignee had not taken possession and that the captain had not agreed to hold as his agent, so that the notice to stop was valid. The discussion in the case, however, indicates that had the assignee either acquired possession or had the captain agreed to hold the timber as agent for him, the seller's right would have been lost.

³⁸ The Georgia Code provides that the right to stop persists "until the vendee obtains actual possession of the goods." And see *Macon, etc., Ry. Co. v. Meador*, 65 Ga. 705; *Ocean Steamship Co. v. Ehrlich*, 88 Ga. 502, 14 S. E. 707, 30 Am. St. Rep. 164. But the constructive possession created by attornment is elsewhere recognized as sufficient.

³⁹ In *Ex parte Cooper*, 11 Ch. D. 68, it is said that the transit "is not at an end until the carrier by agreement between himself and the consignee undertakes to hold the goods for the consignee, not as carrier, but as his agent." The idea might have been more fully expressed if the words "for some other purpose than

fulfilling the original contract of carriage" had been added. Baron Parke in *Whitehead v. Anderson*, 9 M. & W. 518, more accurately expresses the correct doctrine. "Where the carrier enters expressly, or by implication, into a new agreement, distinct from the original contract for carriage, to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination, pursuant to that contract, but in a new character, for the purpose of custody on his account, and subject to some new or further order to be given to him." So Brett, L. J., in *Kendal v. Marshall*, 11 Q. B. D. 356, 364, said: "If there has been delivery of goods to the vendee and an appropriation of them to his own use, the right of stoppage does not exist; in a case of that kind the property in, and the possession of, the goods have passed to the vendee; but where the goods are in the course of transit from the vendor to the vendee, although the property has passed to the vendee, and although he has the constructive possession of them, the right to stop prevails. Where the goods have been appropriated by the vendor, and have been delivered by him to a carrier to be transmitted to the vendee, a constructive possession exists in the vendee; neverthe-

§ 529. **Refusal of bailee to attorn or deliver the goods.**—The carrier is not allowed to enlarge the seller's right by wrongfully refusing to deliver or attorn as the buyer's agent.⁴⁰

§ 530. **Broken transit.**—One of the most difficult questions in the law of stoppage *in transitu* occurs where the goods are transported by more than one agent. The general doctrine has been well stated as follows: "When an intermediate delivery occurs, before the goods reach their ultimate destination, if the party to whom they are delivered has authority to receive them, and gives to them a new destination not originally intended, the *transitu* is at an end. They have reached the ultimate destination intended by both buyer and seller. But if the middleman be a mere agent to transmit the goods in accordance with original directions, the vendor's right continues. The rule may be stated as follows: If in the hands of the middleman they require new orders to put them again in motion, and give them another substantive destination — if without such new orders they must continue stationary — then the delivery is complete and the lien of the vendor has expired."⁴¹ The difficulty lies in the application of the doctrine,

less, whilst the goods are in the hands of the carrier, they are in the course of transit, and the right of stoppage may arise. There is another kind of constructive possession by the vendee; that is when the goods have been delivered by the carrier, and have reached the hands of an agent to the vendee to be held at his disposal."

⁴⁰ *Bird v. Brown*, 4 Ex. 786. In this case the holder of bills of exchange drawn by the seller assumed to act as the seller's agent in notifying the carrier to stop the goods. Thereafter the buyer and his assignees in bankruptcy demanded the goods. The carrier refused to deliver and subsequently the seller formally ratified the action of the holder of the bills of exchange in stopping the goods. It was held, however, that the stoppage was ineffectual when the notice was first given because made without

authority, and that the fiction of relation would not be applied to the ratification where the rights of third persons intervened, and where at the time of the ratification effectual stoppage had ceased to be possible. It had so ceased, the court held, because the action of the carrier in refusing to deliver was wrongful. As to the question of authority to stop, compare *Hutchings v. Nunes*, 1 Moore P. C. (N. S.) 243.

"*Cabeen v. Campbell*, 30 Pa. St. 254. In *Bethell v. Clark*, 20 Q. B. D. 615, Lord Esher, M. R., said: "Where the transit is a transit which has been caused either by the terms of the contract or by the directions of the purchaser to the vendor, the right of stoppage *in transitu* exists; but, if the goods are not in the hands of the carrier by reason either of the terms of the contract or of the directions of the purchaser

and a proper determination can best be reached by a comparison of the facts of the leading decisions. In the following cases it was held that the transit had ended: In *Leeds v. Wright*,⁴² the seller shipped goods from Manchester to the agent of a Paris firm, and the agent was about to forward them to Paris. It was held the transit was ended since the goods were sent to the agent not simply to forward to Paris but to be sent where he thought best. In *Dixon v. Baldwin*,⁴³ goods were ordered of B. of London, to be forwarded to M. at Hull, "to be shipped for Hamburg as usual." The goods were shipped, and part of them sent forward to Hamburg. It appeared in evidence that M. held the goods at the disposal of B. The court held there was no right to stop, since the goods were waiting for new orders from the purchasers to give them their destination. In *Valpy v. Gibson*,⁴⁴ goods were ordered by the buyer to be sent from Manchester to a forwarding house in Liverpool for shipment to Valparaiso, but the house in Liverpool was not authorized to forward the goods until orders were received from the buyer. The goods had been put on shipboard at Liverpool, but the buyer ordered them to be unshipped and sent back to the sellers to be repacked. The sellers undertook to repack them. It was held that the right to stop had been lost when the goods reached the agents in Liverpool; that redelivery to the sellers for repacking gave them no new lien. In *Kendal v. Marshall*,⁴⁵ the buyer bought goods at Bolton, nothing being said about the place of delivery. Later the buyer arranged with M. & Co., forwarding agents at Garston, to receive the goods from Bolton and ship them to Rouen at a through rate from Bolton to Rouen. The buyer then ordered the goods to be sent to M. & Co. at Garston and they were delivered to the railway at Bolton. The goods arrived at Garston and the railway company notified M. & Co.

to the vendor, but are *in transitu* afterward in consequence of fresh directions given by the purchaser for a new transit, then such transit is no part of the original transit, and the right to stop is gone. So, also, if the purchaser gives orders that the goods shall be sent to a particular place, there to be kept till he gives fresh orders as to their destina-

tion to a new carrier, the original transit is at end when they have reached that place, and any further transit is a fresh and independent transit."

⁴² 3 B. & P. 320.

⁴³ 5 East, 175.

⁴⁴ 4 C. B. 837.

⁴⁵ 11 Q. B. D. 356.

of their arrival by a usual form of notice, which stated that if delivery was not taken in due course the company would hold them as warehousemen and charge rent. The goods remained for some days in the shed of the railway company, awaiting the sailing of the steamer to Rouen. It was held that transit was ended. The case seems difficult to support for more than one reason. In the first place the goods had not even been delivered to M. & Co. at Garston, and if it be granted that the transit would not continue to Rouen, it may yet be objected, as the goods were still in the hands of the carrier at Garston, the transit was not ended. The fact that the liability of the carrier had become that of a warehouseman should not effect an ending of the transit.⁴⁶ In the second place the sole function of M. & Co. was to forward the goods to Rouen, and it is difficult to distinguish the case from *Coates v. Railton*,⁴⁷ *Jackson v. Nichol*,⁴⁸ and *Ex parte Rosevear China Clay Co.*,⁴⁹ stated below. The ground upon which Brett, L. J., puts the case, namely that M. & Co. received their instructions from the buyer and not the seller, seems inconsistent with other decisions, especially *Ex parte Rosevear China Clay Co.*,⁵⁰ in which it is held that when goods are put on shipboard the transit continues until the ship reaches its destination, although the seller is ignorant of the destination. In *Jobson v. Eppenheim*,⁵¹ however, Channell, J., held the transit ended by delivery to forwarding agents whose only duty was to forward on the ground that the seller had no knowledge of the ultimate destination of the goods. "Fresh instructions were necessary." Channell, J., does not apparently deem it important that the instructions to the forwarding agent had in fact been given at the time the original order was given to the seller. In *Ex parte Miles*,⁵² a commission agent in London employed by a firm in Jamaica ordered shoes from T. in Northampton. The commission agent ordered the shoes shipped marked as follows. "For this mark — E. M., Kingston, Jamaica." T. knew that this mark was that of the Jamaica buyer. The commission agent instructed T. to forward the shoes thus marked to B., Southampton, for shipment per "Moselle." This was done and T.

⁴⁶ See *supra*, § 526.

⁴⁷ 6 B. & C. 422.

⁴⁸ 5 Bing. N. C. 508.

⁴⁹ 11 Ch. D. 560.

⁵⁰ 11 Ch. D. 560.

⁵¹ 21 T. L. R. 468.

⁵² 15 Q. B. D. 39.

wrote B. giving directions but not mentioning the destination or consignee of the goods. The goods were shipped and the commission agent was described in the bill of lading as the consignor, and the Jamaica firm as consignees. The court held the only *transitus* as between T. and the commission agent, who became bankrupt, was ended at Southampton. It was not enough that the seller knew the ultimate destination of the goods. In *Brooke Iron Co. v. O'Brien*,⁵³ A. of Pennsylvania sold a quantity of iron to C. of Boston, deliverable at Elizabethport, N. J. The iron was shipped to Elizabethport to C. in care of H., a shipping agent. There it was taken on board vessels chartered by C., and the court held that the transit was ended and that the iron could not be stopped on its arrival at Boston, nor did it matter in the opinion of the court whether the vessels were in the hands of independent carriers or whether by the charter C. became owner of the vessel temporarily. In *Guilford v. Smith*,⁵⁴ the buyers residing at Burlington purchased flour from sellers who resided in Toronto and directed its shipment to the buyers' agents at Ogdensburg who were in the habit of receiving flour for the buyers and forwarding it as directed. The bill of lading described the agents as consignees, but referred to the flour as to be forwarded to the buyers at Burlington. The flour arrived at Ogdensburg and was placed in a warehouse belonging to the railroad, but under government supervision, and not subject to removal until both freight and duties were paid. The flour would not have been forwarded from Ogdensburg until a new order was given to the agents. It was held that the right of stoppage was gone. The court said that the question must turn on the capacity in which the agents held the flour. "Did they hold it to transport, or was it a custody to keep, subject to the orders of the " buyers? The court found that the latter was the fact and that the right to stop was, therefore, gone. With these cases may be compared the following, where the transit was held not to be ended. In *Smith v. Goss*,⁵⁵ the seller was ordered to send the goods to London, addressed to the care of G., with directions to send them by the first vessel to Newcastle. It was held that the

⁵³ 135 Mass. 442.⁵⁴ 1 Campb. 232.⁵⁵ 30 Vt. 49.

goods might be stopped while in G.'s possession, as his function was merely to aid in the completion of a transit to Newcastle. In *Coates v. Railton*,⁵⁶ goods were purchased at Manchester by R. on account of B. of London, to be forwarded to Lisbon. The goods were delivered at R.'s warehouse for packing and shipment to Lisbon via Liverpool. The court held the transit was not ended because the destination had been named by the buyer. This case is questioned by Brett, L. J., in *Kendal v. Marshall*,⁵⁷ and it seems can be supported only on the assumption that R.'s agency was simply to forward the goods to Lisbon. In *Jackson v. Nichol*,⁵⁸ the facts are very similar. In *Ex parte Rosevear China Clay Co.*,⁵⁹ the sellers agreed to deliver a cargo of clay F. O. B. vessel at Fowey. The destination of the cargo was unknown to the seller, but the vessel had in fact been chartered by the buyer for a voyage to Glasgow. It was held the goods might successfully be stopped after they had been delivered to the vessel. In *Bethell v. Clark*,⁶⁰ goods were ordered to be consigned to the "Darling Downs" to Melbourne, loading in the East India docks at London. The goods were so sent and were shipped on the vessel by a lighter company employed by the railway. It was held that the transit was to Melbourne and that the right to stop the goods still existed. In *Lyons v. Hoffnung*,⁶¹ the goods were ordered to be sent marked "W. C. K." and sent to Smith's wharf at Sidney for shipment to Kimberley. The initials "W. C." were those of the purchaser, W. Clare. K. meant Kimberley. The goods were sent to the wharf to be shipped by the "Gambier" and a receipt was given the sellers — describing them as shippers, and Clare as the consignee, Kimberley as the destination. These receipts were delivered to Clare, who obtained in exchange a bill of lading in his own name. It was held that the goods might be stopped while on the vessel. In *Aguirre v. Parmelee*,⁶² goods were delivered to an agent of the purchaser for shipment to the purchaser in another city. It was held the right to stop the goods continued after the goods had been taken and shipped by the agent,

⁵⁶ 6 B. & C. 422.

⁵⁷ 11 Q. B. D. 356, 366.

⁵⁸ 5 Bing. N. C. 508.

⁵⁹ 11 Ch. D. 560.

⁶⁰ 19 Q. B. D. 553, 20 Q. B. D. 615.

⁶¹ 15 A. C. 391.

⁶² 22 Conn. 473.

as the latter was acting not as agent to deal with the goods in any other way than to transmit them to the buyer's place of business.⁶³ From these decisions some important conclusions may be deduced.

(1) It does not exclude the right of stoppage that the seller is ignorant of the terminus of the transit.⁶⁴ (2) It does not exclude the right of stoppage that by the terms of the contract the goods are to be delivered and are delivered to a carrier F. O. B.⁶⁵ (3) It does not exclude the right of stoppage that the goods are sent to a forwarding agent for the buyer. If the agent's only duty is to forward the goods he is merely a link in the transit.⁶⁶ And it seems that it is not material whether the seller knows the forwarding agent is merely a link in the transit or not.⁶⁷ Nor is it important that the forwarding agent, if requested by the buyer, would alter the destination of the goods or hold them to await the buyer's orders. A carrier similarly might allow the buyer to interfere with the destination of the goods. Such interference would terminate the right of stoppage;⁶⁸ but the possibility of it does not deprive the buyer of his right. (4) If goods are delivered to a bailee who is subject to such orders as the buyer may choose to give in regard to the goods, the transit is ended when the agent receives the goods, though the seller has been informed by the buyer of the ultimate destination which he means to give the goods, and though the agent does in fact forward them to that destination.⁶⁹ (5)

⁶³ See also *Markwald & Co. v. Their Creditors*, 7 Cal. 213; *Blackman v. Pierce*, 23 Cal. 508; *Johnson v. Eveleth*, 93 Me. 306, 318, 45 Atl. 35; *Frame v. Oregon Liquor Co.*, 48 Or. 272, 85 Pac. 1009, 86 Pac. 791.

⁶⁴ *Ex parte Rosevear China Clay Co.*, 11 Ch. D. 530. But see *Kendall v. Marshall*, 11 Q. B. D. 356, 365; *Jobson v. Eppenheim*, 21 T. L. R. 468.

⁶⁵ *Ex parte Rosevear China Clay Co.*, 11 Ch. D. 560.

⁶⁶ *Coates v. Railton*, 6 B. & C. 422; *Jackson v. Nichol*, 5 Bing. N. C. 508; *Aguirre v. Parmelee*, 22 Conn. 473; *Frame v. Oregon Liquor Co.*, 48 Or. 272, 85 Pac. 1009, 86 Pac. 791.

⁶⁷ *Jackson v. Nichol*, 5 Bing. N. C.

508. In this case the forwarding agent was a general agent of the buyers and had habitually received goods for them to await their orders, but in the case in question he had, before the shipment of the goods, been instructed to forward them to the buyer. But see *Jobson v. Eppenheim*, 21 T. L. R. 468.

⁶⁸ See *supra*, § 527.

⁶⁹ *Kendall v. Marshall*, 11 Q. B. D. 356; *Ex parte Miles*, 15 Q. B. D. 39; *Guilford v. Smith*, 30 Vt. 49. But not if the only discretion reserved to the principal is as to the time when the goods are to be forwarded. *Frame v. Oregon Liquor Co.*, 48 Or. 272, 85 Pac. 1009, 86 Pac. 791.

The seller may, by special terms in his contract, bargain that there shall be a special transit. Such bargain is in effect an agreement that the seller shall have the chance of stoppage during a specified journey, and is binding upon the buyer and his assignees in bankruptcy.⁷⁰

§ 531. **Truckmen.**— When goods arrive at a railroad station or wharf to which they are destined, they are commonly taken by truckmen to warehouses or to the buyer's place of business. Whether the transit still continues while the goods are in the truckmen's hands depends upon the nature of the contract of consignment and upon the way the truckmen are engaged to do the work. Where the consignment was not to the railroad station but to the buyer's place of business, as is commonly the case in consignments by express, the services of the truckmen are naturally included in the transit, and the result is the same if a railroad. with trucks of its own, or employed by it, voluntarily delivers the goods at the consignee's place of business.⁷¹ If, however, the carrier's duty is fully performed when the goods arrive at the railroad station, and it does not voluntarily undertake to deliver them, and a truckman is sent by the buyer to receive the goods, the transit ends when the goods are received at the railroad station by the buyer, or by a truckman acting as his agent. The carriage of the goods by the truckman is in this case a new journey under the direction of the buyer. It is not material whether the buyer receives the goods himself from the railway and then directs the truckman to carry them, or whether the buyer gives a special order to the truckman to receive a particular lot of goods, or, whether, in accordance with general authority, the truckman receives, in the regular course of business, all goods addressed to the buyer.⁷²

§ 532. **Buyer's vessel or cart.**—As delivery to an agent other than an agent whose only duty is to forward the goods is a deliv-

⁷⁰ *Ex parte* Watson, 5 Ch. D. 35. See Benjamin, Sale (5th Eng. ed.), 894.

⁷¹ *Re* Burke, 140 Fed. Rep. 971; *Weber v. Baessler*, 3 Colo. App. 459; *White v. Mitchell*, 38 Mich. 390; *Scott v. Drygoods Co.*, 48 Mo. App.

521; *Half v. Allyn*, 60 Tex. 278; *Harris v. Tenney*, 85 Tex. 254, 20 S. W. 82, 34 Am. St. Rep. 796.

⁷² *O'Neal v. Day*, 53 Mo. App. 139. Compare *Mason v. Wilson*, 43 Ark. 172, and *Inslee v. Lane*, 57 N. H. 454, where the truckman's authority

ery to the principal, delivery to the buyer's servant who is under a general duty to obey his master's orders is necessarily a delivery to the buyer. The most frequent application of this doctrine is where goods are shipped in a vessel belonging to the buyer.⁷³ The mere fact that the vessel is chartered by the buyer does not, however, make a delivery to the ship a delivery to the buyer. The ordinary charter of a vessel does not make the captain a servant of the charterer. The owner still remains the captain's employer, and the charterer is only entitled to direct what goods the ship shall carry and where they shall be carried.⁷⁴ On the other hand if there is what is known as a "demise" of the ship, the buyer is in effect the temporary owner of the vessel, and there is no right to stop the goods.⁷⁵ A few early decisions in Maine and Massachusetts to the contrary cannot, it seems, be supported.⁷⁶ As will be seen hereafter,⁷⁷ the question may be affected by the form of a bill of lading given to the seller by the captain of the ship. Where goods are delivered to the buyer's cart the same principles apply,⁷⁸ except that no question of bill of lading can enter into the situation.⁷⁹

§ 533. Levy of execution or attachment will not defeat right to stop in transitu.—As has been seen, the question of stoppage *in*

to receive the goods had been revoked. In the latter case the buyer's absconding was held of itself to end the authority.

⁷³ *Cowasjee v. Thompson*, 5 Moore P. C. 165; *Schotsmans v. Lancashire, etc., Ry. Co.*, 2 Ch. D. 332; *Bolin v. Huffnagle*, 1 Rawle, 1.

⁷⁴ *Bohtlingk v. Inglis*, 3 East, 381; *Berndtson v. Strang*, L. R. 4 Eq. 481, L. R. 3 Ch. 588.

⁷⁵ See cases *supra*, note 73; also *Blackburn, Sale*, (2d ed.), 351; *Benjamin, Sale* (5th Eng. ed.), 883.

⁷⁶ *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489, 15 Me. 314, 33 Am. Dec. 617; *Stubbs v. Lund*, 7 Mass. 453, 5 Am. Dec. 63; *Ilseley v. Stubbs*, 9 Mass. 65, 6 Am. Dec. 29. As these decisions were made before the limits of the law of stoppage *in transitu*

were fixed, it is possible that even the courts of Maine and Massachusetts would have little hesitation in modifying the principles there laid down.

⁷⁷ *Infra*, § 542.

⁷⁸ This was the ground of decision in *Van Casteel v. Booker*, 2 Ex. 691; *Turner v. Trustees of Liverpool Docks*, 6 Ex. 543.

⁷⁹ In *Merchant Banking Co. v. Phoenix Bessemer Steel Co.*, 5 Ch. D. 205, 219, *Jessel, M. R.*, said that it is a question of fact which should be left to the jury what the real intention of the parties was, and that delivery to the buyer's cart does not, as a matter of law, preclude a right to stop the goods. But this seems inconsistent with general principles, unless understood to mean that the

transitu will not arise unless the property in the goods has passed to the buyer.⁸⁰ The seller's creditors, therefore, have no right to seize the goods. Nor can the buyer's creditors levy upon them so as to defeat the right of subsequent stoppage.⁸¹ The right of the seller will also prevail over a lien upon the goods which the carrier may have by custom or by special contract for a general balance.⁸²

§ 534. **Partial delivery.**—The mere fact that part of the goods have been delivered does not debar the seller from stopping the remainder;⁸³ just as the seller's lien remains after part of the goods have been delivered.⁸⁴ In the case of stoppage *in transitu*, however, attornment by the bailee to the buyer in another capacity than as an instrument of transit will terminate the seller's right,⁸⁵ and delivery of part of the goods may frequently accompany such an attornment and itself be some evidence thereof. The question

seller may contract for a right of lien even though the goods have been delivered in effect to the buyer himself.

⁸⁰ See *supra*, § 521.

⁸¹ In *Blackman v. Pierce*, 23 Cal. 508, 511, the court said: "This right of stoppage *in transitu* is paramount to any lien on the goods claimed by third persons against the purchaser. Thus it may be exercised to defeat an attachment or execution levied upon the goods by a creditor of the vendee." To the same effect are *Bayonne Knife Co. v. Umbenhauer*, 107 Ala. 496, 18 So. 175, 54 Am. St. Rep. 114; *Mason v. Wilson*, 43 Ark. 172; *Wood v. Yeatman*, 15 B. Mon. 270; *O'Brien v. Norris*, 16 Md. 122, 77 Am. Dec. 284; *Durgy Cement Co. v. O'Brien*, 123 Mass. 12; *White v. Mitchell*, 38 Mich. 390; *Morris v. Shryock*, 50 Miss. 590; *Estey v. Truxel*, 25 Mo. App. 238; *Chicago, etc., Ry. Co. v. Painter*, 15 Neb. 394, 19 N. W. 488; *More v. Lott*, 13 Nev. 376; *Inslee v. Lane*, 57 N. H. 454; *Buckley v. Furniss*, 15 Wend. 137, 144; *Calahan v. Babcock*,

21 Ohio St. 281, 8 Am. Rep. 63; *Frame v. Oregon Liquor Co.*, 48 Or. 272, 85 Pac. 1009, 86 Pac. 791; *Hays v. Mouille*, 14 Pa. St. 48; *Allyn v. Willis*, 65 Tex. 65; *Harris v. Tenny*, 85 Tex. 254, 20 S. W. 82, 34 Am. St. Rep. 796; *Kitchen v. Spear*, 30 Vt. 545; *Sherman v. Rugee*, 55 Wis. 346, 13 N. W. 241.

⁸² *Oppenheim v. Russell*, 3 Bos. & P. 42; *Farrell v. Richmond, etc., R. Co.*, 102 N. C. 390, 11 Am. St. Rep. 760.

⁸³ *Kemp v. Falk*, 7 A. C. 573; *Ex parte Cooper*, 11 Ch. D. 68; *Dixon v. Yates*, 5 B. & Ad. 313; *Jones v. Jones*, 8 M. & W. 431; *Tanner v. Scovell*, 14 M. & W. 28; *McElwee v. Metropolitan Lumber Co.*, 69 Fed. 302, 37 U. S. App. 266, 16 C. C. A. 232; *Secomb v. Nutt*, 14 B. Mon. 324; *Johnson v. Eveleth*, 93 Me. 306, 45 Atl. 35; *Buckley v. Furniss*, 17 Wend. 504; *Jeffris v. Fitchburg R. Co.*, 93 Wis. 250, 67 N. W. 424, 33 L. R. A. 351, 57 Am. St. Rep. 919.

⁸⁴ See *supra*, § 508.

⁸⁵ See *supra*, § 528.

is, in reality, one of fact — Did the bailee agree to hold the remaining goods in some other capacity than as a conduit or intermediary between seller and buyer?⁸⁶

§ 535. **Part payment.**—As has been seen, a seller who has only been partially paid is an unpaid seller, not only within the definition of the Sales Act, but also under the rule of the common law;⁸⁷ and, therefore, the right of stoppage *in transitu* exists under such circumstances.⁸⁸ The question of stoppage *in transitu* does not arise unless the sale is at least partially on credit; for if the title of the goods is reserved until payment, the seller by virtue of his title is protected without reference to stoppage *in transitu*. The effect of taking a bill or note has already been considered in connection with the question — Who is an unpaid seller?⁸⁹

§ 536. **Stopping proceeds of goods.**—If the right of stoppage *in transitu* is based on the equitable principle that the seller should not lose his goods while in transit when the buyer's insolvency makes it clear that he is not going to pay the price for them, the same principle would seem to entitle the seller on the buyer's insolvency to the proceeds of the goods if they are pledged or sold while in transit, except in so far as is necessary to protect a pledgee or purchaser for value. On the other hand a difficulty

⁸⁶ Lord Blackburn thus states the principle: "Then it is said that the delivery of a part is a delivery of the whole. It may be a delivery of the whole. In agreeing for the delivery of goods with a person you are not bound to take an actual corporeal delivery of the whole in order to constitute such a delivery, and it may very well be that the delivery of a part of the goods is sufficient to afford strong evidence that it is intended as a delivery of the whole. If both parties intend it as a delivery of the whole, then it is a delivery of the whole; but if either of the parties does not intend it as a delivery of the whole, if either of them dissents, then it is not a delivery of the whole. I had always understood the law upon that point to have been an agreed

law, which nobody ever doubted since an elaborate judgment in *Dixon v. Yates*, 5 B. & A.L. 313, 339, by Lord Wensleydale, who was then Parke, J. The rule I had always understood, from that time down to the present, to be that the delivery of a part may be a delivery of the whole if it is so intended, but that it is not such a delivery unless it is so intended, and I rather think that the *onus* is upon those who say that it was so intended. Therefore, the delivery of this particular parcel of salt was not a delivery of anything else."

⁸⁷ See *supra*, §§ 501, 502.

⁸⁸ *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489, 33 Am. Dec. 617; *Howatt v. Davis*, 5 Munf. 34, 7 Am. Dec. 681.

⁸⁹ See *supra*, § 502.

arises owing to the method of enforcing the right of stoppage *in transitu*. As will be seen,⁹⁰ the way in which the seller asserts his right is by directing the carrier not to deliver the goods. In the cases now under consideration the goods must be delivered to a pledgee or purchaser, and it is conceded that if the seller has any right it is subordinate to theirs. It would certainly be somewhat odd if an order by the seller to a carrier not to deliver goods, given under circumstances which make it illegal for the carrier to obey the order, should be the foundation and the only necessary foundation of a right to obtain later the proceeds of the goods. It is probable, therefore, that the equitable principle protecting the seller must be confined by practical considerations to cases where the goods themselves can be stopped. The question arises in two classes of cases; First, where the goods are pledged by the buyer while in transit; Second, where they are sold. These cases must be separately considered.

§ 537. **Pledge of goods in transit.**—As a pledge requires delivery, the only way in which a pledge of goods in transit can be made is by pledging a bill of lading or other document of title. Under the Sales Act the delivery even for value of a non-negotiable bill of lading, or other document, would not, even if indorsed, amount to a symbolic delivery of the goods and make an effective pledge or mortgage;⁹¹ but the negotiation of a negotiable document of title as security would be a symbolic transfer of possession; and if one who advanced money on the faith thereof received such a document as security, the right of the pledgee or mortgagee would take precedence of the seller's right of stoppage. By the English common law, which does not recognize the distinction between negotiable and non-negotiable bills of lading and treats either when indorsed as a valid symbolic delivery,⁹² the same result would follow if a bill of lading in any form were indorsed as security for an advance. It has been held several times in England that where an indorsement for security of the bill of lading is made, the indorsee is entitled to receive delivery of the goods, but that any surplus value remaining after satisfying the claim of the indorsee belongs to the seller if he gave timely notice to stop the

⁹⁰ *Infra*, §§ 540, 541.

⁹² See *supra*, §§ 282, 285.

⁹¹ See *supra*, §§ 404 *et seq.*, 413.

goods.⁹³ The result of these cases seems undoubtedly just, but the practical difficulty of making the seller's right turn on his giving an order to stop the goods when the carrier is bound to disregard the notice and deliver the goods to the indorsee of the bill of lading makes it questionable whether the result can properly be reached. The English cases have not been followed in this country⁹⁴ although generally cited by text-writers as authority. It seems probable that in this country the seller is not entitled to any right of stoppage other than to the goods themselves, and that if by means of the bill of lading a pledgee or mortgagee has acquired a valid symbolic delivery of the goods and is consequently entitled to the actual delivery of the goods from the carrier, the seller's only possibility of protecting himself is to discharge the debt due the pledgee or mortgagee if it has matured, and thereafter give the carrier notice to stop the goods.⁹⁵

§ 538. **Proceeds of goods sold in transit.**—As will be seen,⁹⁶ the sale of goods by the buyer while they are in transit does not deprive the seller of his right to stop the goods. Unless a negotiable document of title is negotiated for value, or the seller has consented to the subsale, the right to stop still remains. It is also true that one who has merely agreed to buy goods, but has not paid the price, has generally not been regarded as a purchaser for value.⁹⁷ Accordingly it seems impossible to suppose a case where there are unpaid proceeds due from the subbuyer and where the

⁹³ *Re Westzinthus*, 5 B. & Ad. 817; *Spalding v. Ruding*, 6 Beav. 376; *Kemp v. Falk*, 7 A. C. 573. These cases treat the seller's right as an equitable one. The English Sale of Goods Act, section 47, seems to assume the correctness of the rule. As to the change in this respect in the provisions of the American Sales Act, see *infra*, §§ 542, 557.

⁹⁴ Except in one case. See the following note.

⁹⁵ In *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 88, the English decisions were followed. In *Missouri Pacific Ry. Co. v. Heidenheimer*, 82 Tex. 195, 199, 17 S. W. 608, 27 Am. St. Rep. 861, Tarlton, J., delivering

the opinion of the court, said: "If the transfer of a bill of lading by way of pledge or mortgage, or as collateral security for a loan, does not absolutely defeat the right of stoppage *in transitu*, the seller cannot exert that right until he has discharged the debt secured by the transfer, as his right is subject to that of the mortgagee or pledgee."

⁹⁶ *Infra*, §§ 557, 558.

⁹⁷ See *infra*, § 620. If part of the price has been paid, but not the whole, the purchaser is protected to the extent of what he has paid, and the case is similar to that of a pledge, which was considered in the preceding section.

seller cannot stop the goods themselves except where a subsale has been made with the consent of the seller. Such consent deprives the seller of the right to stop the goods.⁹⁸ But it has been held in a leading English case⁹⁹ that the right to stop the proceeds remains; that is, that the seller may entitle himself to receive the price promised by the subbuyer to the original buyer. In a later decision¹ Bramwell, ~~C.~~ J., said: "What difference is there in principle between the case of a man selling goods on credit for £500 and these being then resold for £600, and the case of the purchaser pledging the goods for £600 with a right of sale by the pledgee? Why, if the vendor can stop the proceeds of sale in the one case, should he not have a right to stop them in the other? What injury is there to the subpurchaser?" In spite of criticism in the House of Lords² it seems that Bramwell's view of the matter is sound,³ and that there is no reason to distinguish between the case of a pledge and the case of a subsale. As was seen, however, in the preceding section, there is difficulty in admitting the seller's right of stoppage where the goods have been pledged. Where the question of stopping the proceeds of a subsale is involved another question is frequently though not necessarily involved. The shipment or transit may not have been made from the original seller to the original buyer. As has already been shown, this is generally held fatal to any right on the seller's part.⁴ The case may be supposed, however, that while the goods are in transit from seller to buyer, the buyer with the seller's assent makes a subsale to a new buyer who has not paid the price at the time the original seller gives notice to stop the goods. Such a case should be decided in the same way as a case of pledge. The discussion in regard to that need not be repeated. Where goods have been destroyed while in transit a claim has also been made on behalf of the sellers to obtain insurance effected by the buyer upon the goods, in lieu of stopping the goods themselves, but this right has been denied.⁵

⁹⁸ See *infra*, § 558.

⁹⁹ *Ex parte* Golding, 13 Ch. D. 628.

¹ *Ex parte* Falk, 14 Ch. D. 446.

² *Kemp v. Falk*, 7 A. C. 573, by Lord Selborne.

³ See *Burdick, Sales*, 230.

⁴ See *supra*, § 525.

⁵ *Latham v. Chartered Bank of India*, L. R. 17 Eq. 205, 216; *Berndtson v. Strang*, L. R. 3 Ch. 588. In the latter case Lord Cairns, L. C., said (p. 591): "The right to stop *in transitu* is a right to stop the goods in whatever state they arrive."

§ 539. **Effect of stopping the goods.**—It is now generally recognized that when goods are rightfully stopped the seller is thereby revested with a lien in the same way as if possession of the goods had never been surrendered. The sale is not rescinded; title still is in the buyer, but the seller has as means of redress not simply the holding of the goods but also rescission and resale to the same extent that those remedies are allowed to a seller where title has been transferred but possession not surrendered.⁶ “As the stoppage does not rescind the contract of sale, it follows that the vendee or his assignee may obtain the goods on payment of the price; or if the vendee was able and ready to perform the contract on his part, he may recover damages for the failure of the seller to deliver the property according to its terms.”⁷ The limits set on the seller’s right to resell the goods or to rescind the whole transaction are the same as if possession had never been parted with. What these limits are is considered elsewhere.⁸ As the notice to stop, properly given, reverts the seller with a lien, the carrier or other bailee holding the goods becomes by operation of law the seller’s agent for retaining possession of the property. And if the bailee delivers the goods to any one other than the seller or refuses on demand to deliver to the seller, the carrier is guilty of conversion.⁹ Any other person wrongfully intermeddling with the goods is likewise liable for conversion to the seller.¹⁰

⁶ *Sheppard v. Newhall*, 54 Fed. Rep. 306, 7 U. S. App. 544, 4 C. C. A. 352; *Rucker v. Donovan*, 13 Kans. 251, 19 Am. Rep. 84; *Cross v. O'Donnell*, 44 N. Y. 661, 4 Am. Rep. 721; *Babcock v. Bonnell*, 80 N. Y. 244; *Diem v. Kohlitz*, 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531. In the latter case the court said: “Whether the effect of the stoppage *in transitu*, or the retention of the goods by the vendor, on the discovery of the vendee’s insolvency, is to rescind the contract, or not, has been the subject of much discussion, and some authors say the question is not yet definitely settled. But the prevailing opinion now is, we believe, that the contract is not, necessarily, rescinded,

unless the parties by their conduct so treat it; that conclusion being most favorable to the vendor, for whose protection the doctrine of stoppage *in transitu* was first established; for, if the exercise of the right operated to rescind the contract, the vendor would be deprived of the remedy, which it is now generally conceded he has in a proper case, upon a resale of the goods, to hold the vendee, or the assignee of his estate, for the loss sustained through his nonperformance of the contract, or in consequence of a fall in the market price.”

⁷ *Diem v. Kohlitz*, 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531.

⁸ See *infra*, § 543 *et seq.*

§ 540. Ways of stopping the goods—Provisions of the Sales Act.—

Sec. 59. WAYS OF EXERCISING THE RIGHT TO STOP.—(1.) The unpaid seller may exercise his right of stoppage in transitu either by obtaining actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may prevent a delivery to the buyer.

(2.) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such redelivery must be borne by the seller. If, however, a negotiable document of title representing the goods has been issued by the carrier or other bailee, he shall not be obliged to deliver or justified in delivering the goods to the seller unless such document is first surrendered for cancellation.

This section is based on section 46 of the English Sale of Goods Act with some verbal changes.¹¹ And the last sentence in the second paragraph of the American act is not contained in the English act, and probably does not express the English law. The sentence should be read in connection with the second paragraph of section 62, and its effect will be considered in connection with that section. Aside from this sentence the section is believed to express the rule of the common law.

¹¹ *Litt v. Cowley*, 7 Taunt. 169; *The Tigress*, 32 L. J. Adm. 97; *Jones v. Earl*, 37 Cal. 630, 99 Am. Dec. 338; *Ascher v. Grand Trunk Ry. Co.*, 36 U. C. Q. B. 609.

¹² *McGill v. Chilhowee Lumber Co.* (Tenn.), 82 S. W. 210.

"In the second line the word "obtaining" has been substituted for the word "taking." Probably the meaning is not changed but it seems desirable to cover clearly all cases

where the seller is revested with possession. At the end of the first paragraph of the section the words "may prevent delivery to the buyer" have been used instead of the words in the English section "may communicate it to his servant or agent in time to prevent a delivery to the buyer." The language in the American act is briefer and seems more certainly to express the desired idea.

§ 541. **Ways of exercising the right to stop in transitu at common law.**—As the right of stoppage *in transitu* is a favor granted to the seller for which he has not bargained, it is obvious that the right given must not impose upon the carrier an unfair burden. Accordingly the single essential principle in regard to the way of stopping the goods is that the notice must reach the agent of the carrier who has the actual custody of the goods; or it must be given in such a way that were it not for the negligence of the carrier it would have reached this agent seasonably. If the seller is able to determine what agent of the carrier has the goods in his actual custody, and can reach that agent, the safest way is for the seller to notify that agent. A notice given to the principal, however, is sufficient if given in such season as to enable the principal to forward the notice to the agent in time to effect a stoppage of the goods. For complete assurance a seller will often find it practically advisable to notify several persons. The doctrine is thus stated in the leading case.¹² “To make a notice effective as a stoppage *in transitu*, it must be given to the person who has the immediate custody of the goods; or, if given to the principal, whose servant has the custody, it must be given, as it was in the case of *Litt v. Cowley*,^{12a} at such a time, and under such circumstances, that the principal, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent the delivery to the consignee; and to hold that a notice to a principal at a distance is sufficient to revest the property in the unpaid vendor, and render the principal liable in trover for a subsequent delivery by his servants to the vendee, when it was impossible, from the distance and want of means of communication, to prevent that delivery, would be the height of injustice. The only duty that can be imposed on the absent principal is to use reasonable diligence to prevent the delivery; and in the present case such diligence was used.” The absent principal is liable for failure to use reasonable diligence in forwarding the notice.¹³ In the case of railroads with a multitude of officers and agents, difficult questions may

¹² *Whitehead v. Anderson*, 9 M. & W. 518, 533.

^{12a} 7 Taunt. 169.

¹³ *Kemp v. Falk*, 7 A. C. 573.

“What the shipowners did was this:

On the 31st of July they sent a telegram. They waited two days and they might have got into a scrape by that means.”

arise as to whether an officer or servant of the railroad who receives a notice and who has not himself the actual control of the goods is so far bound to notify other officers and servants of the railroad that the notice is effectual. The only safe course is to give notice to some person who either has the actual possession of the goods or to some officer who is undoubtedly the principal of whatever agent may be in possession of the goods.¹⁴ A notice to the buyer himself is insufficient.¹⁵ There is no form of notice which is essential; it is only necessary that goods be sufficiently described for identification.¹⁶ It is well to state that the order was given because of the buyer's insolvency, but even this is not absolutely requisite.¹⁷ It does not impair the validity of the seller's exercise of his right that his course was adopted at the buyer's suggestion.¹⁸

§ 542. **Effect of outstanding bill of lading.**—The way in which a bill of lading may be used by the seller to retain a hold upon

¹⁴ In *Poole v. Houston, etc., Ry. Co.*, 58 Tex. 134, Watts, C. J., who delivered the opinion of the court, held that a notice given to the agent at the point of destination was properly given, although the goods were intercepted by the seller at a point before the place of destination, on the ground that the station agent should have telegraphed along the line to other station agents the notice he had received. Bonner, J., who delivered a concurring opinion, said in regard to this matter: "I have very serious doubt whether notice served, as in this case, on a mere local agent at the point of destination, is effective as such, unless the goods should come into his possession in the regular line of transportation, either as originally consigned, or should thus come when the bill of lading has been fraudulently changed, and of which fraud the agent had either notice in fact, or of such circumstances as would be equivalent to notice. Otherwise the carrier might, without fault or negligence, be held responsible for the value of goods of which notice of stoppage

in transitu had been given to one who had no power to interfere with or control their destination, and in regard to which the carrier, therefore, had no notice. The testimony in this case shows that the duties of the local agent to whom notice was given, 'were confined to the business in and about the station only. That he had no control over anything except such as are under his immediate control.'" Under the Sales Act the view expressed by Bonner, J., seems sound.

¹⁵ *Rucker v. Donovan*, 13 Kans. 251, 19 Am. Rep. 84; *Mottram v. Heyer*, 5 Denio, 629.

¹⁶ *Allen v. Maine Central Ry. Co.*, 79 Me. 327, 9 Atl. 895, 1 Am. St. Rep. 310; *Clementson v. Grand Trunk Ry. Co.*, 42 U. C. Q. B. 263. See also *Jones v. Earl*, 37 Cal. 630, 99 Am. Dec. 338; *Reynolds v. B. & M. Ry. Co.*, 43 N. H. 580.

¹⁷ *Allen v. Maine Central Ry. Co.*, 79 Me. 327, 9 Atl. 895, 1 Am. St. Rep. 310.

¹⁸ *Frame v. Oregon Liquor Co.*, 48 Or. 272, 86 Pac. 791.

the goods after shipment has been previously considered at some length. It has been seen that the seller may take any one of several courses. He may name himself as consignee of the bill of lading. In such a case the property in the goods will not pass and the seller is entitled to receive the goods from the carrier at their destination as owner, not by virtue of the peculiar doctrine of stoppage *in transitu*. The seller's right to obtain the goods in such a case will not be dependent upon the buyer's insolvency. If, however, the goods are consigned to the buyer and are shipped in accordance with the latter's orders, the property will ordinarily pass.¹⁹ It will not be material so far as the transfer of the property is concerned whether the bill of lading is negotiable in form or a straight bill. If, however, the document is negotiable in form and is retained by the seller, even though the title is in the buyer, he cannot obtain the goods without the bill of lading, for the carrier will not surrender them unless the bill of lading is produced.²⁰ Accordingly, in this instance also, the seller by retaining the document of title has retained a hold upon the goods not dependent upon the principles of stoppage *in transitu*. Even though the carrier be a ship belonging to or demised to the buyer, the result is the same, for the captain by signing bills of lading in any of the forms adverted to has made himself a bailee, not simply for his master the buyer, but for the seller, or for any person who may come within the terms of an order bill of lading.²¹ Accordingly, where a bill of lading is outstanding for the goods, the seller is not driven to rely upon the doctrine of stoppage *in transitu* unless the bill is either a straight bill of lading to the buyer, or unless, if negotiable in form, it has come into the hands of the buyer, either by delivery, if it originally ran to the buyer's order, or by indorsement and delivery if it ran to the seller's order. Where the bill is a straight or non-negotiable bill to the buyer, there can be no doubt of the applicability of the doctrine of stoppage *in transitu*. This is the typical case where the doctrine should be permitted. It seems, however, generally assumed that the right exists even though the bill is negotiable in form, but a difficulty in allowing the right in such a case is obvious. If the

¹⁹ See *supra*, § 282.

²⁰ See *supra*, § 285.

²¹ See *Van Casteel v. Booker*, 2 Ex.

691; *Turner v. Trustees of Liverpool Docks*, 6 Ex. 543.

seller stops the goods the buyer, being in possession of a bill of lading negotiable in form, may negotiate it for value to an innocent purchaser. That a seller who has himself taken out a bill of lading to the buyer's order or has indorsed a bill of lading running to his own order to the buyer, should be allowed to retake the goods from the carrier to the prejudice of one who has relied upon the form of the document and paid money on the faith of it, even though after the stoppage of the goods, is wholly unjust; and it has been held in California²² that in such a case the subsequent purchaser of the bill of lading must be protected. The correctness of the decision has been questioned by text-writers.²³ But it seems clearly better to limit the right of stoppage *in transitu* of a seller who has intrusted the buyer with a perfect apparent title, than to deprive the innocent purchaser of the goods. Accordingly in the Sales Act the correctness of this decision is assumed as a basis for the provisions of the act.²⁴ It is a necessary corollary of a decision preferring a subsequent purchaser of the bill of lading to the seller that the carrier cannot be compelled to surrender the goods until assured not only that there has not thus far been an indorsement of the bill for value, but also that there will not thereafter be such an indorsement. For should the carrier surrender the goods to the seller and afterward the bill of lading be negotiated to a purchaser for value, the latter would be entitled to demand delivery of the goods. The only way in which the carrier can be assured that no subsequent purchaser can arise is by requiring a surrender of the document of title. Accordingly the Sales Act provides that the carrier is not bound to obey the seller's demand for the goods unless any outstanding negotiable bill of lading is first surrendered for cancellation. On the authority of the California decision just referred to and by virtue of the custom of merchants, it is believed that the same result should be reached without the aid of a statute. The previous discussion has been directed simply to bills of lading, but the same reasoning is applicable to other documents of title.

²² *Newhall v. Central Pac. R. Co.*, 51 Cal. 345, 21 Am. Rep. 713.

²³ *Mechem, Sales*, § 1567; *Hutchin-*

son, Carriers, § 414; *Burdick, Sales*, 236.

²⁴ Section 62, second paragraph.

CHAPTER XVI.

RESALE OR RESCISSION BY THE SELLER.

- Section 543. When resale allowable — Provisions of the Sales Act.
544. Right of resale and rescission under the English law.
545. Right of resale in the United States.
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§ 543. When resale allowable — Provisions of the Sales Act.—

RESALE BY THE SELLER.

Sec. 60. WHEN AND HOW RESALE MAY BE MADE.—(1.) Where the goods are of a perishable nature, or where the seller expressly reserves the right of resale in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid seller having a right of lien or having stopped the goods in transitu may resell the goods. He shall not thereafter be liable to the original buyer upon the contract to sell or the sale or for any profit made by such resale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2.) Where a resale is made, as authorized in this section, the buyer acquires a good title as against the original buyer.

(3.) It is not essential to the validity of a resale that notice of an intention to resell the goods be given by the seller to the original buyer. But where the right to resell is not based on the perishable

nature of the goods or upon an express provision of the contract or the sale, the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the resale was made.

(4.) It is not essential to the validity of a resale that notice of the time and place of such resale should be given by the seller to the original buyer.

(5.) The seller is bound to exercise reasonable care and judgment in making a resale, and subject to this requirement may make a resale either by public or private sale.

This section is based on section 48 of the English Sale of Goods Act, but the changes are numerous.¹ Subsection (1) of the American act is like subsection (3) of the English act, so far as the first case where resale is authorized is concerned; namely, when the goods are perishable. The second case enumerated in the American act, namely, where the contract expressly provides for the right of resale in case of default, is separately provided for in subsection (4) of the English statute. The third case is included in subsection (3) of the English act, but the words in the American act requiring default seem more exact than the words of the English act, which simply require nonpayment without expressly requiring that such nonpayment should be wrongful. The American act also is more exact in inserting the words in subsection (1) "having a right of lien, or having stopped the goods in transitu." The English court would doubtless limit the literal meaning of the English act, which says that an unpaid seller may

¹ The section of the English act is as follows: 48.—(1.) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien [or retention] or stoppage in transitu. (2) Where an unpaid seller who has exercised his right of lien [or retention] or stoppage in transitu resells the goods, the buyer acquires a good title thereto as against the original buyer. (3.) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his in-

tention to resell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract. (4.) Where the seller expressly reserves a right of resale in case the buyer should make default, and, on the buyer making default, resells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

resell without qualifying the provision, by the requirement that the unpaid seller's lien must still exist. Subsection (2) of the American act is in effect like subsection (2) of the English act, except in the American act the requirement is made that the sale shall have been made as authorized by the Sales Act; whereas, under the English act, apparently, any re-sale made by a seller with a lien, whether rightly or not, gives a good title to the buyer. Under the American act, if the second sale is wrongfully made, but the second buyer gets delivery, he would be protected if he took in good faith and without notice of the previous sale.² It does not seem wise to protect a purchaser on a resale further than this. Subsections (3), (4), and (5) of the American act are not contained in the English act, nor is any equivalent for them. How their provisions compare with the common law may be seen from the discussion in the following sections. The provisions of subsections (1) and (4) of the English act, relating to rescission, are more fully dealt with in later sections of the American act³ which have no equivalent in the English statute.

§ 544. **Right of resale and rescission under the English law.**—The English law has been very slow to recognize any right on the part of the seller, after the property in the goods has passed to the buyer, either to resume that ownership because of the buyer's default, or to resell the goods. The difficulty that has seemed to press upon the court has been that since mutual assent of buyer and seller was needed to make the buyer owner, it should be equally requisite in order to get the ownership away from him and re-vest the property in the seller. As will be seen in a number of analogies hereafter referred to,⁴ the English court has been somewhat needlessly troubled in regard to this matter, for the transfer of title by the will of one party only is not uncommonly allowed by the law as a means of redressing a wrong or enforcing a right. The case of perishable goods so clearly requires the recognition by the court of a power to sell them by a seller in

² See section 25 of the Sales Act, and *supra*, § 349 *et seq.*

³ Section 61, which relates to rescission of a transfer of title, and sec-

tion 65, which relates to the rescission of all obligations between buyer and seller.

⁴ *Infra*, §§ 566-572.

possession, though without title, that it was first conceded.⁵ As to other kinds of goods, though the seller's right had been expressly denied at the beginning of the nineteenth century,⁶ the decision was soon practically overruled.⁷ Blackburn, in his treatise, expresses the opinion that in no case do the seller's rights amount to "a right to rescind the contract of sale, but perhaps come nearer to the rights of a pawnee with a power of sale than to any other common-law rights."⁸ It was, however, decided that if the seller resold the goods when the buyer was but slightly in default, the seller's conduct amounted to a wrongful conversion of the goods,⁹ and the decisions to this effect were such as throw some doubt on the general proposition that in case of material default the seller might resell the goods.¹⁰ In the middle and latter part of the nineteenth century a new doctrine was introduced into the English law of contracts, namely, that a total repudiation by one party to a contract is equivalent to an offer to rescind the contract, or at least to rescind it, except for the retention by the

⁵ In *Maclean v. Dunn*, 4 Bing. 722, Best, C. J., said: "It is admitted that perishable articles may be resold."

⁶ *Greaves v. Ashlin*, 3 Campb. 426. In this case Lord Ellenborough said: "If the buyer does not carry away the goods bought within a reasonable time, the seller may charge him warehouse room, or he may bring an action for not removing them should he be prejudiced by the delay. But the buyer's neglect does not entitle the seller to put an end to the contract. * * * The notice given to fetch away the goods could not discharge the defendant from his contract, nor empower him to sell the property of the plaintiff."

⁷ *Maclean v. Dunn*, 4 Bing. 722; *Wilmshurst v. Bowker*, 2 M. & G. 792, 7 M. & G. 882. In the former case, Best, C. J., said: "It is a practice, therefore, founded on good sense, to make a resale of a disputed article, and to hold the original con-

tractor responsible for the difference. The practice itself affords some evidence of the law, and we ought not to oppose it except on the authority of decided cases."

⁸ *Contract of Sale* (1st ed.), p. 325. See also *Page v. Cowasjee Eduljee*, L. R. 1 P. C. 127, 145.

⁹ *Martindale v. Smith*, 1 Q. B. 389; *Chinery v. Viall*, 5 H. & N. 288.

¹⁰ In *Martindale v. Smith*, 1 Q. B. 389, 395, Denman, C. J., said: "The sale of a specific chattel on credit, though that credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the vendor a right of action for the price, and a lien upon the goods if they remain in his possession till that price be paid. But that default of payment does not rescind the contract. * * * In a sale of chattels time is not of the essence of the contract, unless it is made so by express agreement."

injured party of a right of action.¹¹ There seems no reason why this doctrine, if sound for contracts generally, should not be applicable to sales, and such seems to be the view of the English court.¹² But when the right of rescission, under these circumstances, was admitted, a doubt was suggested whether the seller could ever have a right to resell the goods unless the circumstances were such that he had a right to rescind.¹³ The language of the English Sale of Goods Act probably will resolve most of the difficulties. As the American law has been much more free from doubt, and as the American courts, by following the rules that mercantile convenience required, have also more consistently followed logical principle than the English court in this matter, it is unnecessary to consider the English decisions further than to give the summary of their result from an authoritative source.¹⁴

"1. A seller may, without express power (at any rate if he gives notice of resale) resell the goods when the buyer by his words or conduct absolutely refuses to pay for them.¹⁵ 2. Simple unpunctuality in payment does not justify a resale.¹⁶ 3. When the

¹¹ See the authorities on which this doctrine is based collected in Wald's *Pollock, Contracts* (3d ed.), p. 339, and a criticism of the doctrine, *ibid.*, pp. 341, 352.

¹² *Ogg v. Shuter*, L. R. 10 C. P. 159. The case was reversed on appeal (1 C. P. D. 47), but as the Court of Appeals held the property had not passed, the decision by that court is not here in point, nor does it reverse the opinion of the lower court on the question here involved.

¹³ Thus in *Ogg v. Shuter*, L. R. 10 C. P. 159, Keating, J., in reply to the question whether the seller (the defendant) had a right to resell the goods, said: "I agree that he had not, because to entitle him to do so he must have a *right to rescind* the contract, and that could be only on an absolute refusal by the plaintiffs to perform their part of the contract." And accordingly the learned editors of the last (5th Eng.) edition of Benjamin, *Sales*, p. 937, hold that

if the seller does not retain the goods for the buyer, relying on his suit for the price, he must rescind the sale and revest himself with title to the goods as owner. This opinion, it will be seen, is directly opposed to that of Blackburn cited in the text of this section. It is also opposed to the opinion of Benjamin. As the learned editors of the latter author's work say, however, it is in conformity with the general recognized view of the law of contracts in England to-day, and the explanation of the difference in opinion of the authorities is doubtless due to the introduction of a novel doctrine into the law of contracts.

¹⁴ Benjamin, *Sale* (5th Eng. ed.), 949.

¹⁵ Citing *Maclean v. Dunn*, 4 Bing. 722; *Fitt v. Cassanet*, 4 M. & G. 898; *Cornwall v. Henson*, [1900] 2 Ch. 298.

¹⁶ Citing *Martindale v. Smith*, 1 Q. B. 389; *Woolfe v. Horne*, 2 Q. B. D. 355.

power of resale is an express one, the seller resells as owner.¹⁷ 4. Whether the power of resale be an express one or not, (a) the *buyer*, who had absolutely refused to pay, cannot treat the contract as rescinded by the resale.¹⁸ (b) The seller cannot, after a resale, recover the *price* of the goods, but he may recover damages for the buyer's breach."¹⁹

§ 545. **Right of resale in the United States.**—The well-recognized doctrine in the United States is thus stated in a recent New York decision:²⁰ "When the price of goods sold on credit is due and unpaid, and the vendee becomes insolvent before obtaining possession of them, the vendor's right to the property is often called a lien, but it is greater than a lien. In the absence of an express power the lienor usually cannot transfer the title to the property on which the lien exists by a sale of it to one having notice of the extent of his right, but he must proceed by foreclosure. When a vendor rightfully stops goods *in transitu*, or retains them before *transitus* has begun, he can, by a sale made on notice to the vendee, vest a purchaser with a good title.²¹ His right is very nearly that of a pledgee, with power to sell at private sale in case of default.²² The vendee having become insolvent and refused payment of the notes given for the purchase price of the property which remained in the vendor's possession, his right to retain it as security for the price was revived as against the vendee and his attaching creditor."²³ Other decisions fully support the unpaid seller's right of resale.²⁴

¹⁷ Citing *Lamond v. Davall*, [1847] 9 Q. B. 1030.

¹⁸ Citing *Pake v. Cowasjee Eduljee*, L. R. 1 P. C. 127; *Maclean v. Dunn*, 4 Bing. 722.

¹⁹ Citing *Chinery v. Viall*, 5 H. & N. 288, per C. P. in *Maclean v. Dunn*, 4 Bing. 722.

²⁰ *Tuthill v. Skidmore*, 124 N. Y. 148, 153, 26 N. E. 348.

²¹ Citing *Dustan v. McAndrew*, 44 N. Y. 72.

²² Citing *Bloxam v. Sanders*, 4 B. & C. 941; *Bloxam v. Morley*, 4 B. & C. 951; *Milgate v. Kebble*, 3 M. & G. 100; *Audenreid v. Randall*, 3 Cliff.

99, 106; *Blackburn, Sale* (2d ed.), 445, 454, 459; *Benjamin, Sale* (Corbin's ed.), § 1280; *Jones, Liens*, § 802.

²³ Citing *Arnold v. Delano*, 4 Cush. 33, 50 Am. Dec. 754; *Haskell v. Rice*, 11 Gray, 240; *Milliken v. Warren*, 57 Me. 46; *Clark v. Draper*, 19 N. H. 419; *Hamburger v. Rodman*, 9 Daly, 93; *Bloxam v. Sanders*, 4 B. & C. 941; *Bloxam v. Morley*, 4 B. & C. 951; *Benjamin, Sale* (Bennett's ed.), § 825; 2 *Benjamin, Sale* (Corbin's ed.), § 1227; *Story, Sale*, § 285; *Blackburn, Sale*, 454.

²⁴ *Putnam v. Glidden*, 159 Mass. 47,

§ 546. **Distinction between executory and executed sales.**—

Though the question here discussed relates to the seller's right of resale where the property in the goods had previously passed to the buyer, the seller has at least as great rights if the resale is made before the transfer of the property. One important purpose of reselling the goods is to fix the measure of the buyer's liability for failure to fulfill his obligation. In order that the sale should furnish an accurate test of the seller's injury, and the buyer's wrong, it is necessary that the sale should be properly made, and this necessity is the same, whether the property in the goods has already passed to the buyer or has not yet passed. Accordingly, in the discussion by the courts of what is necessary for a proper resale, no distinction generally seems to be observed between resale before the transfer of the property and after, and it seems there is no necessity of making such distinction, except in regard to the time when the resale must be made.²⁵

§ 547. **Manner in which sale should be made.**—It would be inconsistent with the summary methods in which goods are customarily dealt with to require the formality of an auction sale. Moreover, any absolute rule requiring particular formalities of sale might bear harshly on the seller in cases where the goods were of small value and the buyer financially irresponsible. The law, therefore, "is satisfied with a fair sale made in good faith according to established business methods, with no attempt to take advantage of the vendee,"²⁶ and in every case it is a question of fact whether the resale complies with this requirement.²⁷ "A public competitive sale by outcry to the highest bidder duly ad-

34 N. E. 81, 38 Am. St. Rep. 394; Van Brocklen v. Smeallie, 140 N. Y. 70, 35 N. E. 415; Arnold v. Carpenter, 16 R. I. 560, 18 Atl. 174, 5 L. R. A. 357, and cases cited in the following sections *passim*.

²⁵ See *infra*, § 550.

²⁶ Ackerman v. Rubens, 167 N. Y. 405, 60 N. E. 750, 53 L. R. A. 867, 82 Am. St. Rep. 728. To the same effect are Alden Speare's Sons Co. v. Hubinger, 129 Fed. Rep. 538, 64 C. C. A. 68; Magnes v. Sioux City Seed Co., 14 Colo. App. 219, 59 Pac.

879; Brownlee v. Bolton, 44 Mich. 218, 6 N. W. 657; Nelson v. Rail Co., 102 Mo. App. 498, 77 S. W. 590; Tripp v. Forsaith Machine Co., 69 N. H. 233, 45 Atl. 746; American Hide & Leather Co. v. Chalkley, 101 Va. 458, 44 S. E. 705; Pratt v. Freeman Mfg. Co., 115 Wis. 648, 92 N. W. 368.

²⁷ Ackerman v. Rubens, 167 N. Y. 405, 60 N. E. 750, 53 L. R. A. 867, 82 Am. St. Rep. 728; Carver v. Graves (Tex. Civ. App.), 106 S. W. 903.

advertised and made upon notice to the vendee is a safer method of measuring the damages than a sale by private negotiation" but such a sale also "has been held sufficient."²⁸ It has been held that the seller, when making a sale at public auction, may buy the goods himself.²⁹ The seller, when attempting to resell the goods, is not bound to accept an offer to buy them on credit. He may take a lower price in cash.³⁰ In regard to one matter only, some courts make an absolute requirement for every sale, and that is in regard to notice.

§ 548. **Notice that resale is to be made.**—In some cases it has been held that in order to bind the buyer by a resale, the seller must have given notice of his intention to make a resale.³¹ But by the weight of authority there is no such absolute requirement.³² It is obviously highly desirable for the seller to give such notice,

²⁸ *Ackerman v. Rubens*, 167 N. Y. 405, 60 N. E. 750, 53 L. R. A. 867, 82 Am. St. Rep. 728, citing *Van Broeklen v. Smeallie*, 140 N. Y. 70, 35 N. E. 415.

²⁹ *Moore v. Potter*, 155 N. Y. 481, 50 N. E. 271, 63 Am. St. Rep. 692; *Ackerman v. Rubens*, 167 N. Y. 405, 60 N. E. 750, 53 L. R. A. 867. In the latter case, Haight, J., dissents on the ground that the seller in making a resale is acting as agent for the buyer, and that selling as agent he cannot sell to himself. "Selling involves contract, and a person cannot contract with himself and bind others thereby. If he could sell to himself publicly he could privately, and thus be able to perpetrate a fraud or injustice which might be difficult to detect or prove." A resale at auction at which the seller bought in the goods was upheld also in *Strickland v. McCulloch*, 8 N. S. Wales, 324. But in *Strauss v. Labsap*, 59 Mo. App. 260, 263, the court said if the seller bought in the goods he would hold subject to redemption if the buyer acted seasonably.

³⁰ *Pratt v. Freeman Mfg. Co.*, 115 Wis. 648, 663, 92 N. W. 368.

³¹ *Magnes v. Sioux City Seed Co.*, 14 Colo. App. 219, 59 Pac. 879; *Clore v. Robinson*, 18 Ky. L. Rep. 851, 38 S. W. 687; *Mann v. National Oil Co.*, 87 Hun, 558; *Waples v. Overaker*, 77 Tex. 7, 19 Am. St. Rep. 727. See also *Maclean v. Dunn*, 4 Bing. 722; *Acebal v. Levy*, 10 Bing. 376; *Ingram v. Wackernagel*, 83 Iowa, 82, 48 N. W. 998.

³² *Davis Ore Co. v. Atlantic Guano Co.*, 109 Ga. 607, 34 S. E. 1011; *Ullman v. Kent*, 60 Ill. 271; *Maulding v. Steele*, 105 Ill. 644; *Plumb v. Campbell*, 129 Ill. 101, 18 N. E. 790; *Wrigley v. Cornelius*, 162 Ill. 92, 44 N. E. 406; *Redmond v. Smock*, 28 Ind. 365; *Ridgley v. Mooney*, 16 Ind. App. 362, 45 N. E. 348; *Dill v. Mumford*, 19 Ind. App. 609, 49 N. E. 861; *Nelson v. Hirsch*, 102 Mo. App. 498, 77 S. W. 590; *Van Broeklen v. Smeallie*, 140 N. Y. 70, 35 N. E. 415; *Wooldert v. Arledge*, 4 Tex. Civ. App. 692, 23 S. W. 1052; *Rosenbaums v. Weeden*, 18 Gratt. 785, 794, 98 Am. Dec. 737; *Pratt v. Freeman Mfg. Co.*, 115 Wis. 648, 92 N. W. 368. See also *Holland v. Rea*, 48 Mich. 218, 12 N. W. 167.

even though it may not be an absolute requirement of law, for the giving of the notice will have a bearing on the question of fact whether the sale was a fair one, "made in good faith, according to established business methods, with no attempt to take advantage of the vendee."³³ As will be seen in a subsequent section,³⁴ the seller's right to resell the goods for the buyer's account may depend to some extent upon the length of time which the buyer has been in default. A notice by the seller of his intent to resell may operate to fix the time within which it is reasonable that the buyer should perform his obligations.³⁵ The Sales Act, therefore, provides that except in the case of perishable goods, which it is obvious may require a sale so expeditious as to be inconsistent with notice to the buyer, the failure to give notice shall be relevant upon the question whether the buyer has been in default an unreasonable time.³⁶

§ 549. **Notice of time and place of sale.**—Though, as appears from the preceding section, some courts have held the seller bound to give notice of his intention to resell the goods, it seems uniformly agreed that there is no legal requirement of notice of the time and place where the sale will be held.³⁷ If at all possible for the seller to do so, it is, however, prudent to give the buyer such notice, as the giving or failure to give it may be important evidence in regard to the fairness of the resale.

§ 550. **Time of resale.**—A resale of the goods necessarily involves an assertion by the seller that his obligation is terminated. If the resale is wrongfully made it would amount to a repudiation of the contract. The circumstances of the case must, therefore, be such as to justify the seller in declining to perform. It cannot be said, then, as matter of law, that the instant the

³³ *Ackerman v. Rubens*, 167 N. Y. 405, 60 N. E. 750, 53 L. R. A. 867, 82 Am. St. Rep. 728.

³⁴ *Infra*, § 550.

³⁵ In *Mendel v. Miller*, 126 Ga. 834, 56 S. E. 88, 7 L. R. A. (N. S.) 1184, the court held that if notice of the intent to resell was given the buyer was conclusively bound by the resale and the amount realized.

³⁶ See § 60 (3).

³⁷ *Holland v. Rea*, 48 Mich. 218, 12

N. W. 167; *Pollen v. Le Roy*, 30 N. Y. 549; *Van Brocklen v. Smealie*, 140 N. Y. 70, 35 N. E. 415; *Gaskell v. Morris*, 7 W. & S. 22; *Rosenbaums v. Weeden*, 18 Gratt. 785, 794, 98 Am. Dec. 737; *American Hide & Leather Co. v. Chalkley*, 101 Va. 458, 44 S. E. 705; *Pratt v. Freeman Mfg. Co.*, 115 Wis. 648, 92 N. W. 368. But see *Hickock v. Hoyt*, 33 Conn. 553.

buyer is in default upon his obligation or any part of it, the seller has a right to resell. The buyer's default must be of an essential or material character; his default generally consists in failure to take the goods and pay for them. If this failure is not accompanied by any circumstances showing repudiation, or that the buyer may not pay within a reasonable time in the future, the question resolves itself into the materiality of the delay. In contracts of merchants, time is of the essence.³⁸ But this can hardly mean that a delay of a day or an hour in a mercantile contract will always be fatal. It may safely be laid down, therefore, that if the buyer's default consists merely in delay, the seller must wait a reasonable time before reselling the goods. Those jurisdictions which require the seller, as matter of law, to give notice of the intention to resell necessarily require lapse of at least such time as is necessary for giving a notice. What is a reasonable time will vary according to the nature of the goods and the circumstances of the case. If goods are perishable or of rapidly fluctuating value, the reasonable time will be very short. The question may also arise, not whether the seller has resold the goods too soon, but whether he has delayed too long in doing so. In regard to this question, the distinction must, it seems, be taken between an executory contract to sell and a sale where the property has already passed to the buyer. In the former case the object of the resale is simply to determine exactly the seller's damages. These damages are the difference between the contract price and the market price at the time and place when the performance should have been made by the buyer. The object of the resale in such a case is to determine what the market price in fact was. Unless the resale is made at about the time when performance was due it will be little evidence, especially if the goods are of a kind which fluctuate rapidly in value, what the market price actually was at the only time legally important.³⁹

³⁸ See *supra*, § 453.

³⁹ *Alden Speare's Sons Co. v. Hubinger*, 129 Fed. Rep. 538, 64 C. C. A. 68; *Brooke v. Laurens Milling Co.*, 78 S. C. 200, 58 S. E. 806. But as said in *North Georgia Milling Co. v. Henderson Elevator Co.*, 130 Ga. 113, 116, 60 S. E. 258: "It is not neces-

sary that the resale shall be at the earliest possible time after the default is known." The seller "is not bound to sell at the contract time and place for delivery." See also *Brooke v. Robson*, 3 Ga. App. 136, 59 S. E. 323.

There seems no reason, however, to impose any such requirement of prompt sale on the seller where the sale is an executed one. In such a case the seller is entitled, by virtue of his lien, merely to hold the goods, and it may frequently be reasonable to hold the goods in the expectation of the buyers ultimately taking them, and after a considerable time, when it clearly appears that the buyer will not take them, to resell them. Whatever obligation the seller may be under to choose one remedy than another is considered hereafter.^{39a}

§ 551. **Resale during period of credit.**—It has been said that where the seller stops goods in transit and thereby regains possession of them he must hold them until the price becomes due.⁴⁰ If this is true where the seller resumes his lien by stoppage *in transitu*, it must also be true where the seller has never parted with possession. It is submitted, however, that the principle is unsound. Where the buyer has manifested neither an unwillingness nor inability to perform his obligation when the period of credit shall have expired, undoubtedly it would be wrongful for the seller to resell the goods during the period of credit; but if the buyer either repudiates his obligation or by becoming insolvent indicates probable inability to perform it, the seller should be justified in protecting himself immediately, and so it has been held.⁴¹ This is but one application of a general principle in the law of contracts that if it is clear that one party to a contract

^{39a} See *infra*, § 559.

⁴⁰ *Shaw v. Lady Ensley Coal Co.*, 147 Ill. 526, 35 N. E. 620; *Newhall v. Vargas*, 15 Me. 314, 33 Am. Dec. 617.

⁴¹ *Diem v. Koblitz*, 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531. "Upon what just principle can the seller in such a case be required to hold the goods until the expiration of the credit? It is true that, at that time, the vendee may again be solvent, and able to pay. There is no presumption or assurance that he will. If any presumption arises, it is rather that the insolvency will continue, which is more in accord-

ance with the experience of the commercial world. But, as we have seen, it is part of the vendee's engagement that he will maintain his credit, which is broken by his insolvency. And it would be unjust to require the vendor to sustain the loss resulting from the destruction or deterioration of the goods in the meantime, which, in many instances, must ensue if the seller is compelled to keep the goods shut up, and take the risk of the future solvency of the buyer." The court further went to say that the seller's right to take prompt action was not confined to the case of perishable goods.

is going to be unable to perform the other party should be excused from performing.⁴²

§ 552. **Expense of resale.**— In calculating what damage the seller has suffered by the buyer's failure to carry out his obligation, the basis must be, not the gross price realized for the goods, but the net price. The seller, therefore, may charge in his account against the buyer all reasonable expenses incurred in making the resale.⁴³ He cannot, however, make a charge for his own services in connection with the resale.⁴⁴

§ 553. **Resale at a profit.**— In the ordinary case a resale is for a lower price than that for which the original buyer was bound. The seller accordingly demands damages from the buyer for his loss which is only partly made good by the proceeds of the sale. It may be supposed, however, that the resale is for a greater price than that originally bargained for. In such a case it is sometimes urged that the buyer should be entitled to the profit thereby made. It is said that the seller, in making the resale, is acting as the agent for the buyer; that only on this theory can the liability of the buyer for loss incurred on the resale be explained, and that the same reasoning requires the seller to account for any profit. It must be admitted that the seller, in making a resale, is generally acting on behalf of the buyer. It is more accurate, however, to say that he is acting by virtue of an authority or power given by law than to say that he is the buyer's agent, as is frequently done.⁴⁵ The common phrase is open to two objections. It assumes that there is a consensual relation

⁴²Wald's *Pollock*, *Contracts* (3d ed.), p. 354.

⁴³*Hill v. McKay*, 94 Cal. 5, 29 Pac. 406; *Barnes v. Bluthenthal*, 101 Ga. 598, 28 S. E. 1017, 65 Am. St. Rep. 339; *Ridgley v. Mooney*, 16 Ind. App. 362, 45 N. E. 348; *Ingram v. Wackernagel*, 83 Iowa, 82, 48 N. W. 998; *Mattingly v. Mathews*, 14 Ky. L. Rep. 300; *Brownlee v. Bolton*, 44 Mich. 218, 6 N. W. 557; *Tripp v. Forsaith Machine Co.*, 69 N. H. 233, 235, 45 Atl. 746; *Pollen v. Le Roy*, 30 N. Y. 549; *Lewis v. Greider*, 51 N. Y. 231; *Sawyer v. Dean*, 114 N. Y. 469, 21 N. E. 1012; *White v. Matador Land*

Co., 75 Tex. 465, 12 S. W. 866; *Chapman v. Larin*, 4 Can. Supr. Ct. 349.

⁴⁴*Penn v. Smith*, 93 Ala. 476, 9 So. 609; *Gehl v. Milwaukee Produce Co.*, 105 Wis. 573, 81 N. W. 666. See also *Brunswick Grocery Co. v. Lamar*, 116 Ga. 1, 42 S. E. 366.

⁴⁵*Davis Sulphur Ore Co. v. Atlanta Guano Co.*, 109 Ga. 607, 34 S. E. 1011; *Bagley v. Findlay*, 82 Ill. 524; *Putnam v. Glidden*, 159 Mass. 47, 34 N. E. 81, 38 Am. St. Rep. 394; *Sands v. Taylor*, 5 Johns. 395, 4 Am. Dec. 374; *Pollen v. Le Roy*, 30 N. Y. 549.

between buyer and seller in regard to the matter, and calling the agency an implied one only partially avoids this objection, since implied has the double meaning of "inferred as a fact from circumstances" and "imposed by law." Another objection is that to speak of the seller as an agent seems to imply that his sole duty is to the person called his principal. Now, though the seller in making a resale is bound to protect the buyer's interests so far as they are not inconsistent with his own rights, the primary considerations which actuate him are, and properly may be, his own interest and not the buyer's.⁴⁶ It will be replied that though it be granted that the seller resells by virtue of an authority given by law as a pledgee or a mortgagee sells on foreclosure, the sale is, nevertheless, for the buyer's account, and, therefore, the buyer should have the profit. There seems no answer to this unless the seller has the right totally to rescind the sale, revest himself with the ownership of the goods, resell them as his own, and take the proceeds for his own account. That the seller has this alternative right will be seen from the following sections, but here it may be said that on whatever reasoning the doctrine is based, the law seems to recognize the seller's right to keep any profit from the resale.⁴⁷ This is expressly so provided in the Sales Act.⁴⁸

§ 554. Rescission of an executed sale—Provisions of the Sales Act.—

RESCISSION BY THE SELLER.

Sec. 61. WHEN AND HOW THE SELLER MAY RESCIND THE SALE.—(1.) An unpaid seller having a right of lien or having stopped the goods in transitu, may rescind the

"The criticism of the use of the word "agent" in this connection is supported by *Moore v. Potter*, 155 N. Y. 481, 50 N. E. 271, 63 Am. St. Rep. 692.

⁴⁷ *Warren v. Buckminster*, 24 N. H. 336; *Bridgford v. Crocker*, 60 N. Y. 627. See also *Strickland v. McCulloch*, 8 N. S. Wales, 324. So in the Indian Contract Act, it is provided in § 107, that the seller who has a lien on goods "may, after giving notice to the buyer of his inten-

tion to do so, resell them after the lapse of a reasonable time, and the buyer must bear any loss, *but it is not entitled to any profit*, which may occur on such resale," and this view seems to be that upheld by the learned editors of the last edition of Benjamin, *Sale* (5th Eng. ed.), 938. Under the English Code, also, it seems that the seller would be entitled to the profit. Benjamin, *Sale* (5th Eng. ed.), 954.

⁴⁸ Section 60 (1).

transfer of title and resume the property in the goods, where he expressly reserved the right to do so in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2.) The transfer of title shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer or by some other overt act an intention to rescind. It is not necessary that such overt act should be communicated to the buyer, but the giving or failure to give notice to the buyer of the intention to rescind shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the right of rescission was asserted.

This section is not based on any section in the English Sale of Goods Act, and probably does not express the English law. It is warranted, however, by the law of this country as the following sections show.

§ 555. **Different remedies allowed by the law in the United States.**

— In a leading New York case⁴⁹ the court said: “The vendor of personal property in a suit against the vendee for not taking and paying for the property has the choice ordinarily of either one of three methods to indemnify himself. (1) He may store or retain the property for the vendee, and sue him for the entire purchase price. (2) He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or (3) he may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price.” This statement of the law is frequently quoted exactly or substantially, and generally no distinction seems to be taken between cases where title to the goods in question has passed and cases where it has not passed.⁵⁰ The statement on the

⁴⁹ *Dustan v. McAndrew*, 44 N. Y. 72, 78.

⁵⁰ *Habeler v. Rogers*, 131 Fed. Rep. 43, 45, 65 C. C. A. 281; *Magnes v.*

Sioux City Seed Co., 14 Colo. App. 219, 225, 59 Pac. 879; *Bagley v. Findlay*, 82 Ill. 524; *Ames v. Moir*, 130 Ill. 582, 591, 22 N. E. 535;

subject of rescission by a learned text-writer⁵¹ seems, therefore, sound: "The seller upon the buyer's default, whether the latter is insolvent or not, and whether his conduct is such as to show a settled determination to repudiate the contract or not, may, although title has passed to the buyer, elect to keep the property as his own and recover damages for the buyer's breach."⁵² Though this rule is criticized by the writer in question, as well as by other high authority,⁵³ it certainly has practical convenience in its favor. Transactions in personal property often do not relate to things of large value, and the simplest way out of the matter, if the buyer fails to fulfill his obligation, is frequently for the seller to treat the goods as his own. He unquestionably is entitled to do this if the contract is executory and the property has not passed to the buyer. It is a great practical advantage if the seller's remedies for securing satisfaction from a defaulting buyer are made to depend as little as possible on the question whether the property has passed or not. Generally no one but a lawyer can give even a helpful opinion upon this question, and frequently nothing but litigation can determine it. Moreover the right of one party to a sale to transfer or resume the property in the goods by his own volition is, as will hereafter be shown, by no means exceptional in the law.⁵⁴

§ 556. **Necessity of manifesting election.**—As the property of the goods is by hypothesis in the buyer and rescission of the transfer is an alternative remedy only, and is in derogation of the bargain, a seller wishing to avail himself of this remedy should manifest his election to do so. Until such election is manifested, it is a fair assumption that the property is still in the buyer.

Comstock v. Price, 103 Ill. App. 19, 21; Bell v. Offutt, 10 Bush, 632; Putnaja v. Glidden, 159 Mass. 47, 49, 34 N. E. 81, 38 Am. St. Rep. 394; Ozark Lumber Co. v. Chicago Lumber Co., 51 Mo. App. 555, 561; Van Brocklen v. Smeallie, 140 N. Y. 70, 75, 35 N. E. 415; Moore v. Potter, 155 N. Y. 481, 50 N. E. 271, 63 Am. St. Rep. 692; Ackerman v. Rubens, 167 N. Y. 405, 408, 60 N. E. 750, 53 L. R. A. 867, 82 Am. St. Rep. 728; Levy v. Glassberg, 92 N. Y.

Suppl. 50; Shawhan v. Van Nest, 25 Ohio St. 490, 18 Am. Rep. 313; Barentine v. Robinson, 46 Pa. St. 177; Pratt v. Freeman Mfg. Co., 115 Wis. 648, 654, 92 N. W. 368.

⁵¹ Burdick, Sales, p. 243.

⁵² So held in *Staisky v. Southern Ry. Co.*, 143 Ala. 272, 39 So. 132. See also *The Treasurer*, 1 Sprague, 473.

⁵³ Mechem, Sale, § 1681.

⁵⁴ See *infra*, §§ 566-570.

There is dearth of authority in regard to the matter so far as rescission for nonpayment of the price is concerned, but the law is clear in case of fraud and other cases where rescission of a transfer of property is allowed.⁵⁵ As the seller is in possession of the goods, any dealing with them in a manner inconsistent with a recognition of a right of property in the buyer will amount to a manifestation of election. Notice of election to the buyer should not be necessary. But, as in regard to resale, the Sales Act makes the giving, or failure to give, such notice relevant in determining the reasonableness of the time given the buyer to make good his obligations under the contract.

§ 557. When sale by the buyer affects the seller's lien—Provisions of the Sales Act.—

Sec. 62. EFFECT OF SALE OF GOODS SUBJECT TO LIEN OR STOPPAGE IN TRANSITU.—Subject to the provisions of this act, the unpaid seller's right of lien or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

If, however, a negotiable document of title has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the right of any purchaser for value in good faith to whom such document has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier or other bailee who issued such document, of the seller's claim to a lien or right of stoppage in transitu.

The first paragraph of this section is identical with the first paragraph of section 47 of the English Sale of Goods Act. The opening words "subject to the provisions of this act" relate primarily to the sections in regard to delivery and retention of possession and to documents of title. The second paragraph of the English section differs materially from the corresponding paragraph of the American Sales Act.⁵⁶ The reasons for the change

⁵⁵ See Wald's *Pollock, Contracts* (3d ed.), 345, and cases cited.

⁵⁶ The English statute reads: "Provided that where a document of title

to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person

have been referred to in connection with the discussion of the effect of a pledge of goods by the buyer on the seller's right of stoppage *in transitu*,⁵⁷ and of the effect of an outstanding negotiable document of title on that right.⁵⁸

§ 558. **Buyer of goods subject to a lien cannot defeat lien.**—

It is fundamental that a seller can give no larger right than he has. When, therefore, goods are subject to a legal lien, as they are when an unpaid seller is in possession of them, the buyer can acquire only such right as the original buyer from whom he bought them had.⁵⁹ If, however, the seller unconditionally attorns to the subpurchaser, since this is, in effect, a delivery of the goods to him, the lien is lost.⁶⁰ The rights of subpurchasers have been considered perhaps most often in cases involving the doctrine of stoppage *in transitu*, and this right, it is generally held, can only be defeated at common law by the transfer of an indorsed bill of lading to the subpurchaser,⁶¹ because only then does the subpurchaser, in effect, get delivery of the goods. Under the Sales Act on the one hand, even the transfer of an indorsed bill of lading, if it is a non-negotiable bill, will not affect the seller's right of stoppage *in transitu*, and on the other hand, the mere fact that a negotiable bill of lading is outstanding limits

who takes the document in good faith and for valuable consideration, then, if such last mentioned transfer was by way of sale, the unpaid seller's right of lien or stoppage *in transitu* is defeated, and if such last mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or stoppage *in transitu* can only be exercised subject to the rights of the transferee."

⁵⁷ See *supra*, § 537.

⁵⁸ See *supra*, § 542.

⁵⁹ *Dixon v. Yates*, 5 B. & Ad. 313, 339; *Farmeloe v. Bain*, 1 C. P. D. 445; *McElwee v. Metropolitan Lumber Co.*, 69 Fed. Rep. 302, 37 U. S. App. 266, 16 C. C. A. 232; *Keeler v. Goodwin*, 111 Mass. 490; *Milliken v. Warren*, 57 Me. 46, 50;

Robinson v. Morgan, 65 Vt. 37, 25 Atl. 899. It hardly needs citation of cases to show that the assignee of the buyer under an executory contract to buy goods can have no better right than the original buyer and must, therefore, pay the price as a condition precedent to his right to claim delivery. *Anderson v. Read*, 106 N. Y. 333, 13 N. E. 292.

⁶⁰ *Hurry v. Mangles*, 1 Campb. 452; *McElwee v. Metropolitan Lumber Co.*, 69 Fed. Rep. 302, 37 U. S. App. 266, 16 C. C. A. 232.

⁶¹ *Craven v. Ryder*, [1816] 6 Taunt. 433; *Ex parte Golding*, 13 Ch. D. 628; *Kemp v. Falk*, [1882] 7 A. C. 573; *Delta Bag Co. v. Kearns*, 112 Ill. App. 269; *Pattison v. Coulton*, 33 Ind. 240, 5 Am. Rep. 199; *Seymour v. Newton*, 105 Mass. 272, 275.

the seller's right.⁶² The importance of an indorsed bill of lading is due to its operation as a delivery of the goods as well as an agreement to transfer title. Under the Sales Act it is only negotiable documents of title that operate as a delivery of the goods when indorsed. Accordingly, the seller, if the right of stoppage *in transitu* be regarded as a legal right, has a higher right than a subpurchaser, who acquires anything less than a transfer of title accompanied by a document which amounts in effect to a delivery of the goods; and even if the seller's right of stoppage is regarded merely as an equity,⁶³ this equity takes precedence over any right which the buyer can give to a subpurchaser by any other means than an indorsed negotiable bill of lading. But since a negotiable bill of lading if outstanding in the buyer's hands may subsequently be indorsed, stoppage is not allowed under the Sales Act, where such a bill has been issued unless the seller is able to surrender it to the carrier.^{63a}

§ 559. **Circumstances affecting seller's choice of remedy.**—Generally there can be no doubt that an unpaid seller may choose any of the remedies against the goods which the law allows; namely, a right to hold them, to resell them on account of the buyer, or to resume the property in the goods. Circumstances are conceivable, however, which may render one of these courses peculiarly disadvantageous to the buyer, with no corresponding advantage to the seller. How far the seller, in such a case, is bound to take a course which will not only protect his interests, but will impose no unnecessary damage on the buyer, is a question not yet decided by the courts. It seems, however, that the seller may be under such a duty in an extreme case. Let it be supposed that the goods are perishable; if the unpaid seller simply retains them on account of the buyer, they will perish and the buyer will lose his goods and the seller his security. Generally, in such a case perhaps the seller may put the responsibility upon the buyer by giving him notice to take the goods and pay for them, but if it appears that the buyer is unable to pay for them at once, even though he is legally bound to do so,

⁶² See *supra*, §§ 31, 62; also § 542.

⁶³ See *supra*, § 518.

^{63a} Sales Act, § 59 (2). See *infra*,
§ 542.

it may be a question whether the seller can allow the goods to perish and then sue for the full contract price. Even if the goods are not perishable, a somewhat similar question may arise. It may be supposed that keeping the goods involves considerable expense, as in the case of horses. If the seller keeps the horses may he charge the expense to the buyer? It has been held in a Massachusetts case that he cannot.⁶⁴ It seems, however, impossible to assent to the principle that a seller who rightfully retains goods belonging to the buyer, and as bailee for him, is not entitled to the necessary reasonable expense of keeping the goods.⁶⁵ It may well be that a seller, under such circumstances, should not be allowed to keep the goods indefinitely and charge up the expense of keeping them against a buyer who has repudiated or totally failed to keep his obligation; but the expense necessary to keep the goods until it becomes clear that the buyer will not take them, and until the seller is enabled to resell the goods to reasonable advantage, seems clear.⁶⁶

⁶⁴ Putnam v. Glidden, 159 Mass. 47, 34 N. E. 81, 38 Am. St. Rep. 394. In this case the plaintiff, a seller of horses, kept them and sued for the price. It was held that the property had passed and that he was entitled to recover the full price. Thereafter he sued for the full expense of keeping the horses while the controversy was pending. The court held that this second action could not be maintained. It is hardly clear how far the decision is based on the theory that the expense of keeping the horses was incurred for the seller's own benefit, as he elected to hold them rather than resell them, and how far the decision is based on the principle that whatever claim for expense the seller might have must be included in the action for the price.

⁶⁵ See Hyde v. Lindsay, 29 Can. Sup. 99. See also Rubin v. Sturtevant, 80 Fed. Rep. 930, 932, 51 U. S. App. 286, 26 C. C. A. 259.

⁶⁶ In McCombs v. McKennan, 2 W. & S. 216, 218, the court said of the conduct of a seller who made a resale of clover seed: "He was not bound to keep it where it was, and let it perish, or wait the rise and fall of the markets. If he took it away for the benefit of all concerned, for the purpose of fairly selling it for the best price that could be got for it, it was no more than he had a right to do, and was perhaps incumbent on him to do, as the defendant had shown his inability or indisposition to receive it on the terms stipulated."

PART V.

ACTIONS FOR BREACH OF THE CONTRACT.

CHAPTER XVII.

REMEDIES OF THE SELLER ON THE CONTRACT.

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§ 560. Seller's right of action for the price — Provisions of Sales Act.—

REMEDIES OF THE SELLER.

Sec. 63. ACTION FOR THE PRICE.—(1) Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

(2.) Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it.

(3.) Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 64 (4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price.

This section is based largely on section 49 of the English Sale of Goods Act. Subsection (1) is identical in the two statutes except that the American act substitutes the words "a contract to sell or a sale" for the words "contract of sale," in the English act. In subsection (2) the American act contains a similar change in the first line and the words "or of transfer of title" are inserted also in the first sentence. These words are inserted because, especially in case of conditional sales, the price may be payable irrespective of transfer of title, but not payable irrespective of delivery.¹ The last sentence of subsection (2) is not contained in the English act.² Subsection (3) of the English act relates to

¹ See *infra*. § 579.

² The necessity for the addition is set forth *infra*, §§ 576-578.

Scotland exclusively, and has not been followed in the American act, though it indicates an analogy in the Scotch law with the rule established by subsection (3) of the American act, which is new and is not law in England, as will appear from the following discussion.³

§ 561. **Seller may recover price where property has passed.**—Where the property in the goods has passed and the buyer wrongfully neglects or refuses to pay for them, the seller may recover the price.⁴ Of course credit may have been given or the price may have been payable upon condition, and unless the term of credit has expired or the condition happened, no recovery can be had. In such a case the refusal of the buyer to pay would not be wrongful.

§ 562. **Recovery of price allowed in some jurisdictions where property has not passed.**—The general rule of the English law⁵ and of many States in this country⁶ denies an action for the price unless the property has passed, and the reason for the rule is plain. As the seller still is owner of the goods, he ought not to be given also the price for them. His damage is the difference in value between what he now has, namely, the goods, and what he would have had if the defendant had not broken his contract, namely, the price. Nevertheless, a large number of States do not follow the English law in this matter. If the reason why the property in the goods has not passed to the buyer is because the buyer wrongfully refused to take title when offered to him, according to the weight of authority, perhaps, in this country, the seller may recover the full purchase price.⁷

³ Section 562 *et seq.* Subsection (3) of the English act is stated *infra*, § 574, note 52.

⁴ *Scott v. England*, 2 Dowl. & L. 520; *Oleese v. Fruit, etc., Co.*, 211 Ill. 539, 71 N. E. 1084; *Armstrong v. Turner*, 49 Md. 589; *Mitchell v. Le Clair*, 165 Mass. 308, 43 N. E. 117; *Meagher v. Cowing*, 149 Mich. 416, 112 N. W. 1074; *Wood v. Michaud*, 63 Minn. 478, 65 N. W. 963; *Doremus v. Howard*, 23 N. J. L. (3 Zab.) 390; *Hayden v. Demets*, 53 N. Y. 426.

It is unnecessary to multiply citations for so obvious a proposition.

⁵ *Atkinson v. Bell*, 8 B. & C. 277. See also *Elliott v. Pybus*, 10 Bing. 512.

⁶ See *infra*, § 566.

⁷ *Habeler v. Rogers*, 131 Fed. Rep. 43, 45, 65 C. C. A. 281; *Kinthead v. Lynch*, 132 Fed. Rep. 692; *Magnes v. Sioux City Seed Co.*, 14 Colo. App. 219, 59 Pac. 879; *Darby v. Hall*, 3 Pennew. (Del.) 25; *Ames v. Moir*, 130 Ill. 582, 22 N. E. 535; *Trunkey v.*

§ 563. **Decisions under Statute of Frauds as basis of rule.**—The reason for allowing this is not always very clearly stated. The earliest decision was in *Bement v. Smith*,⁸ an action for the price of a sulky built to order by the plaintiff for the defendant and refused when tendered by the plaintiff, who thereupon said he would leave it with a third person and accordingly did so. In allowing the plaintiff to recover the full price the court relied on early cases under the Statute of Frauds.⁹ In these early cases it was held that such a contract as the one in suit was a contract not of sale but for work and labor. This being true, the court held as a consequence that though the plaintiff did not recover the price directly, as for goods sold, the amount of recovery should be, nevertheless, fixed by the price, since that was the agreed value of the labor. The only way in which this reasoning can be answered in a wholly satisfactory way is by confessing that the authorities, under the Statute of Frauds, which have held that a contract for goods to be made to order is not a contract of sale but a contract for work and labor are erroneous. This is now admitted in England, and the early decisions are overruled.¹⁰ But in many States in this country it is still law that where goods are to be made to order, which are of a special kind differ-

Hedstrom, 131 Ill. 204, 209, 23 N. E. 587; *Osgood v. Skinner*, 211 Ill. 229, 71 N. E. 869; *Comstock v. Price*, 103 Ill. App. 19; *Dwiggins v. Clark*, 94 Ind. 49, 48 Am. Rep. 140; *Rastetter v. Reynolds*, 160 Ind. 133, 66 N. E. 612; *Moline Scale Co. v. Beed*, 52 Iowa, 307, 3 N. W. 96, 35 Am. Rep. 272; *McCormick Machine Co. v. Markert*, 107 Iowa, 340, 78 N. W. 33; *Bell v. Offutt*, 10 Bush (Ky.), 632, 639; *Singer Mfg. Co. v. Cheney*, 21 Ky. L. Rep. 550, 51 S. W. 813; *Ozark Lumber Co. v. Chicago Lumber Co.*, 51 Mo. App. 555; *St. Louis Range Co. v. Kline-Drummond Co.*, 120 Mo. App. 438, 96 S. W. 1040; *Gordon v. Norris*, 49 N. H. 376; *Black River Lumber Co. v. Warner*, 93 Mo. 374, 6 S. W. 210; *Bement v. Smith*, 15 Wend. 493; *Dustan v. McAndrew*, 44 N. Y. 72, 78; *Atkinson*

v. Truesdell, 127 N. Y. 230, 27 N. E. 844; *Van Brocklen v. Smeallie*, 140 N. Y. 70, 35 N. E. 415; *Cragin v. O'Connell*, 50 N. Y. App. Div. 339, 169 N. Y. 573, 61 N. E. 1128; *Levy v. Glassberg*, 92 N. Y. Suppl. 50; *Shawhan v. Van Nest*, 25 Ohio St. 490, 18 Am. Rep. 313; *Rhodes v. Mooney*, 43 Ohio St. 421, 425, 4 N. E. 233; *Haynes v. Brown*, 18 Okla. 389, 89 Pac. 1124; *Smith v. Wheeler*, 7 Or. 49, 33 Am. Rep. 698; *Ballentine v. Robinson*, 46 Pa. St. 177; *Reynolds v. Callender*, 19 Pa. Super. Ct. 610; *Pratt v. Freeman Mfg. Co.*, 115 Wis. 648, 92 N. W. 368.

⁸ 15 Wend. 493 (1836).

⁹ *Towers v. Osborne*, 1 Strange, 506; *Crookshank v. Burrell*, 18 Johns. 58, 9 Am. Dec. 187.

¹⁰ *Lee v. Griffin*, 1 B. & S. 272. See *supra*, § 54.

ing from those ordinarily made by the seller, the contract is not one of sale, but for work and labor;¹¹ and in other States it is held that in any case where the contract is for the sale of a commodity not in existence at the time, and which the seller is to manufacture or put in a condition to be delivered, the contract is one for work and labor.¹² It may be doubted whether the States which have adopted one or the other of these views under the Statute of Frauds would generally admit, as a consequence of their decisions, that the contracts in question should be treated as contracts for work and labor in such a sense that the price must be paid for the work rather than for the title to the property. It would be indeed be unfortunate if the strained construction which has been adopted in order to evade the Statute of Frauds should be applied in other classes of cases. It should rather be said, and probably would be, that though a contract may not be a contract of sale within the meaning of the Statute of Frauds, if it is contemplated that special work and labor by the seller shall go into it, it is, nevertheless, a contract of sale for other purposes. There can, in fact, be no doubt that the price is promised for the completed article, not for the work and materials which have gone into its manufacture. The reason, therefore, on which *Bement v. Smith*¹³ was rested cannot be supported. It is not generally adopted to-day,¹⁴ and the New York court has long ceased to rest the buyer's right to the price on this reason. A later New York decision¹⁵ laid down the rule broadly that any seller might at his option store or retain the property for the vendee and sue him for the entire purchase price. This doctrine is stated broadly as applicable not only to cases where the title has passed, but to cases where the buyer's default consists in not letting it pass.¹⁶ This decision and the rule laid down therein have been very influential in other jurisdictions, and cases which refuse to confine the seller to the difference between the contract price and the market price

¹¹ See *supra*, § 55.

¹² See *supra*, § 55.

¹³ 15 Wend. 493.

¹⁴ It was, however, followed in *Balentine v. Robinson*, 46 Pa. St. 177.

¹⁵ *Dustan v. McAndrew*, 44 N. Y. 72.

¹⁶ *Dustan v. McAndrew*, 44 N. Y. 72, 73, per Earl, C. See *supra*, § 555. The same statement is expressly applied to executory contracts of sale in *Ackerman v. Rubens*, 167 N. Y. 405, 60 N. E. 750, 82 Am. St. Rep. 728.

generally go back to this New York decision for their foundation. Of course, if the seller is entitled to the price, the buyer must be entitled to the goods. At what moment the title passes to him is not much discussed in the decisions, but the statement of the rule that the seller may store or retain the property for the buyer implies that when the seller deposits the goods with a third person for the buyer, or gives notice to the buyer by suing for the price or otherwise, that he himself is holding the goods for the buyer, either the title thereupon passes, or, what amounts to the same thing, the rights of the parties will subsequently be adjusted as if it had passed at that time.¹⁷ The remedy thus allowed is neither more nor less than specific performance of the contract. In a court of equity a contract for a purchase of land is enforced by a decree ordering the defendant to pay the price upon the transfer of title. In the case of a sale of goods the New York court and other courts following its rule allow the seller by force of his own expressed volition to make the buyer owner in spite of the buyer's dissent, and thereupon to recover the price.

§ 564. **Restriction of New York rule.**—Some States restrict the application of the New York doctrine to cases where the goods contracted for are of a peculiar kind, not readily salable on the market and as to which, therefore, a market price cannot readily be fixed.¹⁸

§ 565. **Rule often condemned, but just.**—The doctrine, whether in its broadest or most restricted form, at first sight strikes most legal theorists as both anomalous and erroneous. It is generally condemned by the text-writers.¹⁹ But the rule in its more limited

¹⁷ It would follow that thereafter the risk of loss must be upon the buyer, and this is borne out by the reasoning in *Neal v. Shewalter*, 5 Ind. App. 147, 154. The property in question in that case after having been wrongfully refused by the buyer was destroyed by fire. The court said the goods "remained the property of the [sellers]. They did not place themselves in the position of bailees for the [buyers]. Therefore, they would be entitled only to the difference between the contract price and

the market price at the time and place at which the [buyers] became in default."

¹⁸ *Kinkead v. Lynch*, 132 Fed. Rep. 692; *River Spinning Co. v. Atlantic Mills (R. I.)*, 155 Fed. Rep. 466; *Black River Lumber Co. v. Warner*, 93 Mo. 374, 6 S. W. 210; *Ozark Lumber Co. v. Chicago Lumber Co.*, 51 Mo. App. 555; *Gordon v. Norris*, 49 N. H. 376; *Smith v. Wheeler*, 7 Or. 49, 33 Am. Rep. 698; *Ballentine v. Robinson*, 46 Pa. St. 177.

form should commend itself. The very fact of the wide adoption of a doctrine which is, and is known to be, contrary to the rule previously prevailing shows that the new doctrine must commend itself to the sense of justice of the courts, and if the matter be looked at broadly as one of justice rather than one of technical remedies permitted by our law, it will be hard to find a reason why the seller of land should be allowed to force the buyer to take it and pay the price while the manufacturer of goods for a special and peculiar order should not be. In such a case the seller may urge the very reason which courts of equity have habitually given for allowing specific performance of contracts in regard to sales of land, the inadequacy of damages. It is true the remedy is not mutual. The buyer is without specific redress if the seller refuses to make the goods, or refuses to give them up when he has made them. But the buyer is much less in need of the remedy of specific performance in this kind of case than the seller. If the seller does not manufacture the goods, the buyer can ordinarily do better by getting some one else to manufacture them than he could do by trying to force the seller to manufacture against his will. If the goods are already manufactured, the seller will rarely be disposed to withhold them from the buyer. The very fact that the goods are of a special kind and have no general market value will preclude the seller from making any other disposition of them. Doubtless cases could be put, however, where the buyer is in need of specific performance, but the fact that he is allowed no such right either at law or in equity ought not to debar the seller from specific redress. The requirement of mutuality has perhaps been pushed to the extreme of a technicality in equity.

§ 566. **Rule thought anomalous, and opposed by some authorities.**

— It is not, however, chiefly because the rule is unjust that fault is found with it; it is rather because it seems at variance with established legal principles. It seems anomalous that the seller should be able to force title upon the buyer by simply electing to do so. This is probably the reason why many jurisdictions reject the New York doctrine and follow the English law.²⁰ Is it,

²⁰ Mechem, Sales, § 1394; Burdick, Sales (2d ed.), § 364; Tiffany, Sales (1st ed.), § 103 (compare 2d ed.),

§ 112). Benjamin does not refer to the doctrine.

²⁰ Grier v. Simpson, 8 Houst.

however, so anomalous as is sometimes supposed for one party to an obligation to enforce it specifically against the other without the aid of a court of equity? Is it not constantly done in cases where rescission of title to personal property is allowed as a remedy?

§ 567. **Defrauded seller may specifically enforce his rights.**—

If a buyer obtains by fraud the seller's assent to transfer the ownership of goods, there is no doubt that the buyer gains title thereby.²¹ Yet there is no more doubt that the seller may regain his title by his own election so to do. Not only may he bring trover,²² but he may also bring replevin.²³ And if the seller can regain possession of the goods peaceably without the aid of a

7: Deere Co. v. Gorman, 9 Kans. App. 675, 89 Pac. 177; Singer Mfg. Co. v. Cheney, 21 Ky. L. Rep. 550, 51 S. W. 813; Moody v. Brown, 34 Me. 107, 56 Am. Dec. 640; Tufts v. Grewer, 83 Me. 407; Greenleaf v. Gallagher, 93 Me. 549, 45 Atl. 829, 74 Am. St. Rep. 371; Greenleaf v. Hamilton, 94 Me. 118, 46 Atl. 798; Tufts v. Bennett, 163 Mass. 398, 40 N. E. 172; McCormick Machine Co. v. Balfany, 78 Minn. 370, 81 N. W. 10, 79 Am. St. Rep. 393; Funke v. Allen, 51 Neb. 407, 74 N. W. 832, 69 Am. St. Rep. 716; Backes v. Schlick, Neb. , 117 N. W. 707; Unexcelled Fire Works Co. v. Polites, 130 Pa. St. 536, 18 Atl. 1058, 17 Am. St. Rep. 788; Jones v. Jennings, 168 Pa. St. 493, 32 Atl. 51; Puritan Coke Co. v. Clark, 204 Pa. St. 556, 54 Atl. 350 (but see Balcantine v. Robinson, 46 Pa. St. 177); Gammage v. Alexander, 14 Tex. 414; Tufts v. Lawrence, 77 Tex. 526, 14 S. W. 165; Rider v. Kelley, 32 Vt. 268, 76 Am. Dec. 176; American Hide & Leather Co. v. Chalkley, 101 Va. 458, 463, 4 S. E. 705. See also Morris v. Cohn, 55 Ark. 401, 17 S. W. 342; Dowagiac Mfg. Co. v. Mahon, 13 N. Dak. 516, 101 N. W. 903.

²¹ Thus if the buyer resells the goods to a purchaser for value without notice, the latter gets an indefeasible title. See *infra*, § 650. But if the buyer had acquired merely possession by fraud, not even a purchaser for value without notice could get title. Lightman v. Boyd, 132 Ala. 618, 32 So. 714; Baehr v. Clark, 83 Iowa, 313, 49 N. W. 840, 13 L. R. A. 717; Rohrbough v. Leopold, 68 Tex. 254, 4 S. W. 460. So the seller may "affirm" the sale and sue for the agreed price—a remedy which proceeds upon the assumption that title is in the buyer. See Schwartz v. McCloskey, 156 Pa. St. 258, 264, 27 Atl. 300.

²² Atlas Shoe Co. v. Bechard, 102 Me. 197, 66 Atl. 390, 10 L. R. A. (N. S.) 245; Thurston v. Blanchard, 22 Pick. 18, 33 Am. Dec. 700; Moody v. Drown, 58 N. H. 45; Baird v. Howard, 51 Ohio St. 57, 36 N. E. 732, 22 L. R. A. 846, 46 Am. St. Rep. 550. In Atlas Shoe Co. v. Bechard, the action was maintained against the fraudulent buyer's assignee for creditors.

²³ John A. Farwell Co. v. Hilton, 84 Fed. Rep. 293; Wendling Lumber Co. v. Glenwood Lumber Co., Cal.

court he may do so, and thereby is revested with title.²⁴ This is nothing else than specific enforcement of the obligation of the fraudulent buyer to return the title wrongfully acquired by him. Moreover the seller must, as a condition of recovery, return to the buyer whatever was paid for the goods.²⁵ Generally the buyer will refuse to receive it, and the seller may then tender it and recover as if he had actually returned it.²⁶ Let it be supposed the price was itself in the form of a chattel. When the defrauded seller tenders back this chattel, and the tender is refused, and the seller thereupon is allowed to recover what he had parted with or its full value, the relief necessarily proceeds upon the assumption that the seller has restored title to the buyer in the chattel given as the price, without the buyer's assent.²⁷ If the property in question is land and the buyer has fraudulently acquired a conveyance, the seller must go into equity in order to get a reconveyance, but in the case of a sale of goods he can regain title to what he has parted with and revest the buyer with title to the consideration without this procedure.

§ 568. **So in cases of mistake, duress, infancy, or insanity.**—The same rules of law apply where rescission of title is allowed for other reasons than for fraud — as mistake, duress, infancy, or

, 95 Pac. 1029; *Cox Shoe Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316; *Hall v. Gilmore*, 40 Me. 578; *Skinner v. Michigan Hoop Co.*, 119 Mich. 467, 78 N. W. 547, 75 Am. St. Rep. 413; *Field v. Morse*, 54 Neb. 789, 75 N. W. 58; *Baker v. McDonald*, 74 Neb. 595, 104 N. W. 923, 1 L. R. A. (N. S.) 474; *Sisson v. Hill*, 18 R. I. 212, 26 Atl. 196, 21 L. R. A. 206.

²⁴ *Wheelden v. Lowell*, 50 Me. 499. See also *Smith v. Hale*, 158 Mass. 178, 33 N. E. 493, 35 Am. St. Rep. 485, where on the assertion by the buyer of a warranted buggy of a right of rescission for breach of warranty, he was held entitled to take without breach of the peace from the seller's land property given by the buyer as the price of the buggy.

²⁵ Save in exceptional cases. See 21 L. R. A. 206, note, and 1 L. R. A. (N. S.) 474.

²⁶ *Barnett v. Speir*, 93 Ga. 762, 21 S. E. 168; *Porter v. Leyhe*, 67 Mo. App. 540. See also *Milliken v. Skillings*, 89 Me. 180, 36 Atl. 77.

²⁷ In *Nolan v. Jones*, 53 Iowa, 387, 5 N. W. 572, one party to an exchange, induced by fraud, was allowed replevin to recover his goods. The court says that because of the fraud the transaction was "void," but also says the plaintiff might have "affirmed" it. To the same effect is *Porter v. Leyhe*, 67 Mo. App. 540. Compare *Barnett v. Speir*, 93 Ga. 762, 21 S. E. 168; *Haase v. Mitchell*, 58 Ind. 213, also cases of exchange.

insanity.²⁸ So if an infant pleads his infancy in order to prevent recovery of the price of goods, the seller may replevy the goods.²⁹ This necessarily means that the seller by his own election enforces specifically the obligation of the infant to return the goods which he will not pay for. To say that the infant's plea is an assent to retransfer the goods is to state a fiction. It is immaterial whether the infant assents or expressly dissents.

§ 569. **So in case of unpaid seller.**—The remedies allowed to an unpaid seller after the property has passed to the buyer, other than the right to recover the price, illustrate the same principle. The seller may by his own act take title out of the buyer and revest it either in himself or in a third person to whom a resale of the goods is made. The English law formerly denied this,³⁰ but the Sale of Goods Act now allows at least the right of resale,³¹ and the right of resale necessarily involves a transfer of title without the assent of the owner of the property. It does not help the matter to imply a fictitious agency calling the seller the agent of the buyer to resell. In this country the seller's right, not simply to resell the goods, but to rescind the transfer of title and take title back to himself, is well recognized.³² The seller in thus acting is foreclosing his lien. In case he chooses to resell on account of the buyer it is a foreclosure by sale. In case he elects to retake title to himself it is a strict foreclosure. In the case of land a bill in equity might be necessary. In the case of goods the result is reached more summarily.

§ 570. **Rescission of title by buyer.**—In the converse case, where the buyer seeks to rescind a transfer of title to him, whether for fraud,³³ mistake,³⁴ or breach of warranty,³⁵ the same rule again prevails. The buyer may, if he chooses, recover the price that he has paid, and is not obliged to sue for the difference in value between the goods which he has acquired and the price which he paid. He recovers the price in full if he elects to do so. This

²⁸ *Smith v. Ryan*, 191 N. Y. 452, 84 N. E. 402. See, however, as to infancy, *supra*, § 15.

²⁹ *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105.

³⁰ *Martindale v. Smith*, 1 Q. B. 389; *Page v. Cowasjee Eduljee*, L. R. 1 P. C. 127.

³¹ See *supra*, § 544.

³² See *supra*, §§ 545, 555.

³³ See *infra*, § 647.

³⁴ See *infra*, § 656.

³⁵ See *infra*, § 600.

election necessarily operates as a transfer of the title back to the seller. The doctrine which permits one whose goods have been converted to "waive the tort" and sue for the value of the goods, or the price for which the converter has sold them, is another case where a plaintiff transfers title by his own action, without any assent of the defendant.³⁶ Indeed, even where trover is brought for the conversion, it is impossible to justify the existing rule of damages which gives the injured party the full value of the goods except on the theory that the title to the goods is transferred to the buyer. If the plaintiff were regarded as continuing the owner of the goods, he should recover damages equal in amount only to the loss which he suffered by the deprivation of possession of the property. If the goods were destroyed, of course this would equal their value; but if they still remained in existence, it might well be a comparatively small amount.³⁷

§ 571. **Conditional sales.**—A case which presents a still closer analogy to that primarily under discussion arises in the law of conditional sales. As will be seen hereafter,³⁸ in such sales the seller may recover the full price, though the title to the goods has not been transferred. It is further generally held that if the seller sues for the price, he cannot thereafter reclaim the goods, although according to the contract the title was to remain in the seller until the price was paid.³⁹ Thus the seller loses a title which by the contract was still to remain in him, and the buyer

³⁶ See Keener, *Quasi-Contracts*, 159.

³⁷ It is actually held that the property in the goods passes to the defendant either when judgment is given for the plaintiff or when the execution upon the judgment is satisfied. See *Miller v. Hyde*, 161 Mass. 472. 37 N. E. 760, 42 Am. St. Rep. 424. So late a time as either of these days seems somewhat inconsistent with the rule of damages, because in order to justify full damages it would seem on theory that the plaintiff must have had a cause of action justifying such damages at the time the action was brought, an assumption which can only be sustained as a universal rule on the theory that the

property had passed to the defendant at that time. If we take the time of transfer, however, to be the later period when judgment is rendered or execution satisfied, there is still a case where the ownership is transferred from one party to the other without the assent of both parties and without the aid of a court of equity.

³⁸ *Infra*, § 579.

³⁹ *Parke, etc., Co. v. White River Lumber Co.*, 101 Cal. 37, 35 Pac. 442; *Holt Mfg. Co. v. Ewing*, 109 Cal. 353, 42 Pac. 435; *Crompton v. Beach*, 62 Conn. 25, 25 Atl. 446, 18 L. R. A. 187, 36 Am. St. Rep. 323; *Smith v. Gilmore*, 7 D. C. App. 192; *Richards*

acquires it when and because the seller elects to sue for the price. A further illustration is found if the seller under a conditional sale attaches or levies execution upon the property sold. Even in jurisdictions which do not regard the mere act of suing for the price a binding election, such a seizure debars the seller from thereafter reclaiming the goods. In effect it transfers the property to the buyer.⁴⁰ The same rule is applied in the case of

r. Schreiber, 98 Iowa, 422, 67 N. W. 569; *Bailey v. Hervey*, 135 Mass. 172; *Whitney v. Abbott*, 191 Mass. 59, 77 N. E. 524; *Button v. Trader*, 75 Mich. 295, 42 N. W. 834; *Alden v. Dyer*, 92 Minn. 134, 99 N. W. 784; *Frederickson v. Schmittroh*, Neb. , 112 N. W. 564; *Dowagiac Mfg. Co. v. Mahon*, 13 N. Dak. 516, 101 N. W. 903, 905. See also *Smith v. Barber*, 153 Ind. 322, 53 N. E. 1014. These decisions seem erroneous and are opposed to the following: *Forbes Piano Co. v. Wilson*, 144 Ala. 586, 39 So. 645; *Jones v. Snider*, 99 Ga. 276, 25 S. E. 668; *Dederick v. Wolfe*, 68 Miss. 500, 9 So. 350, 24 Am. St. Rep. 283; *McPherson v. Acme Lumber Co.*, 70 Miss. 649, 12 So. 857; *Campbell Press Co. v. Rockaway Pub. Co.*, 56 N. J. L. 676, 29 Atl. 681, 44 Am. St. Rep. 410. See also *Thomason v. Lewis*, 103 Ala. 426, 15 So. 830; *Fuller v. Byrne*, 102 Mich. 461, 60 N. W. 980; *Matthews v. Lucia*, 55 Vt. 308. The error in the decisions first cited is this — the reservation of title by the seller is for the purpose of securing the price. The transaction is in its essence the same as a chattel mortgage given by the buyer on the purchased property to secure the price. See *supra*, § 331 *et seq.* Just as the mortgagee may sue for the price and also foreclose his mortgage upon the property, so the seller in a conditional sale should be allowed to sue for the price and also reclaim the property, not as his own,

but for the purpose of foreclosing it; that is — for the purpose of endeavoring to realize from it the full amount due him. Of course, as in the case of a mortgage, the seller should be restricted to satisfaction of his claim with interest. If, therefore, judgment for the price is satisfied in part, this should be credited, and any excess over the amount due, which may be acquired by seizing and disposing of the goods, should be returned to the buyer. Though the cases cited at the beginning of this note may be erroneous for the reason just given, the error does not relate to the matter for which the cases are here cited; namely, the power of a court of law to treat an election on the part of the plaintiff as effectual to transfer title to property to the defendant. Suing for the earlier instalments of the price would probably nowhere be held inconsistent with a subsequent claim to resume possession of the goods. *Haynes v. Temple*, 198 Mass. 372, 84 N. E. 467.

⁴⁰*Tanner Engine Co. v. Hall*, 89 Ala. 628, 7 So. 187; *Montgomery Iron Works v. Smith*, 98 Ala. 664, 13 So. 525; *Fuller v. Fames*, 108 Ala. 464, 19 So. 366; *Albright v. Meredith*, 58 Ohio St. 194, 50 N. E. 719. But in *Greenwald v. Tinsley*, Miss. , 42 So. 89, it was held that the acceptance by the seller of a mortgage by the buyer of the goods conditionally sold did not waive the title reserved in a prior conditional sale.

chattel mortgages. Even in jurisdictions where it is held that a mortgage vests a legal title in the mortgagee, attachment of the goods by him deprives him of all rights of ownership in the property.⁴¹

§ 572. **Executory contracts.**—A somewhat analogous doctrine of self-help exists in the law of executory contracts. If one party to such contract is guilty of a material breach, the other party may elect to rescind it. Courts have sometimes endeavored to make out mutual assent by calling the breach or repudiation of the wrongdoer in such a case the offer to rescind; but this is an obvious fiction. In truth, the wrongdoer is under an obligation to permit the rescission of the contract, and the injured party is allowed to enforce the obligation by treating the contract as rescinded without the aid of a court.⁴²

§ 573. **Summary of reasons for allowing seller to recover price.**—The illustrations which have been given show that the allowance of what is in effect specific performance of an obligation, or the transfer of ownership at the election of one party without the assent of the other without resort to a court of equity, is not unusual in our law, and most persons would hesitate to say that in these illustrative cases the plaintiff should be denied the specific execution of the obligation due him. Courts of equity have confined the right of specific performance of affirmative obligations in regard to personal property so narrowly that either injustice must be done or the necessary remedy must be sought in another way. Indeed, it may be questioned whether the remedy of a bill in equity would be so satisfactory in the case of ordinary sales of goods as the shorter cut afforded by courts of law. If the proper equitable remedy cannot be adequately reproduced by the procedure of a court of law, it is doubtless wrong for it to invade the province of equity. Likewise the results which equity with its elastic decrees reaches in analogous cases must be taken as the standard of permissible relief, and it is only to reach such results

⁴¹ *Libby v. Cushman*, 29 Me. 429; *Whitney v. Farrar*, 51 Me. 418; *Evans v. Warren*, 122 Mass. 303; *Dyckman v. Sevatson*, 39 Minn. 132, 39 N. W. 73; *Haynes v. Sanborn*, 45 N. H. 429.

⁴² See *Wald's Pollock, Contracts* (3d ed.), 339 *et seq.* In France and Louisiana the injured party brings an action in court for rescission of the contract.

by the judgment of a court of law or by permitting an injured person to work out his own redress, that relief in these summary ways should be allowed. But where the same result can be reached at law as in equity, the court of law not only may invade the province of equity, but it should do so if the rule of equity is more just. Especially should it do so if the court of equity for technical reasons refuses to take jurisdiction of the case, and the court of law must give the only available remedy. Where a seller has prepared goods of a special and peculiar kind under a contract and the buyer wrongfully refuses to take them, this reasoning is particularly applicable. Damages are not an adequate remedy for the seller. He does not want the goods himself and he cannot resell them readily, yet they are not without value, and if he is confined to the difference between their value and the contract price, a substantial diminution from the price would be made. Further, a court of equity will not take jurisdiction of the case. Though there is the same reason for doing so that exists in the case of a contract for the sale of land, so far at least as the seller's side of the bargain is concerned, courts of equity have been indisposed to extend their jurisdiction to such cases.⁴³

§ 574. **The civil law.**— It is worth noticing that in the civil law the buyer is entitled to recover the full price when the seller is in default. By the classical civil law the property never passed until delivery of the goods.⁴⁴ So that in any case to allow the buyer to recover the full price when the seller refused to accept delivery necessarily involved recovery of the price by one who had not transferred the property in the goods.⁴⁵ The Roman

⁴³ It should perhaps be said, in order to prevent misapprehension, that the rule contended for is only applicable where the contract has been broken by the buyer after the goods have been procured or manufactured. If the buyer repudiates his contract or countermands his order before the goods have been manufactured or procured by the seller, he ought not to be allowed, and generally is not allowed, to enhance the damage of the buyer by manufacturing or

procuring the goods. See *infra*, §§ 588, 589.

⁴⁴ Moyle, *Contract of Sale in the Civil Law*, 110.

⁴⁵ Pothier, *Contract of Sale*, § 280: "When the contract contains no provision for credit, the seller may immediately commence this action (*actio venditi*) against the buyer upon making the offer which he ought to do to deliver the thing, provided it is not already delivered. If after the contract the thing ceases, without the

Law, indeed, went further than this. Even though the goods had been destroyed by accident before delivery, and, therefore, before transfer of the property, the risk was thrown on the buyer, and the seller was allowed to recover the price.⁴⁶ It may, therefore, be urged that the Roman Law virtually made the promises of buyer and seller independent, and that as such a doctrine is not only clearly inconsistent with our law, but also with fundamental principles of justice, no desirable suggestion or analogy can be derived from that system of jurisprudence. The rule of the classical Roman Law in regard to risk is, however, generally abolished to-day in Europe;⁴⁷ and the recognition of the dependency of the promises in a bilateral contract is as completely recognized, perhaps more completely recognized, on the Continent of Europe than in England.⁴⁸ But in spite of this, the rule in regard to the recovery of the price persists. This is true in France.⁴⁹ So the old German Commercial Code, which was in force not simply in Germany but also in Austria, and is still in force in the latter country, provides: "If the buyer is in default in accepting the goods, the seller may deposit them, at the risk and expense of the buyer, in a public warehouse or otherwise in a safe manner."⁵⁰ The new Commercial Code in force throughout the German Empire since 1897 copies this provision.⁵¹ Even in Scotland the same rule prevails to-day, for the rule of the civil law is preserved in the Sale of Goods Act.⁵²

fault of the seller, to be in a situation to be delivered, the seller is not thereby deprived of his right of commencing his action for the payment of the price. But while the seller is in default in delivering the thing sold, he cannot demand the price of it.

⁴⁶ See 9 Harv. L. Rev. 72.

⁴⁷ See 9 Harv. L. Rev. 76.

⁴⁸ See 13 Harv. L. Rev. 80.

⁴⁹ Code Civil, Arts. 1138, 1652; 2 Troplong, note 603; Massé et Vergé, note 10.

⁵⁰ Handelsgesetzbuch, § 343.

⁵¹ Handelsgesetzbuch of 1897, § 373.

In commenting upon this provision Lehmann and Ring say in their Kom-

mentar zum Bürgerlichen Gesetzbuche und seinen Nebengesetze (Berlin, 1901), ii, 101: "Since the seller is no longer responsible for the goods, he acquires the right to the price and must only make allowance for what he saves in consequence of being freed from performance or what he acquires or wrongfully fails to acquire through other application of his labor. He can also recover from the buyer indemnity for the necessary expenses for the care and custody of the goods. He must even be allowed a claim for storage if he is a merchant."

⁵² "Section 49. (3) Nothing in this section shall prejudice the right of

§ 575. **Recovery of price payable on day certain.**—The second subsection of the English statutory provision relating to the recovery of the price provides that the price may be recovered where it payable on a day certain, irrespective of delivery, although the property in the goods has not passed. It is a matter of construction in every case whether the price is payable on a day certain, irrespective of delivery. The contract will rarely so provide in terms,⁵³ and the proper construction must generally depend upon the relative time fixed by the contract for performance on one side or the other. The rules of construction applicable here are the same which are applied to contracts generally. Contracts to sell, indeed, present a typical case for the application of the doctrines of implied conditions. Unless there is ground for a contrary supposition, courts will assume that the payment of the price and the delivery of the goods were intended to be concurrent acts, and the obligation of each party to perform will be dependent upon the simultaneous performance by the other party.⁵⁴ Even though a date be fixed for the performance on one side, and no date fixed for the counter-performance, the same principle will be applied unless there is something in the contract or surrounding circumstances to show that the performance for which the time was not fixed could not in its nature be given, or was not intended to be given on the same day as the performance for which the time

the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be." Chalmers, in his annotation of the section, quotes as the authority for this provision, *Mercantile Law Commission*, 1855 (2d report), p. 47: "The seller may sue the purchaser for the price and interest, whether the goods sold are specified or not, provided goods according to the contract have been tendered to the purchaser."

⁵³ *In Krebs Hop Co. v. Livesley*, Or. , 92 Pac. 1084, a contract for the sale of hops provided for an advance payment of the price and the seller was held entitled to sue for it

prior to the time fixed for delivery of the goods.

⁵⁴ *Cole v. Swanston*, 1 Cal. 51, 52 Am. Dec. 288; *Merrill Furniture Co. v. Hill*, 87 Me. 17, 32 Atl. 712; *Haskins v. Warren*, 115 Mass. 514, 533; *Southwestern Freight Co. v. Stanard*, 44 Mo. 71, 100 Am. Dec. 255; *Whitman Agricultural Assn. v. National Assn.*, 45 Mo. App. 90; *Lamont v. La Fevre*, 96 Mich. 175, 55 N. W. 687; *Walter v. Reed*, 34 Neb. 544, 52 N. W. 682; *Chapman v. Lathrop*, 6 Cow. 110, 16 Am. Dec. 433; *Wabash Elevator Co. v. First Nat. Bank*, 23 Ohio St. 311; *Cleveland v. Pearl*, 63 Vt. 127, 21 Atl. 261, 25 Am. St. Rep. 748. See also *supra*, §§ 342, 448.

was fixed.⁵⁵ If, however, different times are fixed for the payment of the price and the delivery of the goods, the general rule, undoubtedly, is that adopted from Lord Holt's opinion in *Thorp v. Thorp*,⁵⁶ that the act which is by the contract to be performed first is absolutely due on that day, while the performance which is to take place on a later day is not due unless as a condition precedent the prior performance has been rendered. Generally, if performance by either buyer or seller is to precede the performance of the other, it is the seller's performance that will come first. It is common for sellers to give credit for the price. It is not common for buyers to give credit for the goods. It may, however, happen in a particular case that the buyer promises to pay the price before acquiring the ownership or even the possession of the goods. In such a case the provisions of section 63 (2) are applicable, and the seller is by the terms of the contract entitled to recover the price.

§ 576. **Prospective inability to pay.**—Apparently under the English statute this right to recover the price would not depend in any way upon the prospective performance, or failure to perform, of the seller. There can be no doubt that by agreeing to pay the price before the transfer of the goods the buyer agrees to take the risk of the seller's subsequent performance under ordinary circumstances. Let it be supposed, however, that it becomes evident, before the time for payment of the price, that the seller will not perform when the day comes for the delivery of the goods. It is a manifest injustice if the buyer must pay the price knowing that all he will get is a right of action against the seller. It is true the buyer has agreed positively to pay on the day, but he made that agreement on the assumption that the seller was going to perform subsequently, an assumption which

⁵⁵ *Morton v. Lamb*, 7 T. R. 125; *Brennan v. Ford*, 46 Cal. 7, 16; *Sanborn v. Shipherd*, 59 Minn. 144, 60 N. W. 1089; *Dunham v. Pettee*, 8 N. Y. 508.

⁵⁶ 12 Mod. 455. Lord Holt was considering only when the word "for" or its equivalent made a promise conditional, but the rules he laid down

were adopted in *Serjeant Williams' notes to Pordage v. Cole*, 1 Wms. Saund. 319l, as applicable to all mutual promises irrespective of the word "for." Lord Mansfield's decision in *Kingston v. Preston*, 2 Dougl. 664, 668, clearly warranted this extension.

is no longer justified. The cases, therefore, rightly excuse the buyer from his obligation to pay the price under these circumstances. The ground of the excuse is, in substance, failure of consideration, although strictly the consideration of the buyer's promise is not the seller's performance but the seller's promise. The parties contemplate a double exchange. They exchange promises when the contract is made and they plan to exchange performances later. The fact that the performances are not to be simultaneous does not alter the fact that one performance is regarded as the price or exchange of the other. Accordingly there is in justice as good reason for excusing the party from whom the prior performance is due, when he will not get subsequent performance from the other party, as there is for excusing the latter party when default of his cocontractor has already taken place. Prospective failure to receive the promised exchange, if the prospect is sufficiently certain, therefore, should be, and in fact is, held by the courts to be as good a defense as a failure which has actually occurred.

§ 577. *Illustrative cases, insolvency or transfer of property.*—Several classes of cases illustrate this. If the party from whom the second performance is due becomes insolvent, this is an excuse to the other party.⁵⁷ So a voluntary transfer to a third person of the property to which the contract relates is an excuse, and rightly

⁵⁷ *Ex parte* Chalmers, L. R. 8 Ch. 289; Bloomer v. Bernstein, L. R. 9 C. P. 588; Morgan v. Bain, L. R. 10 C. P. 15; Mess v. Duffus, 6 Comm. Cas. 165; *Re* Phoenix Bessemer Steel Co., 4 Ch. D. 108; Robertson v. Davenport, 27 Ala. 574; Brassel v. Troxel, 68 Ill. App. 131; Rappleye v. Racine Seeder Co., 79 Iowa, 220. 44 N. W. 363, 7 L. R. A. 139; Hobbs v. Columbia Falls Co., 157 Mass. 109, 31 N. E. 756; Lennox v. Murphy, 171 Mass. 370, 373, 50 N. E. 644; Pardee v. Kanady, 100 N. Y. 121, 2 N. E. 885; Vandegrift v. Cowles Engineering Co., 161 N. Y. 435, 55 N. E. 941, 48 L. R. A. 685; Diem v. Koblitz, 49 Ohio St. 41, 29 N. E. 1124, 34 Am.

St. Rep. 531; Dougherty Bros. v. Central Bank, 93 Pa. St. 227, 39 Am. Rep. 750; Lancaster Bank v. Huver, 114 Pa. St. 216, 6 Atl. 141. See also Sale of Goods Act, §§ 18, 41. Compare *Ex parte* Pollard, 2 Low. 411; Stokes v. Baars, 18 Fla. 656; Chemical Nat. Bank v. World's Columbian Exposition, 170 Ill. 82, 48 N. E. 331; Jewett Pub. Co. v. Butler, 159 Mass. 517, 34 N. E. 1087; Bank Commissioners v. New Hampshire Trust Co., 69 N. H. 621, 44 Atl. 130. In all these cases the seller's performance was first due, but there can be no difference in result when the buyer's performance is first due.

inasmuch as this indicates generally both an inability and an unwillingness to perform.⁵⁸ It has been suggested in some cases that the seller might regain the property before the time for performance and, therefore, the buyer should not be excused.⁵⁹ It is always a question of fact what the prospects for the reacquisition of the property by the seller are, but in an ordinary case it would seem that the disposition of the property by the seller both indicates a repudiation of his obligation, and also puts him in a position where, even though willing to perform subsequently, he could not do so unless the third person who bought the property consented to resell it. This is a contingency not within the original contemplation of the parties and the risk of which the buyer ought not to be compelled to run.

§ 578. **Repudiation.**— For the same reason any repudiation on the part of the party from whom the subsequent performance is due will excuse the party from whom the prior performance is due.⁶⁰ The whole doctrine of allowing suit on a contract before the time for performance has come, because of repudiation, was based in the leading decision on the necessity of giving the innocent party an excuse for not performing or preparing to perform his promise.⁶¹ Though the reason given does not warrant the conclusion reached that the innocent party must have an immediate right of action, there can be no doubt of the correctness of the reason itself.⁶² Another illustration of the fact that the liability of the party who is to perform first is not so absolute as to be wholly independent of anything which the other party to the contract may do is shown by the fact that if the party from

⁵⁸ *Fort Payne v. Webster*, 163 Mass. 134, 39 N. E. 786; *Meyers v. Markham*, 90 Minn. 230, 96 N. W. 335, 787; *James v. Burchell*, 82 N. Y. 108; *Brodhead v. Reinbold*, 200 Pa. St. 618, 50 Atl. 229, 86 Am. St. Rep. 735. See also *Leonard v. Bates*, 1 Blackf. 172; *Russ Lumber Co. v. Muscupiabe Co.*, 120 Cal. 521, 52 Pac. 995, 65 Am. St. Rep. 186.

⁵⁹ *Garberino v. Roberts*, 109 Cal. 125, 41 Pac. 857; *Webb v. Stephen-*

son, 11 Wash. 342, 39 Pac. 952. See also *Joyce v. Shafer*, 97 Cal. 335, 32 Pac. 320; *Shively v. Semi-Tropic Co.*, 99 Cal. 259, 33 Pac. 848. These cases, like those in the preceding note, relate to real estate.

⁶⁰ *Ripley v. McClure*, 4 Ex. 345.

⁶¹ *Hochster v. De La Tour*, 2 E. & B. 678.

⁶² *Wald's Pollock, Contracts* (3d ed.), 361.

whom the prior performance is due does not in fact perform until after the time when performance by the other party is due, his liability immediately becomes conditional on the performance of the later promise. The commonest illustration of this, perhaps, is where goods are sold on credit, but delivery has not been made when the term of credit expires. In such a case the seller's lien revives, or, in other words, the obligation of the seller to deliver becomes conditional on the performance by the buyer of his promise to pay the price.⁶³ This application of the principle is universally admitted, and by the weight of modern authority, in this country at least, the broader principle is laid down that wherever suit is not brought for the earlier performance due under a contract until after the time for the later performance the defendant's liability becomes conditional on performances or tender of performance by the plaintiff.⁶⁴

§ 579. **Conditional sales.**—Conditional sales, so-called, present the only class of cases where it is at all usual for the buyer to agree to pay the price before he acquires title to the property. In such sales the practice is for the buyer to be given possession of the thing purchased, the seller retaining title, however, until the price is paid. Sometimes none of the price is paid at the time the goods are delivered; more frequently an instalment of the price is payable then and the balance of the price is payable either in instalments or as a whole at a later time. Such a transaction is in its essence analogous to a transfer of title to the buyer, and a mortgage back by the buyer to the seller in order to secure the price. If the bargain related to real estate, it would probably take that form. When it relates to chattels, largely, perhaps because the value of the subject-matter of the bargain is not great enough to make desirable formalities usual with real estate, the parties, as a short cut to reach the same result, generally provide that the seller shall retain title. He retains it, however, merely as security. The beneficial interest in the property, so far as is not inconsistent with the security of the seller, is vested in the buyer.⁶⁵ In conditional sales the buyer, relying on his possession

⁶³ See *supra*, § 507.

⁶⁵ See *supra*, §§ 330–337.

⁶⁴ See *supra*, § 507.

of the goods as sufficient to secure him for such portion of the price as he may pay before the property passes to him, is content to pay part of the price in advance. He does not, however, in any common case pay any part of the price until delivery. For this reason the wording of the English Sales of Goods Act is unfortunate. The act apparently fails to provide for the case which it is intended to cover.⁶⁶ In this country there seems to be no reason to doubt that the seller, if he has delivered the goods to the buyer, may recover the full price.⁶⁷ In many jurisdictions the seller is allowed to recover the price, even though the subject-matter of the sale has been accidentally destroyed.⁶⁸ Such decisions necessarily involve the seller's right to recover the price irrespective of transfer of the property. The contrary decisions contain, however, no implication that if the goods had not been destroyed the seller could not recover the instalments of the price payable before the time for transferring the property. Of course it is entirely possible to make the price payable irrespective of delivery as well as of transfer of the property,⁶⁹ but such a contract must be unusual.⁷⁰ It is generally provided in contracts of conditional sale that on default of the buyer the seller may reclaim possession of the goods, and even in the absence of such a provision it has

⁶⁶ Section 49 (2) allows a recovery of the price where it "is payable on a day certain, irrespective of delivery * * * although the property in the goods has not passed." The insertion of the words "irrespective of delivery" gives the subsection an inadequate effect, and these words seem somewhat inconsistent with the end of the sentence quoted. In conditional sales the seller who has delivered possession should certainly be allowed to recover the full price, because by the terms of the bargain the price is to be paid irrespective of the transfer of title; but the price is not to be paid irrespective of delivery, and under the English statute it is hard to see how the seller could recover more than the difference be-

tween the contract price and the market price for the goods.

⁶⁷ *McRae v. Merrifield*, 48 Ark. 160, 2 S. W. 780; *Morris v. Cohn*, 55 Ark. 401, 18 S. W. 384, 385; *Smith v. Aldrich*, 180 Mass. 367, 62 N. E. 381; *Whitney v. Abbott*, 191 Mass. 59, 77 N. E. 524; *Haynes v. Temple*, 198 Mass. 372, 84 N. E. 467. As Massachusetts does not permit the seller, generally, to recover the full price until title has passed, the decisions of that State have peculiar force. See also *Tufts v. Poness*, 32 Ont. 51.

⁶⁸ See *supra*, § 335.

⁶⁹ See *Gray v. Booth*, 64 N. Y. App. Div. 231.

⁷⁰ See *Morris v. Cohn*, 55 Ark. 401, 18 S. W. 384.

been held to be implied.⁷¹ If the seller exercises his right to reclaim the goods, it is generally held an election to rescind the contract, and thereafter an action for the price or any unsatisfied balance of it, is not allowed.⁷² It is obviously possible, however, for the seller to resume possession of the goods without thereby rescinding the contract. He may, it would seem, resume possession without forfeiting or claiming to forfeit the buyer's right to pay any unsatisfied portion of the price and thereby perfect his ownership, but merely to increase his own security.⁷³ But the mere reclaiming of possession seems generally regarded as an election to rescind; and it seems rightly, for it is generally a correct inference from the reclaiming of possession by the seller that the buyer's interest in the property is to be terminated. But that this involves a termination of the buyer's obligation to pay the price does not follow. The consideration for the promise to pay was the conditional right given the buyer, and "when a man acts in consideration of a conditional promise, if he gets the promise he gets all that he is entitled to by his act, and if, as events turn out, the condition is not satisfied, and the promise calls for no performance, there is no failure of consideration."⁷⁴ The only reason for qualifying this principle is the equitable principle which forbids a forfeiture. Some courts have further held that as the seller has reclaimed the goods there is failure

⁷¹ *Ryan v. Wayson*, 108 Mich. 519, 66 N. W. 370.

⁷² *Lamond v. Davall*, 9 Q. B. 1030; *Dowdell v. Empire Furniture Co.*, 84 Ala. 316, 318, 4 So. 31; *Aultman v. Fletcher*, 110 Ala. 452, 18 So. 215; *Rodgers v. Bachman*, 109 Cal. 552, 42 Pac. 448; *Green v. Sinkers*, 135 Ind. 434, 35 N. E. 262; *Perkins v. Grob-ben*, 116 Mich. 172, 74 N. W. 469, 72 Am. St. Rep. 512; *McBryan v. Uni-versal Elevator Co.*, 130 Mich. 111, 89 N. W. 683; *Minneapolis Works v. Hally*, 27 Minn. 495, 8 N. W. 597; *Aultman v. Olson*, 43 Minn. 409, 45 N. W. 852 (compare *Third Bank v. Armstrong*, 25 Minn. 530); *Earle v. Robinson*, 91 Hun. 363; *affd.*, without opinion, 157 N. Y. 683, 51 N. E. 1090; *White v. Gray's Sons*, 96 N. Y. App.

Div. 154; *Edmead v. Anderson*, 118 N. Y. App. Div. 16; *Campbell Press Co. v. Hickok*, 140 Pa. St. 290, 21 Atl. 362; *Seanor v. McLaughlin*, 165 Pa. St. 150, 30 Atl. 717; *Kelley Springfield Roller Co. v. Schlimme*, 220 Pa. St. 413, 69 Atl. 867; *Tufts v. Brace*, 103 Wis. 341, 79 N. W. 414; *Sawyer v. Pringle*, 18 Ont. App. 218.

⁷³ *Miller v. Steen*, 30 Cal. 402, 89 Am. Dec. 124; *Tufts v. D'Arcambal*, 85 Mich. 185, 190, 48 N. W. 497, 12 L. R. A. 446, 24 Am. St. Rep. 79. See also *Latham v. Sumner*, 89 Ill. 233, 31 Am. Rep. 79; *White v. Gray's Sons*, 96 N. Y. App. Div. 154.

⁷⁴ *Gutlon v. Marcus*, 165 Mass. 335, 336, 43 N. E. 125. See also *Bierce v. Hutchins*, 205 U. S. 340, 51 L. ed. 828, 205 S. Ct. 828.

of consideration, not simply for the buyer's promise to pay the remainder of the price, but also for any portion of the price that may have been already paid, and that, therefore, at least if the contract does not provide for the forfeiture of such payments, they may be recovered with only such deduction as is fair compensation for the use of the goods.⁷⁵ And a few courts have also held that in an action brought to reclaim possession the seller must either tender the portion of the price which has been paid subject to proper reduction for temporary use, or that a money judgment will be rendered in which an equitable reduction is made from the value of the goods.⁷⁶ But there is force in the statement of the California court "that there is little equity and no policy in allowing a buyer under such circumstances to be at pleasure quit of his contract with no other liability than such as the law would have implied had there been no contract at all."⁷⁷ A seller should be allowed all the means that he has contracted for in order to get the price of the goods, and most courts do not compel the seller to account for any payment which he has received if he reclaims the goods because of the buyer's default.⁷⁸ In some States stress

⁷⁵ Hill v. Townsend, 69 Ala. 286; Pierce v. Staub, 78 Conn. 359, 62 Atl. 760, 3 L. R. A. (N. S.) 785; Latham v. Sumner, 89 Ill. 233, 31 Am. Rep. 79.

⁷⁶ Hays v. Jordan, 85 Ga. 741, 11 S. E. 833, 9 L. R. A. 373; National Cash Register Co. v. Cervone, 76 Ohio St. 12, 80 N. E. 1033 (statutory). See also Hamilton v. Singer Mfg. Co., 54 Ill. 370. If the fair value of the goods for the period during which the buyer has had them exceeds the portion of the price paid, no deduction may be made in an action of trover by the seller. Commercial Publishing Co. v. Campbell Printing Co., 111 Ga. 388, 36 S. E. 756.

⁷⁷ Rayfield v. Van Meter, 120 Cal. 416, 52 Pac. 666.

⁷⁸ Fleck v. Warner, 25 Kans. 492; Hawkins v. Hersey, 86 Me. 394, 30 Atl. 14; White v. Oakes, 88 Me. 367, 34 Atl. 175, 32 L. R. A. 592; Angier v. Manufacturing Co., 1 Gray, 621, 61

Am. Dec. 436; Lorain Steel Co. v. Norfolk & Bristol Street Ry. Co., 187 Mass. 500, 73 N. E. 646; Haynes v. Temple, 198 Mass. 372, 84 N. E. 467; Thirlby v. Rainbow, 93 Mich. 164, 53 N. W. 159; Ryan v. Wayson, 108 Mich. 519, 66 N. W. 370; Perkins v. Grobbsen, 116 Mich. 172, 74 N. W. 469, 39 L. R. A. 815, 72 Am. St. Rep. 512; Van Den Bosch v. Bouwman, 138 Mich. 624; Duke v. Shackelford, 56 Miss. 552 (overruling on this point a dictum in Ketchum v. Brennan, 53 Miss. 596); Haynes v. Hart, 42 Barb. 58; Morgan v. Kidder, 55 Vt. 367. In two cases above cited (Fleck v. Warner and Thirlby v. Rainbow), it was decided that the seller might regain possession without accounting for payments received, but the question was left open whether subsequently the buyer would have a right to redeem the property or to recover payments made.

is laid upon the existence of an express term in the contract that the payments shall be forfeited.⁷⁹ But it seems that little importance should be attached to this provision, for even when not expressed it must always be a fair implication. The right given expressly or impliedly to retake possession cannot fairly be considered as meaning a right to rescind the transaction by putting the buyer *in statu quo*. So long as courts treat the question as one to be determined solely by the provisions of the contract, the conclusion can rarely be avoided that the seller may resume possession and hold all that he has received. No satisfactory solution of the rights of the parties in such a transaction can be found without observing that the essential character of the transaction is the same as that of an absolute sale with a mortgage back. A failure to observe and apply this analogy has led to injustice both against the seller and against the buyer. The seller is by a majority of courts denied the two remedies for which his contract provides; namely, the personal obligation of the debtor and the security of the goods, and compelled to choose between them, though both may be necessary for his protection. The buyer is also by the majority of courts denied the protection which courts of equity long ago gave to mortgagors. The opportunity and danger of a forfeiture are the same in the case of a conditional sale as in a mortgage; yet though it is abundantly established everywhere that whatever the terms of a mortgage, the mortgagee is only entitled to obtain his debt and interest, and that terms of the bargain by which a forfeiture is contracted for will not be enforced, it seems to be generally supposed that in a conditional sale the terms of the bargain are to be enforced whatever they may be. This difference is doubtless partly due to the fact that courts of equity have established the fundamental principles of the law of mortgages, whereas the rights of the parties in conditional sales have usually been determined at law. But in view of the general adoption of equitable principles by courts of law to-day, either under statutes or without their

⁷⁹ See *Singer Mfg. Co. v. Treadway*, 4 Ill. App. 57 (compare *Singer Mfg. Co. v. Ellington*, 103 Ill. App. 517); *Van Den Bosch v. Bouwman*, 138

Mich. 624. See also *Pierce v. Staub*, 78 Conn. 459, 62 Atl. 760, 3 L. R. A. (N. S.) 785.

aid, there seems no reason why such principles should not be applied here whatever the form of action. Some courts have so determined and have given the parties rights analogous to those of mortgagor and mortgagee.⁸⁰ In some other jurisdictions where the courts have failed to recognize or felt unable to enforce equities analogous to those of the mortgage relation, the defect has been remedied by statute; especially the injustice to the buyer of permitting a forfeiture when most of the price has been paid has been guarded against in these statutes.⁸¹ But no result

⁸⁰ *Dederick v. Wolfe*, 68 Miss. 500, 9 So. 350, 24 Am. St. Rep. 283 (in this case payments had been made but the last payment was overdue. The seller replevied the goods and sold them. The price realized was not sufficient, added to what had already been received, to pay the buyer the full price of the goods. It was held that he might sue for the balance); *McPherson v. Acme Lumber Co.*, 70 Miss. 649, 12 So. 857 (the seller received notes for the price and subsequently indorsed them. In spite of this indorsement, and in spite of the fact that suit was pending on the notes by the indorsee, it was held that the seller might bring replevin for the goods, but that he would hold the property in trust); *Puffer v. Lucas*, 112 N. C. 377, 17 S. E. 174, 19 L. R. A. 682 (in this case although there was an express provision for forfeiting payments made before default, the court held that a foreclosure sale should be ordered if the buyer did not complete payment within a reasonable time); *McCormick Machinery Co. v. Koch*, 8 Okla. 374, 58 Pac. 626 (this case was similar to *Dederick v. Wolfe*, *supra*, except that there was in this case an express power authorizing the sale and application of the proceeds). See also *Matteson v. Milling Co.*, 143 Cal. 436, 77 Pac. 144; *Shafer v. Russell*, 28 Utah, 444, 79 Pac. 559.

⁸¹ Mass. Rev. Laws, c. 198, § 11-13 (the seller is required to give notice to the buyer before retaking possession, and the buyer is allowed for a limited period a right to redeem the goods if possession has been reclaimed); *Roach v. Curtis*, 191 N. Y. 387, 84 N. E. 283 (applying the New York statute which requires the seller to hold the goods for thirty days after reclaiming possession, within which time the buyer may redeem; and requiring the buyer thereafter to sell the goods and apply the price. A failure on the part of a seller who has reclaimed possession to follow the provisions of the statute enables a buyer to recover all payments that he has made); *Weil v. State*, 46 Ohio St. 450, 21 N. E. 643; *National Cash Register Co. v. Cervone*, 76 Ohio St. 12, 80 N. E. 1033 (construing the Ohio statute which provides that the seller cannot retake possession without refunding what he has been paid, less a reasonable amount for the use of the goods); *Cowan v. Singer Mfg. Co.*, 92 Tenn. 376, 21 S. W. 663 (construing a statute similar to the New York statute and allowing the buyer to recover instalments paid where the seller had reclaimed possession, but had not dealt with the goods as the statute required); *Lieberman v. Puckett*, 94 Tenn. 273, 29 S. W. 6 (denying the buyer the right to re-

can be regarded as satisfactory which does not fully protect the seller in his right to the full price, and to his remedy against the buyer both on the debt and against the goods as security, in order to realize that price, and which does not also protect the buyer against any forfeiture or penalty beyond the amount of the price. Such protection should be afforded the buyer in spite of any attempt made in the contract to surrender or waive it.

§ 580. **Damages for not accepting goods — Provisions of Sales Act.**

Sec. 64. ACTION FOR DAMAGES FOR NON-ACCEPTANCE OF THE GOODS.—(1.) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2.) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3.) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

(4.) If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the

cover instalments where he had controverted the seller's claim to regain possession of the goods); *Whitelaw Furniture Co. v. Boon*, 102 Tenn. 719, 52 S. W. 155 (holding the burden on the seller, when sued after the recovery of possession for instalments previously paid, to prove strict compliance with the statute); *French v. Osmer*, 67 Vt. 427, 32 Atl. 254 (con-

struing a statute which provides that after thirty days from the time of condition broken the seller may cause the goods to be taken and sold at public auction; and holding that this statute does not preclude an action against the purchaser's bailee for injuring the goods after thirty days from the time of condition broken).

seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages.

The first three subsections follow section 50 of the English Sale of Goods Act. The only change is in subsection (3) where the words "in the absence of special circumstances, showing proximate damage of a greater amount" have been substituted for the words "prima facie to be ascertained by." Presumably no difference of meaning is involved by this change, but the wording of the American act shows specifically in what cases the general rule laid down by the subsection is not applicable. Subsection (4) of the American act has nothing analogous in the English statute and does not state the English law. As will be seen hereafter it does state the general doctrine of the common law in this country.⁸²

§ 581. Seller's right of action for nonacceptance of goods.—

If the seller without lawful excuse fails to accept goods which he agreed to buy, he is liable on ordinary principles of contract for this breach of obligation. As has already been shown, indeed, in jurisdictions which do not allow the seller under an executory contract to recover the price when the property in the goods has not passed, the seller's only remedy will be an action for damages for the buyer's failure to perform his promise to accept the goods.⁸³ When the seller under an executory contract to sell exercises his right to resell the goods because of the buyer's refusal to accept them, this does not excuse the buyer from liability. The resale is not an alternative remedy of the seller in such a case, it is merely a means of fixing the amount of damages in an action which he may bring against the buyer for the latter's failure to accept the goods.

§ 582. Measure of damages for nonacceptance of goods.—The amount of the plaintiff's recovery in an action for breach of contract should be such a sum of money as will put him in as good a

⁸² See *infra*, §§ 588, 589.

⁸³ See *supra*, §§ 562, 566.

position as he would have been in had the defendant performed his legal obligation by carrying out the promise sued upon. The application of this rule to the law of sales is generally easy. If the buyer had accepted and paid for the goods as he was bound to do by his contract, the seller would have been obliged to incur all the expense of delivering the goods at the time and place agreed on, and he would on the other hand have received the price or become entitled to it. The buyer's wrong leaves him still in possession of the goods and frees him from any expense of delivering them, and, on the other hand, deprives him of the price. His loss then is the difference between the value of the goods and the price which he was to receive for them. If he is saved any expense by not being obliged to put the goods in deliverable condition or to transport them to a particular place, this also must be taken into account. But the essential element of damage is conveniently expressed by the formula — the difference between the contract price, that is, the amount of the obligation which the buyer failed to fulfill, and the market price — that is the value of the goods which the seller has left upon his hands. As the market price varies, with time and place, it is essential to fix upon the market price at the time and place provided in the contract. The matter may, therefore, be summarized — that the measure of damage is the difference between the contract price and the market price of the goods at the time and the place when the contract should have been performed.⁸⁴ If the market value for the goods equals or exceeds the contract price, though a legal wrong has been committed, the plaintiff has suffered no damage thereby and, though entitled to judgment, can only get nominal

⁸⁴ *Barrow v. Arnaud*, 8 Q. B. 595, 608, per Tindal, C. J.; *Yellow Poplar Lumber Co. v. Chapman*, 74 Fed. Rep. 444, 42 U. S. App. 21, 20 C. C. A. 503; *Tahoe Ice Co. v. Union Ice Co.*, 109 Cal. 242, 41 Pac. 1020; *Hassell Iron Works v. Cohen*, 36 Colo. 353, 85 Pac. 89; *Ridgley v. Mooney*, 16 Ind. App. 362, 45 N. E. 348; *Lawrence Canning Co. v. Mercantile Co.*, 5 Kans. App. 77, 48 Pac. 749; *Tufts v. Bennett*, 163 Mass. 398, 40 N. E.

172; *Houghton v. Furbush*, 185 Mass. 251, 70 N. E. 49; *Kellogg v. Frohlich*, 139 Mich. 612, 102 N. W. 1057; *Funke v. Allen*, 54 Neb. 407, 74 N. W. 832, 69 Am. St. Rep. 716; *Unexcelled Fire Works Co. v. Polites*, 130 Pa. St. 536, 18 Atl. 1058, 17 Am. St. Rep. 788; *Jones v. Jennings*, 168 Pa. St. 493, 32 Atl. 51; *Huguenot Mills v. Jempson & Co.*, 68 S. C. 363, 47 S. E. 687, 102 Am. St. Rep. 673.

damages. As the burden is upon the plaintiff to show what damage, if any, he has suffered, it is incumbent upon him, in order to make out a case for recovery of more than nominal damages, to show that the market value of the goods is less than the contract price.⁸⁵ Though the market value at the time and place where delivery should have been accepted under the contract is the exact matter to be determined, that value sometimes cannot be determined directly. There may be no available market at that place. In such a case the value at the nearest available market will be accepted, taking the expense of transportation into account.⁸⁶

§ 583. **Damages where goods have no market value.**— If there is no market value from which the goods can be sold, it is impossible to lay down a narrower principle than that the plaintiff is “entitled to the full amount of the damage which they have really sustained by a breach of the contract.”⁸⁷ It does not necessarily follow that because there is no available market in which the goods can be sold at the time, that they have no pecuniary value. In some cases, however, this may be true, and in

⁸⁵ *Foos v. Sabin*, 84 Ill. 564; *Tufts v. Bennett*, 163 Mass. 398, 40 N. E. 172.

⁸⁶ In *Barry v. Cavanagh*, 127 Mass. 394, the purchaser failed to take paving stones at a specific place in Boston, Dover street bridge. The court said, speaking of the stone: “Now, if, when they were brought to Dover street bridge, where there was no market for them, it would cost all they would sell for at a market to carry them to the market, they were valueless there, and they would be entitled to recover the contract price in order to be made whole. If they (the stones) could be conveyed to a market for a part of what they would sell for, they were worth at the bridge the market price less the cost of getting them to the market, and the true rule would be the difference between what they were so worth and the contract price. Stated other-

wise, if they were salable where they lay, to be delivered elsewhere at a price larger than the cost of delivery there, the excess of such price above the cost of delivery was the market value, which should have been deducted from the contract price, in order to get at the damages.” See also *Chicago v. Greer*, 9 Wall. 726, 19 L. ed. 769; *McCormick v. Hamilton*, 23 Gratt. 561. Also if the market is controlled by the buyer, and perhaps if for any cause the local market is subject to such peculiar conditions as not fully to reflect the value of the goods, the market value at the nearest available market may be used to determine the seller’s damage. *Yellow Poplar Lumber Co. v. Chapman*, 74 Fed. Rep. 444, 42 U. S. App. 21, 20 C. C. A. 503.

⁸⁷ *Dunkirk Colliery Co. v. Lever*, 9 Ch. D. 20, 25.

such a case damages are the entire contract price without deduction.⁸⁸

§ 584. **Effect of repudiation before the time for performance.**—

Either the buyer or seller may repudiate his contract before the time for performance has arrived, or after the time for some performance has arrived, but before the time before complete performance has elapsed. The rights of the injured party in such a case do not differ in principle or in law when the contract relates to the sale of goods from other cases of repudiated contracts. The rule has been broadly laid down in England that in case of notice to a promisee of a promisor's intention not to perform his contract, "the promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the nonperformance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."⁸⁹ The second alternative suggested by the English court may first be considered.

§ 585. **Right to bring immediate action on repudiation.**— It is said that it is not the repudiation alone which gives the

⁸⁸ *Allen v. Jarvis*, 20 Conn. 38; *Barry v. Cavanagh*, 127 Mass. 394; See also *Chicago v. Greer*, 9 Wall. 726. 19 L. ed. 769.

⁸⁹ *Cockburn, C. J.*, in *Frost v. Knight*, L. R. 7 Ex. 111, 112. To the same effect see *Johnstone v. Mill-*

ing, 16 Q. B. D. 460. This language is sometimes quoted by American courts, though in some respects it certainly is contrary to rules almost universally recognized in this country. See *infra*, § 589.

promisee a right of action, but the acceptance of the repudiation by the latter. The repudiation is thus regarded as an offer on the part of the repudiator of a breach of contract which the injured party may accept and thereby acquire a right of action. This is obvious fiction and a fiction not justified by any necessity of the case.⁹⁰ The doctrine has been rejected by some of the ablest courts,⁹¹ and in many jurisdictions the question is as yet undecided, but by *dictum* or decision the doctrine has been adopted by the courts of most of the States where the matter has been judicially discussed.⁹² On principle a distinction must be ob-

⁹⁰ The doctrine is criticised in Wald's *Pollock, Contracts* (3d ed.), 355 *et seq.*

⁹¹ *Warden v. Hinds*, 163 Fed. Rep. 201, C. C. A. ; *Pittman v. Pittman*, 110 Ky. 306, 61 S. W. 461; *South Gardiner Lumber Co. v. Bradstreet*, 97 Me. 165, 53 Atl. 1110; *Martin v. Meles*, 179 Mass. 114, 60 N. E. 397; *Porter v. American Legion of Honor*, 183 Mass. 326, 67 N. E. 238; *Carstens v. McDonald*, 38 Neb. 858, 57 N. W. 757; *King v. Waterman*, 55 Neb. 324, 75 N. W. 830; *Parker v. Pettit*, 43 N. J. L. 512, 517 (overruled); *Stanford v. McGill*, 6 N. Dak. 536, 72 N. W. 938, 38 L. R. A. 760; *Markowitz v. Greenwall Co.* (Tex. Civ. App.), 75 S. W. 74, 317. See also *Perkins v. Frazer*, 107 La. 390, 31 So. 773.

⁹² *Roehm v. Horst*, 178 U. S. 1, 20 S. Ct. 780, 43 L. ed. 953; *Northrop v. Mercantile Trust Co.*, 119 Fed. Rep. 969; *Wolf v. Marsh*, 54 Cal. 228; *Fresno, etc., Co. v. Dunbar*, 80 Cal. 530, 22 Pac. 275; *Poirier v. Gravel*, 88 Cal. 79, 25 Pac. 962; *Remy v. Olds*, 88 Cal. 537, 26 Pac. 355; *Garberino v. Roberts*, 109 Cal. 125, 128, 41 Pac. 857; *Thomson v. Kyle*, 39 Fla. 582, 23 So. 12, 63 Am. St. Rep. 193; *Fox v. Kitton*, 19 Ill. 519; *Follansbee v. Adams*, 86 Ill. 13; *Kadish v. Young*, 108 Ill. 170, 48 Am. Rep. 548; *Engesette v. Mc-*

Gilvray, 63 Ill. App. 461; *Kurtz v. Frank*, 76 Ind. 594, 40 Am. Rep. 275; *Adams v. Byerly*, 123 Ind. 368, 371, 24 N. E. 130; *Crabtree v. Messersmith*, 19 Iowa, 179; *Holloway v. Griffith*, 32 Iowa, 409, 7 Am. Rep. 208; *McCormick v. Basal*, 46 Iowa, 235; *Platt v. Brand*, 26 Mich. 173; *Sheahan v. Barry*, 27 Mich. 217; *Kalkhoff v. Nelson*, 60 Minn. 284, 287, 62 N. W. 332; *Bignall, etc., Mfg. Co. v. Pierce, etc., Mfg. Co.*, 59 Mo. App. 673; *Claes, etc., Mfg. Co. v. McCord*, 65 Mo. App. 507; *Vickers v. Electrozone Co.*, 67 N. J. L. 665, 52 Atl. 467; *O'Neill v. Supreme Council Am. L. of H.*, 70 N. J. L. 410, 57 Atl. 463; *Burtis v. Thompson*, 42 N. Y. 246, 1 Am. Rep. 516; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Ferris v. Spooner*, 102 N. Y. 10, 5 N. E. 773; *Matthews v. Matthews*, 62 Hun, 110; *Nichols v. Scranton, etc., Co.*, 137 N. Y. 471, 33 N. E. 561; *Stokes v. Mackay*, 147 N. Y. 223, 41 N. E. 496; *Union Ins. Co. v. Central Trust Co.*, 157 N. Y. 633, 52 N. E. 671, 44 L. R. A. 227 (compare *Shaw v. Republic L. I. Co.*, 69 N. Y. 286, 293; *Benecke v. Haebler*, 38 N. Y. App. Div. 344; *Hicks v. British Am. Assur. Co.*, 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424; *Langan v. Supreme Council*, 174 N. Y. 266, 66 N. E. 932); *Schmitt v. Schnell*, 14 Ohio C. C. 153; *Zuck v. McClure*,

served between cases where the repudiation precedes any actual breach of contract by the defendant and cases where the repudiation follows or accompanies an actual failure of the defendant to perform part of his agreement. In the latter class of cases, even though the repudiation precedes part of the performance promised by the defendant, the plaintiff unquestionably has a right of action because of the breach which has already taken place. And if a natural consequence of the breach which has already taken place is that the contract as a whole cannot be so far performed as to make it obligatory upon the plaintiff to receive the remaining performance due from the defendant, the plaintiff's damages in an action for the breach already taken place must include not only all the damage which he has suffered, but also all that he will hereafter suffer from the nonperformance of the contract as a whole. It is no objection that all the damage has not yet been suffered; the cause of action from which the damage flows has

98 Pa. St. 541; *Hocking v. Hamilton*, 158 Pa. St. 107, 27 Atl. 836; *Mountjoy v. Metzger*, 9 Phila. 10; *Ault v. Dustin*, 100 Tenn. 366, 45 S. W. 981; *Brown v. Odill*, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. Rep. 914; *Burke v. Shaver*, 92 Va. 345, 23 S. E. 749; *Lee v. Mutual, etc., Assn.*, 97 Va. 160, 33 S. E. 556; *Mutual Assn. v. Taylor*, 99 Va. 208, 37 S. E. 854; *Davis v. Grand Rapids, etc., Co.*, 41 W. Va. 717, 24 S. E. 630; *Chapman v. Beltz Co.*, 48 W. Va. 1, 35 S. E. 1013. See also *Wells v. Hartford Co.*, 76 Conn. 27, 55 Atl. 599; *Trammell v. Vaughan*, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. Rep. 302; *Vandegrift v. Cowles Engineering Co.*, 161 N. Y. 435, 55 N. E. 941, 48 L. R. A. 685. Many of these cases do not relate to sales, but if the principle is adopted in other kinds of contracts it is fair to assume it will be in contracts to buy and sell. The leading case in support of the doctrine is *Roehm v. Horst*, 178 U. S. 1, 20 S. Ct. 780, 43 L. ed. 953, and unlike many (per-

haps most of the cases cited above) the doctrine was necessarily involved in the decision of the case; the alleged breach having taken place before any of the defendant's performance was due, not merely before the last part of it was due. In *Roehm v. Horst*, there were in suit four separate contracts made simultaneously for the purchase and sale of hops; two for the purchase and sale of hops of the crop in 1896, and two for the purchase and sale of hops in 1897. In the autumn of October, 1896, the buyer notified the seller that he would not accept performance of the contracts so far as they had not already been performed. The action was brought by the seller in January, 1897, before any performance was due under the two contracts for the purchase and sale of hops of the crop of 1897. Fuller, C. J., delivered an elaborate opinion and every argument that can be advanced in favor of the doctrine may be found in his opinion.

already occurred.⁹³ Even in jurisdictions, where the doctrine of anticipatory breach is professedly adopted, it is somewhat narrowly and perhaps illogically limited. Thus, if the goods have been received so that the buyer's only obligation is to pay the price, an anticipatory repudiation by the buyer will not enable the seller to bring an immediate action. This is certainly true in case the buyer's promise to pay is in the form of a promissory note,⁹⁴ and it is probable that the same principle would prevent an immediate action on an anticipatory repudiation of any unilateral obligation to pay money.⁹⁵

§ 586. **Ability on the part of the plaintiff to perform after repudiation.**—Whether repudiation gives rise to a cause of action or not it unquestionably excuses the injured party from further performance. He may assume that his performances will not be accepted, and therefore, need not tender performance and need not make any preparation which would necessarily precede a tender.⁹⁶ Nor does it seem material for this excuse whether the repudiation precedes the time for the performance of any of the defendant's obligations under the contract, or follows a partial breach. It sometimes happens, how-

⁹³ See Wald's *Pollock, Contracts* (3d ed.), p. 363. Many of the cases cited in the preceding note were cases where there had been an actual breach of contract, and though, in these cases the courts expressed themselves in favor of the doctrine of anticipatory breach, the actual decisions are unquestionably right apart from that doctrine for the reason stated in the text. See for example *Nichols v. Scranton, etc., Co.*, 137 N. Y. 471, 33 N. E. 561; *Union Ins. Co. v. Central Trust Co.*, 157 N. Y. 633, 52 N. E. 671, 44 L. R. A. 227; *Hocking v. Hamilton*, 158 Pa. St. 107, 27 Atl. 836.

⁹⁴ *Roehm v. Horst*, 178 U. S. 1, 7, 20 S. Ct. 780, 43 L. ed. 953; *Benecke v. Haebler*, 38 N. Y. App. Div. 344; *affd.*, without opinion, in 166 N. Y. 631. See also *Honour v. Equitable*

Life Assurance Soc., [1900] 1 Ch. 852; *Greenway v. Gaither*, Taney, 227; *Flinn v. Mowry*, 131 Cal. 481, 63 Pac. 724.

⁹⁵ And perhaps the same rule would apply to other unilateral obligations. See *infra*, § 598. In *Warden v. Hinds*, 163 Fed. Rep. 201, C. C. A. , it was held that a contract to make a will could not be broken by anticipation.

⁹⁶ *Cort v. Ambergate, etc., Ry. Co.*, 17 Q. B. 127; *Braithwaite v. Foreign Hardwood Co.*, [1905] 2 K. B. 543; *Anvil Mining Co. v. Humble*, 153 U. S. 540, 551, 14 S. Ct. 876, 38 L. ed. 814; *Lowe v. Harwood*, 139 Mass. 133, 29 N. E. 538; *Vickers v. Electrozone Co.*, 67 N. J. L. 665, 52 Atl. 467; *Wharton v. Winch*, 140 N. Y. 287, 35 N. E. 589.

ever, that the plaintiff would not have been able to perform even though the defendant had not repudiated his contract. In such a case, if the doctrine of anticipatory breach is accepted as sound, it can hardly be denied that the plaintiff acquired a right of action when the repudiation was accepted by him; and his own subsequent inability to perform, though not due to the defendant's repudiation, cannot, it seems, deprive him of a right of action once acquired. He should, however, recover no more than nominal damages since the breach has caused him no damage. Had the breach not taken place he himself would have been unable to perform and not only would not have received the benefit of the defendant's performance but might perhaps himself have been liable in damages.⁹⁷ If the doctrine of anticipatory breach is not

⁹⁷ In *Gerli v. Poidebard Silk Mfg. Co.*, 57 N. J. L. 432, 31 Atl. 401, 30 L. R. A. 61, 51 Am. St. Rep. 612, the plaintiff sued the defendant for breach of a contract to buy silk on August 15th. The court said: "Conceding that the defendant's repudiation of the whole contract before August 15th absolved the sellers from the duty of tendering an instalment on that date and gave them an immediate right of action against the defendant for a breach of contract, nevertheless, when it appeared, as it did on the trial, that by no possibility could the sellers have made tender of the silk due August 15th, because the silk did not arrive in New York until a later day, it became evident that as to that instalment the sellers suffered no loss by the breach." See also *Gray v. Smith*, 83 Fed. Rep. 824, 48 U. S. App. 581, 28 C. C. A. 168; *Bradley v. Benjamin*, 46 L. J. Q. B. 590; *Catlin v. Jones*, 107 Or. 97 Pac. 546. It seems probable that the plaintiff need not show affirmatively that he could and would have performed had the defendant not repudiated the contract. A *prima facie* case is made out by proof of the repudiation, and the defendant

must then adduce evidence to show that had the repudiation not been made, still the plaintiff would not have performed. *Bradley v. Benjamin*, 46 L. J. Q. B. 590; *Lowe v. Harwood*, 139 Mass. 133; *Foternick v. Watson*, 184 Mass. 187, 193. The case of *Braithwaite v. Foreign Hardwood Co.*, [1905] 2 K. B. 543, seems inconsistent with the statement in the text. In that case there was a contract for the sale of rosewood to be delivered in instalments "cash payable against bills of lading." Before the arrival of the first consignment the buyer repudiated his obligation. The seller did not accept the repudiation as a breach, but tendered bills of lading for the several instalments when due, and on the buyer's persisting in his refusal to take the goods resold the rosewood against the contract and brought action in this case for the difference between the contract price and the price for which the rosewood was resold. It came to the knowledge of the buyer, after its refusal, that part of the rosewood in the first consignment was not of the quality described in the contract. The lower court held the plaintiff, nevertheless, entitled to

accepted, however, the plaintiff has no cause of action, even for nominal damages. He has not performed or offered to perform and his failure to do so was not caused by the defendant's repudiation.

§ 587. **Measure of damages for anticipatory breach.**—The character of the breach cannot change the nature of the contract, and the damages must, therefore, be what the injured party suffered or is likely to suffer because of the failure of the defendant to perform at the time he agreed to do so. If that time arrives before the trial of the case, there is no difficulty in determining what the cost or value of performance by the plaintiff at that time was, and this must be deducted from the contract price. If the trial takes place before that time, the jury must estimate as best they can what the future situation is likely to be. In any event though the plaintiff may bring his action at once, his damages must be based on the cost or value of performance at the time fixed by the contract for that performance, not at the time of the breach.⁹⁸

recover, an allowance of about 6 per cent. on the value of the first consignment being made for the inferiority of part of the wood. This decision was affirmed though it was urged that the buyer need not have accepted that instalment, since it was not obliged to sort out the inferior wood and accept a smaller instalment of wood of the proper quality. The decision may be accepted if it can be assumed that on the refusal of this instalment the seller could have made, within the time limit fixed by the contract, a proper tender (*Borrowman v. Free*, 4 Q. B. D. 500), but if not, the decision is inconsistent with the cases cited above: and the broad principle laid down by the court that the plaintiff was absolved from all performance of conditions precedent carries an implication that though the plaintiff's nonperformance was not due to the defendant's repudiation, the performance is nevertheless excused.

This implication is clearly inconsistent with the other authorities in this note and with principle.

⁹⁸ *Roper v. Johnson*, L. R. 8 C. P. 167; *Roehm v. Horst*, 178 U. S. 1, 20 S. Ct. 780, 43 L. ed. 953; *Missouri Furnace Co. v. Cochran*, 8 Fed. Rep. 463; *Cherry V. I. W. v. Florence I. R. Co.*, 64 Fed. Rep. 569, 12 C. C. A. 306; *Mercantile Co. v. Lusk*, 6 Kans. App. 629, 49 Pac. 788; *Lee v. Briggs*, 99 Mich. 487, 58 N. W. 477; *Windmuller v. Pope*, 107 N. Y. 674, 14 N. E. 436; *Todd v. Gamble*, 148 N. Y. 382, 42 N. E. 982, 52 L. R. A. 225; *Davis v. Grand Rapids S. F. Co.*, 41 W. Va. 717, 24 S. E. 630; *Ontario Lantern Co. v. Hamilton Brass Co.*, 27 Ont. App. 346. Compare, however, *Masterton v. Mayor of Brooklyn*, 7 Hill, 61, 42 Am. Dec. 38; followed in *Sullivan v. McMillan*, 26 Fla. 543, 8 So. 450, 37 Fla. 134, 53 Am. St. Rep. 239; *James H. Rice Co. v. Penn. Plate Glass Co.*, 88 Ill.

§ 588. **Duty of the plaintiff to mitigate damages.**—After an anticipatory breach a defendant should not be liable for any greater damage than is naturally caused by the defendant's wrong. If the plaintiff by taking one line of conduct may secure such advantage as the contract entitles him to at less expense to the defendant than if another course is pursued, the plaintiff should only be allowed damages based on the former course. How far this principle precludes the plaintiff from continuing performance of a contract after repudiation will be considered in the following section. Another application of the principle, however, has been suggested. It has been held in England that after repudiation the injured party should at once make another contract with a third person similar to that which has been repudiated if the market prices are clearly tending in a direction which will make that the more profitable course for the defendant.⁹⁹ There are two reasons to be urged against the correctness of such decisions. In the first place it is always impossible to be certain whether prices are going up or down. To speak of a market "obviously falling" or "obviously rising" is to speak without due reflection. The prices at which persons will make contracts for future delivery must always be based on the estimate of well-informed persons as to the future value of the goods in question. Many things are obvious after the event which were not so previously. At least it is never so clear what turn the market price of a commodity may take that it is entirely certain that if the plaintiff at once makes a substituted contract it will turn out to be profitable for the defendant. It is not clear then that to take such a course will mitigate damage, and though for his own protection it may often be reasonable for a party to take this course, and if reasonable he should be allowed damages assessed on the basis of the expense of obtaining the new contract,¹ there seems

App. 407. In *New York*, however, *Masterton v. Mayor of Brooklyn*, does not seem to be followed. *Windmuller v. Pope*, 107 N. Y. 674, 14 N. E. 436; *Todd v. Gamble*, 148 N. Y. 382, 42 N. E. 982; *St. Regis P. Co. v. Santa Clara L. Co.*, 173 N. Y. 149, 65 N. E. 967.

⁹⁹ *Roth v. Taysen*, 73 L. T. R. 628. See also *Re South African Trust, etc., Co.*, 74 L. T. 769; *Nickoll v. Ashton*, [1900] 2 Q. B. 298.

¹ In *Missouri Furnace Co. v. Cochran*, 8 Fed. Rep. 463, the court, however, held that the plaintiff was not entitled to damages on the basis of

no reason why he should adopt such a course for the defendant's benefit. Another reason against the English decisions is that the plaintiff is entitled to use such money or credit as he has for making all the forward contracts he is able to for his own benefit; he need not, even though the transaction seems likely to be profitable, give the repudiating defendant the advantage of any contract he is able to make when the making of such a contract limits his ability to make contracts for his own benefit.²

§ 589. **Right of plaintiff to continue performance.**—According to the first alternative laid down by Lord Cockburn, and adopted in the English law,³ the promisee may treat the notice of repudiation as inoperative and in that case he not only may but must continue to be ready and willing to perform on his own part. In laying down this rule the English court has not observed that it may involve a violation of the rule of damages, stated in the preceding section; for the continuance of performance by the plaintiff when he knows that the performance will not be accepted is frequently not only an increase of loss but an increase, under circumstances showing that the increase will be no advantage to the plaintiff and will be an injury to the defendant. This will be especially true in cases where the contract calls for the manufacture of goods, and before they are completely manufactured the buyer countermands his order or repudiates his agreement to buy. According to the almost uniform line of decisions in this country the plaintiff cannot recover increased damages thus needlessly incurred. He can only recover such a sum as will insure to him the profit he would have received had the contract been fully performed.⁴ If no enhancement of damages will follow from the plaintiff's further performance, undoubtedly the plaintiff may

a new forward contract he had entered into after the repudiation, but could only recover damages based on the actual price at the time fixed by the contract for performance.

²In *Kadish v. Young*, 108 Ill. 170, 48 Am. Rep. 548, the court held plaintiff need not make a new forward contract. See also *Hinckley v. Pittsburg Steel Co.*, 121 U. S. 264, 7 S. Ct.

875, 30 L. ed. 967; *Missouri Furnace Co. v. Cochran*, 8 Fed. Rep. 463.

³See *supra*, § 584.

⁴*Clark v. Marsiglia*, 1 Denio, 317, 43 Am. Dec. 670, is the earliest decision. In this case the plaintiff was employed to clean and repair a number of pictures, for which the defendant agreed to pay. After the plaintiff had begun work upon them

manufacture goods or transport them or otherwise conform to his obligation, and it is a question of fact in every case whether such enhancement of damage will be caused.⁵ But one distinction

the defendant countermanded the order. The plaintiff nevertheless completed the work and sued for the full price. The court held he could recover only for what he had done before the order was countermanded, with such further sum as would compensate him for the interruption of the contract at that point. To similar effect are *Kingman v. Western Mfg. Co.*, 92 Fed. Rep. 486, 34 C. C. A. 489; *Black v. Woodrow*, 39 Md. 194, 216; *Heaver v. Lanahan*, 74 Md. 493, 22 Atl. 263; *Collins v. Delaporte*, 115 Mass. 159 (*semble*); *Hosmer v. Wilson*, 7 Mich. 294, 74 Am. Dec. 716; *Gibbons v. Bente*, 51 Minn. 499; *American Publishing Co. v. Walker*, 87 Mo. App. 503; *Backes v. Schlick*, Neb. , 117 N. W. 707; *Dillon*

v. Anderson, 43 N. Y. 231; *Lord v. Thomas*, 64 N. Y. 107; *Johnson v. Meeker*, 96 N. Y. 93, 48 Am. Rep. 609; *People v. Aldridge*, 83 Hun, 279; *Heiser v. Mears*, 120 N. C. 443, 27 S. E. 117; *Davis v. Bronson*, 2 N. Dak. 300, 50 N. W. 836, 16 L. R. A. 655, 33 Am. St. Rep. 783; *Collyer v. Moulton*, 9 R. I. 90, 98 Am. Dec. 370; *Ault v. Dustin*, 100 Tenn. 366, 45 S. W. 981; *Chicago, etc., Co. v. Barry (Tenn.)*, 52 S. W. 451; *Tufts v. Lawrence*, 77 Tex. 526, 14 S. W. 165; *Derby v. Johnson*, 21 Vt. 17; *Danforth v. Walker*, 37 Vt. 239, 40 Vt. 257; *Cameron v. White*, 74 Wis. 425, 43 N. W. 155, 5 L. R. A. 493; *Tufts v. Weinfeld*, 88 Wis. 647, 60 N. W. 992; *Ward v. American Health Food Co.*, 119 Wis. 12, 96 N. W. 388. But see *contra*, *Roebling's Sons Co. v. Lock Stitch Fence Co.*, 130 Ill. 660, 22 N. E. 518; *McAlister v. Safley*, 65 Iowa, 719, 23 N. W. 139 (compare *Moline Scale Co. v. Beed*, 52 Iowa,

307, 3 N. W. 96, 35 Am. Rep. 272); *Martin v. Meles*, 179 Mass. 114, 118, 60 N. E. 397. The facts in the case of *Roebling's Sons Co. v. Lock Stitch Fence Co.*, 130 Ill. 660, 22 N. E. 518, are sufficient argument in favor of the generally prevailing rule, and against the rule actually applied by the Illinois court. The defendant, resident in Illinois, contracted to buy of the plaintiff, resident in New Jersey, 500 tons of barbed wire. After 120 tons had been delivered the defendant requested the plaintiff to stop further shipments, and on the refusal of the latter, telegraphed, "Will not take wire if shipped." Nevertheless, the plaintiff went through the futile and expensive steps of preparing and sending the rest of the wire, and was held entitled to recover damages for so doing. Compare *Rounsaville v. Leonard Mfg. Co.*, 127 Ga. 735, 56 S. E. 1030, where the court held that though under the law of Georgia the seller might store the goods and sue for the full price (see *supra*, § 562), he could not ship them in accordance with the contract after repudiation by the buyer.

⁵ A possible situation is well illustrated by *Southern Cotton Oil Co. v. Heflin*, 99 Fed. Rep. 339, 39 C. C. A. 546. The plaintiff had agreed to sell all the cotton-seed cake and meal its mill produced during a specified year. In the course of the year the defendant repudiated the contract. The cake and meal was but one product made from perishable raw material by the plaintiff's mill. To stop making the cake and meal would have involved abandoning the manufacture of other products, and would also

is to be observed, so far as the question under consideration in this section is concerned, between cases where repudiation or countermand takes place before manufacture or work on the part of the seller has been begun, and a notice given after work has been done, or manufacture begun by the seller. Where nothing has been done it will almost always be the proper course for the seller to refrain from doing anything, and the measure of his damages will be simply the profit he would have derived had the contract been carried out.^{5a} Where manufacture has been begun, however, another element must be considered. If the seller stops manufacture it may cause the waste of what he has done, and it is in such cases particularly that it may prove less expensive for the repudiating buyer to continue manufacture and complete the goods rather than to stop performance. But it may be the least expensive course to stop performance even though a waste is thereby caused. Such waste, however, must be included as part of the damages for which the buyer is liable.⁶

§ 590. Seller's right of rescission — Provisions of Sales Act.—

Sec. 65. WHEN SELLER MAY RESCIND CONTRACT OR SALE.—Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his obligations thereunder, or has committed a material breach thereof, the seller may totally rescind the contract or the sale by giving notice of his election so to do to the buyer.

have involved a violation by the plaintiff of contracts for the sale of oil and other materials. Accordingly the plaintiff was held entitled to recover the difference between the contract price and the market price of the cake and meal manufactured after the notice of repudiation.

^{5a} To refrain from manufacturing the goods might involve in some cases closing a factory at a large loss. In such a case it seems the manufacturer may proceed with the contract.

⁶ In *Chicago v. Greer*, 9 Wall. 726,

19 L. ed. 767, the defendant contracted to buy ten-inch leather hose to be manufactured by the plaintiff. After the leather had already been cut the buyer repudiated the contract. There was no general market for hose of such large size, and the seller, therefore, cut the leather down to the size necessary for making nine-inch hose. This involved waste. The seller was held entitled not only to the profit that would have been made on the contract but also the waste due to cutting the leather down.

This section is not based on any section of the English Sale of Goods Act, and probably goes beyond the actual English law. It is, however, supported by the weight of authority in this country, as the following sections show.

§ 591. **Meaning of rescission.**—(Considerable confusion has been caused in the law of contracts by the misuse of the word “rescission.” By a long line of decisions usually referred to under the heading of implied conditions, it became established that generally where one party to a contract was in default, or was evidently going to be in default in the performance of his obligation,⁷ he could not recover from the other party if the latter failed to perform his obligations. This right of the defendant to refuse to go on has frequently been called “rescission.” The danger of so calling the right is that it leads to the inference that the contract has ceased to exist, and that neither party can sue upon it. It is important, therefore, to distinguish the rescission of the contract from the excuse of one party or the other from the performance of his obligations.⁸

§ 592. **Seller's right of rescission.**— Though it will generally be more favorable for a seller, if the buyer makes default, not to rescind the contract, but merely to rely on his own excuse for not performing, and sue the buyer for his default on the contract, the seller has the right if he so desires to rescind the contract altogether. This right seems to have been established in the

⁷ See Wald's Pollock, Contracts (3d ed.), 351.

⁸ This distinction is brought out in *Anvil Mining Co. v. Humble*, 153 U. S. 540, 551, 14 S. Ct. 876, 38 L. ed. 814: “Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situ-

ation which the wrong-doing of the other party has brought about.” So *Holmes, J., in Daley v. People's Building, etc., Assn.*, 178 Mass. 13, 18. 59 N. E. 452. “Conduct going no further than the defendant's might not justify even a refusal of further performance on the other side * * * a right which must not be confounded with rescission and which in some cases is more easily made out.” See also *Earnshaw v. Whittemore*, 194 Mass. 187, 80 N. E. 520, and the remarks of *Bowen, L. J., in Boston Deep Sea Fishing, etc., Co. v. Ansell*, 39 Ch. D. 339, 365; *Hayes v. Nashville*, 80 Fed. Rep. 641, 645, 47 U. S. App. 713, 26 C. C. A. 59.

English law on the theory that repudiation by one party might be regarded as an offer of rescission by the other,⁹ but this is evidently purely fictitious, and the general law of contracts in this country allows rescission not simply for repudiation, but also because of the inability of the other party to perform, and for any breach of contract so material and substantial that it would be a defense to an action brought by the party in default under the contract.¹⁰ As the right of rescission is given to the injured party by the law without reference to the terms of the contract, there is not the same difficulty in allowing rescission immediately upon an anticipatory repudiation that there is in allowing an action upon the contract under such circumstances. Even jurisdictions which do not accept the doctrine of anticipatory breach, therefore, have no hesitation in holding that an anticipatory repudiation or manifestation of inability justifies an immediate rescission.¹¹ As in the case of rescission for other reasons, it is no doubt

⁹ *Ehrensperger v. Anderson*, 3 Ex. 148, 158. See *Fay v. Oliver*, 20 Vt. 118, 122, 49 Am. Dec. 764.

¹⁰ *Panama, etc., Co. v. India, etc., Co.*, L. R. 10 Ch. App. 515, 532 (*semble*); *Phillips, etc., Co. v. Seymour*, 91 U. S. 646, 23 L. ed. 341; *Farmers' L. & T. Co. v. Galesburg*, 133 U. S. 156, 10 S. Ct. 316, 33 L. ed. 573; *Watson v. Ford*, 93 Fed. Rep. 359, 35 C. C. A. 345; *Powell v. Sammons & Dotes*, 31 Ala. 552; *Ferris v. Hoglan*, 121 Ala. 240, 25 So. 834; *Porter v. Arrowhead Reservoir Co.*, 100 Cal. 500, 35 Pac. 146; *San Francisco Bridge Co. v. Dumbarton Land, etc., Co.*, 119 Cal. 272, 51 Pac. 335; *Campbell Printing Press Co. v. Marsh*, 20 Colo. 22, 36 Pac. 799; *Code of Georgia*, § 3712; *Bacon v. Green*, 36 Fla. 325, 18 So. 870; *Harrison Machine Works v. Miller*, 29 Ill. App. 567; *Wolf v. Schlacks*, 67 Ill. App. 117; *Cronwell v. Wilkinson*, 18 Ind. 365; *Anderson v. Haskell*, 45 Iowa, 45; *Wernli v. Collins*, 87 Iowa, 548, 54 N. W. 365; *Stahelin v. Sowle*, 87 Mich. 124, 49 N. W. 529; *Robson*

v. Bohn, 27 Minn. 333, 7 N. W. 357; *Nelson v. Hanson*, 45 Minn. 543, 48 N. W. 410; *Gulich v. Alford*, 61 Miss. 224; *Mugan v. Regan*, 48 Mo. App. 461; *Oliver v. Goetz*, 125 Mo. 370, 28 S. W. 441; *Drew v. Claggett*, 39 N. H. 431; *Welsh v. Gossler*, 89 N. Y. 540; *Hill v. Blake*, 97 N. Y. 216; *N. Dak. Civil Code*, § 3932; *Rummington v. Kelley*, 7 Ohio (Pt. 2) 97; *Higby v. Whittaker*, 8 Ohio, 198; *Kirby v. Harrison*, 2 Ohio St. 326, 59 Am. Dec. 677; *Okla. St.*, § 866; *Miller v. Phillips*, 31 Pa. St. 218; *Greene v. Haley*, 5 R. I. 260; *Bennett v. Shaughnessy*, 6 Utah, 273, 22 Pac. 156; *Fletcher v. Cole*, 23 Vt. 114; *Preble v. Bottom*, 27 Vt. 249; *Meeker v. Johnson*, 5 Wash. 718, 32 Pac. 772, 34 Pac. 148; *School District v. Hayne*, 46 Wis. 511. Many of these cases do not relate to contracts to sell, but the principle is identical whatever the nature of the contract.

¹¹ In *Ballou v. Billings*, 136 Mass. 307, 308, the court said of an anticipatory repudiation: "Such a repudi-

true that in order to rescind the contract for repudiation or material breach an election so to do must be manifested.¹²

§ 593. **Seller's right to recover on quantum valebat when contract rescinded.**— Though the seller who has elected for due cause to rescind (using that word in the strict sense of the preceding sections) a contract, cannot thereafter sue upon it, he is entitled to recover the value of whatever he has delivered to the buyer. If all the goods have been delivered or if the contract is divisible so that a debt has arisen for whatever performance the seller has rendered, it is unnecessary to invoke the principles of *quasi-contract*, and being unnecessary, it is not allowed.¹³ But if goods have been delivered which, because they are part only of what the contract called for or for other reason, do not entitle the seller to recover according to the terms of the contract, and the reason why further performance is not rendered is because of the prevention, repudiation, or abandonment of the contract by the buyer, the seller may recover the value of what he has given.¹⁴ Though

ation did more than excuse the plaintiff from completing a tender; it authorized him to treat the contract as rescinded and at an end. It had this effect, even if, for want of a tender, the time for performance on the defendants' part had not come, and, therefore, it did not amount to breach of covenant."

¹² See Wald's *Pollock, Contracts* (3d ed.), p. 345, and generally as to the right of rescission, *ibid.*, p. 334-347.

¹³ It is true that a plaintiff who has furnished services or goods under a contract entitling him to receive in return a liquidated sum of money may sue in *indebitatus assumpsit* and not on the special contract. Keener, *Quasi-Contracts*, 300; Leake, *Contracts* (3d ed.), 45; 1 Chitty, *Pleading* (7th ed.), 358; Atkinson v. Bell, 8 B. & C. 277, 283; Gandall v. Pontigny, 1 Stark. 198; Savage v. Canning, Ir. R. 1 C. L. 434; Wardrop v. Dublin, etc., Co., Ir. R. 8 C. L. 295;

Shepard v. Mills, 173 Ill. 223, 50 N. E. 709; Southern Bldg. Assn. v. Price, 88 Md. 155, 41 Atl. 53; Nicol v. Fitch, 115 Mich. 15, 72 N. W. 988, 69 Am. St. Rep. 542. But the measure of damages is what the plaintiff was promised under the contract; not as is the rule where the plaintiff is allowed rescission and restitution, the reasonable value of what he has given. Keener, *Quasi-Contracts*, 301; Leake, *Contracts* (3d ed.), 45; Barnett v. Sweringen, 77 Mo. App. 64, 71. and cases cited; Porter v. Dunn, 61 Hun, 310; s. c., 131 N. Y. 314. And see cases cited in the first part of this note.

¹⁴ Mayor v. Pyne, 3 Bing. 285; Bartholomew v. Markwick, 15 C. B. (N. S.) 711; McConnell v. Kilgallen, 2 L. R. Ir. 119. Thompson v. Galley, 52 Neb. 317, 72 N. W. 314; Person v. Stoll, 72 N. Y. App. Div. 141, 174 N. Y. 548; Wellston Coal Co. v. Franklin Paper Co., 57 Ohio St. 182, 48 N. E. 888. The same principle

the injured party may thus rescind when a contract has been repudiated, abandoned, or materially broken by the other party, and immediately recover the value of what he has given, an exception is made in many jurisdictions where the sale was on credit. It is generally held that in such a sale, even though the buyer has agreed to give his own bill or note payable at a future day, and has failed to do so, the seller cannot recover in *indebitatus assumpsit* the value of the goods delivered until the stipulated period of credit has expired.¹⁵ But the failure to give the promised bill or note is itself a material breach of the contract,¹⁶ and should, it seems, justify rescission by the seller and restitution of the value of the property he has transferred.¹⁷ As the measure of damages in an action on the contract to give a bill or note is the price of the goods, which was to form the face of the paper,¹⁸ and as the price of the goods would also generally be the test of their value in an action based on rescission and restitution, it is not very material where common-law forms of action are abolished upon what ground the seller's right of recovery is put.¹⁹ Another limitation inconsistently imposed by the prevailing rule of the courts is that if by the terms of the bargain a plaintiff

is applied where services have been rendered, and, without the fault of the plaintiff, complete performance is not rendered. *Clay v. Yates*, 1 H. & N. 73; *United States v. Behan*, 110 U. S. 338, 4 S. Ct. 81, 28 L. ed. 168; *Jenson v. Lee*, 67 Kans. 539, 73 Pac. 72; *Posner v. Seder*, 184 Mass. 331, 68 N. E. 335; *Kearney v. Doyle*, 22 Mich. 294; *McCullough v. Baker*, 47 Mo. 401; *Dempsey v. Lawson*, 76 Mo. App. 522; *Chamberlin v. Scott*, 33 Vt. 80.

¹⁵ *Mussen v. Price*, 4 East, 147; *Dutton v. Solomonson*, 3 B. & P. 582; *Manton v. Gammon*, 7 Ill. App. 201 (compare *Dunsworth v. Wood Machine Co.*, 29 Ill. App. 23); *Carson v. Allen*, 6 Dana, 395; *Thomas Mfg. Co. v. Watson*, 85 Me. 300, 27 Atl. 176; *Crawford v. Avery*, 35 Miss. 205; *Dodge v. Waterman*, 36 N. H.

186; *Hanna v. Mills*, 21 Wend. 90, 34 Am. Dec. 216; *Scott v. Montague*, 16 Vt. 164.

¹⁶ That an action on the contract may be brought immediately for such a breach is admitted. *Manton v. Gammon*, 7 Ill. App. 201; *Migatz v. Stieglitz*, 166 Ind. 361, 77 N. E. 400; *McCormick v. Basal*, 46 Iowa, 235; *Kelly v. Pierce* (N. Dak.), 112 N. W. 995, 12 L. R. A. (N. S.) 180; *Stephenson v. Repp*, 47 Ohio St. 551, 25 N. E. 803, 10 L. R. A. 620.

¹⁷ And so it was held in *Stockdale v. Schuyler*, 29 N. Y. St. Rep. 380; *affd.*, 130 N. Y. 674, 29 N. E. 1034. See also *Tyson v. Doe*, 15 Vt. 571; *Jaquith v. Adams*, 60 Vt. 392.

¹⁸ See cases cited in note 16, *supra*.

¹⁹ See *Stephenson v. Repp*, 47 Ohio St. 551, 25 N. E. 803, 10 L. R. A. 620.

was entitled to receive not money but goods or services in return for goods or services furnished by him, he cannot recover on a *quantum valebat* or *quantum meruit* the money value of the goods or services which he has furnished.²⁰ As the recovery when allowed is based on the unjust enrichment of the defendant, not on the terms of the contract, there seems no reason for this limitation.

²⁰ *Harrison v. Luke*, 14 M. & W. 139 (compare *Keys v. Harwood*, 2 C. B. 905); *Anderson v. Rice*, 20 Ala. 239; *Oswald v. Godbold*, 20 Ala. 811; *Eastland v. Sparks*, 22 Ala. 607; *Bernard v. Dickens*, 22 Ark. 351; *Baldwin v. Lessner*, 8 Ga. 71; *Cochran*

v. Tatum, 3 T. B. Mon. 404; *Slayton v. McDonald*, 73 Me. 50; *Pierson v. Spaulding*, 61 Mich. 90, 27 N. W. 865; *Mitchell v. Gile*, 12 N. H. 390; *Weart v. Hoagland's Admr.*, 22 N. J. L. (2 Zab.) 517.

CHAPTER XVIII.

REMEDIES OF THE BUYER ON THE CONTRACT.

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§ 594. Conversion or detention by the seller where the property has passed — Provisions of Sales Act.

REMEDIES OF THE BUYER.

Sec. 66. ACTION FOR CONVERTING OR DETAINING GOODS.— Where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld.

This section is not contained in the English Sale of Goods Act, though it expresses undoubtedly the law of England as well as of

this country. The language of the section is broad enough to include actions of tort for the conversion or detention of the property, actions of replevin, and also actions for breach of the seller's contractual obligation to deliver the goods.

§ 595. **Buyer's rights where property has passed.**—Where the property in the goods has passed to the buyer, it may be supposed either that the buyer has fully performed all his own obligations under the contract which are precedent or concurrent with the seller's obligation to deliver the goods, or that at least an offer to perform has been made, or it may be supposed that no such performance or offer by the buyer has been made. On the latter supposition the buyer of course has not entitled himself to the goods and cannot sue the seller in any form of action for the latter's failure to deliver.¹ But upon the former supposition the seller is guilty of both a tort and a breach of contract. He is detaining or converting without just excuse the property which belongs to the buyer, and he is also violating his contractual duty as a seller. The seller's wrong may not be willful, but he is liable in tort for his negligent failure to fulfill the duties imposed upon him by law and in contract irrespective of either wilfulness or negligence, except in so far as the contract adopts reasonable care as the standard of obligation. He is, therefore, liable for the consequences of careless shipment or delivery.²

§ 596. **Damages for failure to deliver goods when property has passed.**—As the goods belong to the buyer in the case supposed, the amount of his recovery, whether he sues in tort or in contract, is *prima facie* the market value of the goods at the time and place when delivery should have been rendered. And if the price has been paid, such is the recovery actually allowed.³ Where the goods have no market value at that time and place the same

¹ See Sales Act, sections 11 and 42; also *supra*, §§ 11 *et seq.*, 448 *et seq.* In such a case the seller has not "wrongfully" failed to deliver within the meaning of section 66 of the act.

² *Clarke v. Hutchins*, 14 East, 475; *Buckman v. Levi*, 3 Campb. 414; *Wilson v. Western Fruit Co.*, 11 Ind.

App. 89, 38 N. E. 827; *Dickey v. Grant*, 6 Cow. 310; *Sprinkle v. Brim* (N. C.), 57 S. E. 148, 12 L. R. A. (N. S.) 679; *McCandlish v. Newman*, 22 Pa. St. 465; *Davis v. Koenig*, 165 Pa. St. 347, 30 Atl. 976.

³ *Deere v. Lewis*, 51 Ill. 254; *Win-side Bank v. Lound*, 52 Neb. 469, 72 N. W. 486; *Hill v. Smith*, 32 Vt. 433.

principles must be applied when the property has passed as are applied when the breach of contract consists of a failure to transfer the property.⁴ If the price has not been paid, however, the seller's breach of duty in failing to deliver the goods involves the result that the buyer is excused from his obligation to pay the price. Accordingly the contract price of the goods must be deducted from the plaintiff's recovery, and thus the measure of damages is in effect the same as if the property in the goods had not passed.⁵ It has often been urged that the value of the goods at the time of the wrongful conversion or refusal to deliver by the seller may not fully compensate the buyer for the wrong done him. It may be supposed that the value of the goods increases rapidly immediately after the time fixed by the contract for delivery. The circumstances of the case may be such as to make it reasonably clear that the buyer would have retained the goods until the advance in price and would thus have got the advantage of their increased value. If the buyer has not paid the price it may be urged in answer to this that on the breach of the seller's obligation the buyer should buy elsewhere with his money and that if he did so he would then get the advantage of the subsequent increase in price. This answer seems sound and is generally accepted, but if the buyer has paid the price the reasoning is inapplicable. The buyer may not have money or credit to secure a further supply of goods, and if he has it is not just to deprive him of the right to make as many profitable contracts for his own benefit as his means and credit will permit. Accordingly in some jurisdictions, especially in regard to the sale of stocks and other articles of rapidly fluctuating value, the rule has been suggested that the plaintiff ought to receive damages based on the highest market price up to the time of trial.⁶ But this rule allows the plaintiff a very inequitable advantage over the defendant. Months and perhaps years may elapse before the case comes to trial, and to give the plaintiff the advantage of the

⁴ See *infra*, § 583.

⁵ *Chinery v. Viall*, 5 H. & N. 288. See also *Kennedy v. Whitwell*, 4 Pick. 466.

⁶ See *Markham v. Jaudon*, 41 N. Y. 235 (overruled); *Baker v. Drake*,

53 N. Y. 211, 13 Am. Rep. 507, 66 N. Y. 518, 23 Am. Rep. 80; *Wright v. Bank of Metropolis*, 110 N. Y. 237, 18 N. E. 79, 1 L. R. A. 289, 6 Am. St. Rep. 356.

highest intermediate price is to give him a speculative advantage which it is hardly conceivable he would actually have realized to the full and perhaps not in any part. Accordingly the Supreme Court of the United States, following the later New York decisions, has qualified the rule by allowing only the highest intermediate value up to such a time after the owner has received notice of the conversion as is reasonably needed to enable him to replace the converted property.⁷ The ordinary rule of confining the plaintiff's damages to the value of the goods at the time of the defendant's breach of duty has at least the merit of certainty and ease of application. It is undoubtedly the general rule everywhere, and in many jurisdictions would doubtless be applied even in the case of goods of fluctuating value.⁸ How far the rule is qualified by the allowance of consequential damages will be hereafter considered.⁹

§ 597. Buyer's right of action where property has not passed.—Provisions of the Sales Act.—

Sec. 67. ACTION FOR FAILING TO DELIVER GOODS.—(1.) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for nondelivery.

(2.) The measure of damages is the loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3.) Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

⁷ *Galigher v. Jones*, 129 U. S. 193, 9 S. Ct. 335, 32 L. ed. 658, citing many State decisions.

⁸ In *Williams v. Reynolds*, 34 L. J. Q. B. 221, and *Kennedy v. Whitwell*, 4 Pick. 466, the defendant, subsequently to the conversion, resold the

goods at a higher price than the market value at the time of the defendant's breach of duty. The plaintiff was held not entitled to the advantage of this enhanced price.

⁹ *Infra*, § 614.

This section is copied from section 51 of the English Sale of Goods Act, with the insertion, however, at the beginning of subsection (1) of the words: "the property in the goods has not passed to the buyer, and". The English section seems to apply to all cases whether the property in the goods has passed or not; but as the seller is entitled to other remedies than an action on the contract if the property has passed, it seems better to deal with that case in a separate section, as has been done in section 66 of the American act. Section 67 is, therefore, confined to cases where the property in the goods has not passed.

§ 598. **Buyer's right of action for failure to transfer property.—**

A contract to sell goods necessarily looks forward to an ultimate transfer of the property to the buyer. When all conditions have been fulfilled which qualify the seller's obligation to complete the contract and he has no justifiable excuse, it is obvious that a right of action arises. Whether a repudiation by the seller before the time for any performance on his part arrives can operate as an immediate breach of contract involves the same question as where the repudiation is made by the buyer, and it is enough to refer to the discussion that has already been given upon the matter.¹⁰ A word should, however, be added in regard to the case where the buyer has already paid the price, and the seller's repudiation is, therefore, a repudiation of a purely unilateral obligation. It has already been seen¹¹ that a repudiation by the debtor of a unilateral money obligation cannot be sued before the time when the money was due under the contract. But it is not clear whether the objection to an immediate right of action is the unilateral character of the obligation, or because it is for the payment of money. It cannot be regarded as settled whether jurisdictions which allow the doctrine of anticipatory breach would apply the doctrine in the case of a unilateral obligation to deliver goods, or to perform any other act than the payment of money.¹² Except in the limited class of cases where equity gives

¹⁰ *Supra*, §§ 584, 585.

¹¹ *Supra*, § 585.

¹² In *Roehm v. Horst*, 178 U. S. 1, 17, 20 S. Ct. 780, 43 L. ed. 953, Fuller, C. J., in distinguishing the case of commercial paper, said: "In

the case of an ordinary money contract, such as a promissory note or bond, the consideration has passed, there are no mutual obligations; and cases of that sort do not fall within the reason of the rule." It is

specific performance of a contract to sell chattels, an action for damages is the buyer's only remedy for the seller's refusal to transfer the property in the goods as agreed. No property right in the goods is created by the contract.¹³

§ 599. **Measure of damages.**—The general principle already stated that the measure of damages for breach of an obligation is the sum which will put the plaintiff in as good a position as he would have been in if the obligation had been fulfilled applies here also. And the application of the doctrine can be summed up by the same formula where the buyer is the plaintiff as in the case where the seller is the plaintiff. "The proper measure of damages in general is the difference between the contract price and the market price of such goods at the time when (and place where) the contract is broken, because the purchaser having the money in his hands may go into the market and buy."¹⁴ The test of market value is, however, but a means of getting at the buyer's loss, and under special circumstances it may cease to be exact or may become inapplicable. The buyer may be able to get similar goods for less than the market price, and if he does buy goods against the defendant's contract his damages must be based on his actual loss; namely, the difference between the price he paid and that which he would have had to pay under the con-

equally true of a unilateral obligation to deliver goods that the consideration has passed and there are no mutual obligations.

¹³ Therefore, if after a contract to sell specific goods the seller in violation of his contract sells the goods to another purchaser, replevin will not lie against the latter by the prior purchaser. *Kerr v. Henderson*, 62 N. J. L. 724, 42 Atl. 1073.

¹⁴ *Barrow v. Arnaud*, 8 Q. B. 595, 609. To the same effect are *Grand Tower Co. v. Phillips*, 23 Wall. 471, 23 L. ed. 71; *Capen v. Glass Co.*, 105 Ill. 185; *Rahm v. Deig*, 121 Ind. 283, 23 N. E. 141; *Kribs v. Jones*, 44 Md. 396; *McGrath v. Geg-*

ner, 77 Md. 331, 26 Atl. 502, 39 Am. St. Rep. 415; *McKercher v. Curtis*, 35 Mich. 478; *Austrian v. Springer*, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350; *Olson v. Sharpless*, 53 Minn. 91, 55 N. W. 125; *Hewson Supply Co. v. Minnesota Brick Co.*, 55 Minn. 530, 57 N. W. 129; *McKnight v. Dunlop*, 5 N. Y. 537, 55 Am. Dec. 370; *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130; *Cahen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203; *Saxe v. Penokee Lumber Co.*, 159 N. Y. 371, 54 N. E. 14; *Hill v. Smith*, 32 Vt. 433; *Cockburn v. Ashland Lumber Co.*, 54 Wis. 619, 12 N. W. 49.

tract.¹⁵ Should the buyer pay more than the market price, however, he cannot charge the excess against the seller, for not the seller's wrong but his own folly was the cause of the excessive payment. The rule in regard to the difference between the market price and the contract price is applicable where the right of action is based upon repudiation as well as where based upon actual breach.¹⁶ Where the goods are by terms of the contract deliverable in instalments, the same principle is to be applied. And if the value of the goods varies during the period of the contract, the plaintiff's damages must be separately calculated for each instalment.¹⁷ Sometimes when the seller is unable to fulfill his obligation at the time when performance was due, by mutual consent the time for delivery is extended. The damages are then to be calculated as of the time of the subsequent agreement.¹⁸ If the seller has prepaid the price no deduction of course must be made

¹⁵ *Theiss v. Weiss*, 166 Pa. St. 9, 31 Atl. 63, 45 Am. St. Rep. 638; *Morris v. Supplee*, 208 Pa. St. 253, 57 Atl. 566. If the seller had paid for the goods it seems clear that he would be under no obligation to put out a further sum of money in order to take advantage of a favorable offer to purchase goods elsewhere at less than market price; and if the buyer chooses to take advantage of an exceptional chance to buy goods cheaply, and does not profess to make the purchase for the account of the defaulting seller, there seems no reason why the buyer should not be allowed to claim the benefit of the transaction for himself and not give the seller the advantage of it. Even though the buyer has not paid the price, it may be urged that he is under no duty to the defaulting seller to give him the advantage of a special opportunity to buy at a low price if only a limited amount of the goods can be obtained at that price. It seems, however, to be generally assumed that the buyer is under a

duty to purchase the goods at a diminished price on the seller's account if he can do so, and even though his opportunity to purchase at a reduced price is from the defaulting seller himself, it has been held he must take advantage of the opportunity in order to minimize the damages. *Lawrence v. Porter*, 63 Fed. Rep. 62, 22 U. S. App. 483, 11 C. C. A. 27, 26 L. R. A. 167.

¹⁶ *Leigh v. Paterson*, 8 Taunt. 540; *Emory Mfg. Co. v. Salomon*, 178 Mass. 582, 60 N. E. 377; *Austrian v. Springer*, 94 Mich. 343, 54 N. W. 50.

¹⁷ *Brown v. Muller*, L. R. 7 Ex. 319; *Ex parte Llansamlet T. P. Co.*, L. R. 16 Eq. 155; *Barningham v. Smith*, 31 L. T. R. 540; *Delaware, etc., H. C. Co. v. Mitchell*, 92 Ill. App. 577; *Hill v. Chipman*, 59 Wis. 211, 18 N. W. 160.

¹⁸ *Ogle v. Earl Vane*, L. R. 2 Q. B. 275; *Hickman v. Haynes*, L. R. 10 C. P. 598; *Ralli v. Rockmore*, 111 Fed. Rep. 874; *Brown v. Sharkey*, 93 Iowa, 157, 61 N. W. 364.

from the market price.¹⁹ And on the other hand if the market price is no greater than the contract price, the buyer though he has a right of action can recover only nominal damages.²⁰ It may be that no market exists at the place where delivery was due. The nearest available market furnishes the basis under such circumstances; the expense of obtaining and transporting the goods from that market to the place where delivery is due being added.²¹ It will not infrequently happen that goods have no market value or none which can be determined with any exactness. Wherever goods are of a special kind or are of a peculiarly good or bad grade or quality, this is likely to occur. In such a case the court must **determine the value of the goods as best it can by** considering the expense to the buyer of securing similar goods, or goods which would equally well serve the purpose.²² If the goods have no value whatever, the buyer can never be entitled to more than nominal damages.²³ In many cases the plaintiff's damage may exceed the difference between the contract and the market price. In what cases such special or consequential damage can be recovered will be considered in a subsequent section.²⁴

¹⁹ *Startup v. Cortazzi*, 2 Crompt. M. & R. 165; *Winside State Bank v. Lound*, 52 Neb. 469, 72 N. W. 486; *Smethurst v. Woolston*, 5 W. & S. 106; *Humphreysville Copper Co. v. Mining Co.*, 33 Vt. 92; *Hill v. Smith*, 32 Vt. 433.

²⁰ *Valpy v. Oakeley*, 16 Q. B. 941; *Moses v. Rasin* (C. C.), 14 Fed. Rep. 772; *Fessler v. Love*, 48 Pa. St. 407; *Wire v. Foster*, 62 Iowa, 114, 17 N. W. 174; *Merriman v. Machine Co.*, 96 Wis. 600, 71 N. W. 1050.

²¹ *Grand Tower Co. v. Phillips*, 23 Wall. 471, 23 L. ed. 71; *Marshall v. Clark*, 78 Conn. 9, 60 Atl. 741; *Capen v. Glass Co.*, 105 Ill. 185; *South Gardiner Lumber Co. v. Bradstreet*, 97 Me. 165, 53 Atl. 1110; *National Tar Co. v. Gaslight Co.*, 189 Mass. 234, 75 N. E. 625; *Cohen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203; *Nottingham Coal & Ice Co. v. Preas*, 102 Va. 820, 47 S. E. 823.

²² *Wilmoth v. Hamilton*, 127 Fed. Rep. 48, 61 C. C. A. 584; *Bell v. Reynolds*, 78 Ala. 511, 56 Am. Rep. 52; *Jordan v. Patterson*, 67 Conn. 473, 35 Atl. 521; *Johnston v. Faxon*, 172 Mass. 466, 52 N. E. 539; *F. W. Kavanaugh Mfg. Co. v. Rosen*, 132 Mich. 44, 92 N. W. 788; *Ideal Wrench Co. v. Garvin Machine Co.*, 92 N. Y. App. Div. 187, 71 N. E. 1118; *McHose v. Fulmer*, 73 Pa. St. 365; *Davis v. School Furniture Co.*, 41 W. Va. 717, 24 S. E. 630. In *Hinde v. Liddell*, L. R. 10 Q. B. 265, the court took into consideration the expense of obtaining a substitute for the goods contracted for. But an unnecessarily expensive substitute cannot be taken as the measure of the buyer's damages. *Warren v. Stoddart*, 105 U. S. 224, 28 L. ed. 1117.

²³ *Barnes v. Brown*, 130 N. Y. 372, 29 N. E. 760.

²⁴ *Infra*, § 614.

§ 600. **Rescission and recovery of price paid.**— It has already been seen²⁵ that the seller may in certain cases rescind the contract and recover the value of goods which he has furnished. Similarly if the seller repudiates or makes material default, the buyer may rescind the contract and recover the price or any part of it that he may have paid. Where a buyer is allowed rescission as a remedy for breach of warranty in an executed sale, as he is under the Sales Act,²⁶ the right of rescission and recovery of the price is one of great importance and wide scope. It will be further considered subsequently.²⁷ But even in England and other jurisdictions where rescission of an executed sale is not allowed, the buyer may recover the price or any portion of it which has been paid if there is a total failure of consideration. There is such a total failure if the seller fails to transfer to the buyer the property in any part of the goods. It is immaterial whether this failure is due to the buyer's fault,²⁸ or, because owing to the destruction of the goods or other cause rendering performance impossible without the seller's fault the buyer will not get the goods for which he has bargained.²⁹ The principle has sometimes been extended to executed sales, especially to sales of negotiable paper and securities, where the goods were not what they purported to be.³⁰ And the principle is applicable to other cases where the

²⁵ *Supra*, § 593.

²⁶ Section 69.

²⁷ See *infra*, § 608.

²⁸ *Nash v. Towne*, 5 Wall. 689, 18 L. ed. 527; *Pope v. Allis*, 115 U. S. 363, 6 S. Ct. 69, 29 L. ed. 393; *Dalton v. Bentley*, 15 Ill. 420; *Meader v. Cornell*, 58 N. J. L. 375, 33 Atl. 960; *Cleveland v. Sterrett*, 70 Pa. St. 204.

²⁹ *Logan v. Le Mesurier*, 6 Moore P. C. 116; *Stone v. Waite*, 88 Ala. 599, 7 So. 117; *Joyce v. Adams*, 8 N. Y. 291; *Williams v. Allen*, 10 Humph. 337, 51 Am. Dec. 709; *Kelly v. Bliss*, 54 Wis. 187, 11 N. W. 488; *Wong Ko v. Hawaiian Govt.*, 7 Hawaii, 690.

³⁰ *Young v. Cole*, 3 Bing. N. C. 724. In that case an action for money

had and received was allowed by a broker against his customer to recover the amount paid over to the customer as the proceeds of certain Guatemala bonds, which were unstamped by the government of Guatemala and were, therefore, invalid. The broker, compelled by the rules of the Stock Exchange, had previously repaid the purchaser the price the latter had paid. The reasoning of the court appears in the following extract from the opinion of Tindal, C. J.: The plaintiff "delivered the money to the defendant on an understanding that the bonds he had received from the defendant were real Guatemala bonds, such as were salable on the Stock Exchange. It seems, therefore, that the consideration on which the

article sold is not simply inferior in quality to what was justly expected by the buyer, but different in kind, as if a watch were sold as a gold watch, when in fact brass.³¹ The ground on which rescission is allowable in such cases in jurisdictions which deny generally the right to rescind an executed sale for the seller's failure to fulfill his legal obligations seems rather to be mistake or fraud than breach of promise. Doubtless the seller in these cases is liable for damages upon an implied warranty, but breach of this alone under the English rule does not generally and, therefore, here would not seem to afford ground for rescission. The further element of mistake or fraud is a proper ground for rescission everywhere.³² Except where the element of difference in kind occurs or other facts showing such mistake or fraud as is ground for relief, it is doubtful if jurisdictions which do not allow rescission for breach of warranty can permit rescission by the buyer of an executed sale.³³ Perhaps an exception to the generality of this

plaintiff paid his money has failed as completely as if the defendant had contracted to sell foreign gold coin and had handed over counters instead. It is not a question of warranty; but whether the defendant has not delivered something which, though resembling the article contracted to be sold, is of no value." Other cases of void securities where recovery was similarly allowed are: *Jones v. Ryde*, 5 Taunt. 488; *Westropp v. Solomon*, 8 C. B. 345; *Gompertz v. Bartlett*, 2 E. & B. 849; *Gurney v. Womersley*, 4 E. & B. 133; *Meyer v. Richards*, 163 U. S. 385, 16 S. Ct. 1148, 41 L. ed. 199; *Terry v. Bissell*, 26 Conn. 23; *Merriam v. Wolcott*, 3 Allen, 258, 80 Am. Dec. 69; *Wood v. Sheldon*, 42 N. J. L. 421, 36 Am. Rep. 523.

³¹ *Sparling v. Marks*, 86 Ill. 125. Similarly where a patent is sold, which turns out to be void. *Harlow v. Putnam*, 124 Mass. 553; *Shepherd v. Jenkins*, 73 Mo. 510; *Herzog v. Heyman*, 151 N. Y. 587, 45 N. E. 1127, 56 Am. St. Rep. 646. Compare *Gloucester Glue Co. v. Russia Cement Co.*, 154 Mass. 92, 27 N. E. 1005,

12 L. R. A. 563, 26 Am. St. Rep. 214. So where the goods were confiscated by the United States because of the seller's failure to pay customs duties — a failure of which the buyer was ignorant. *Hamrah v. Maloof*, 111 N. Y. Suppl. 509.

³² See *infra*, § 653 *et seq.*

³³ In *Behn v. Burness*, 3 B. & S. 751, *Williams, J.*, said: "In cases where the thing sold is not specific and the property has not passed by the sale, the vendee may refuse to receive the thing proffered him in performance of the contract, on the ground that it does not correspond with the descriptive statement, or, in other words, that the condition expressed in the contract has not been performed. *Still if he receives the thing sold, and has the enjoyment of it, he cannot afterward treat the descriptive statement as a condition, but only as an agreement for a breach of which he may bring an action to recover damages.*" So in *Varley v. Whipp*, [1900] 1 Q. B. 513, *Channell, J.*, said: "If the property in the machine passed prior to July 2d, nothing

rule exists where the buyer accepts part of the goods to which the contract relates in the expectation of receiving the rest, and the rest are not furnished. In such a case the buyer may return the part of the goods which he has received.³⁴ And if the cases which have just been rested on mistake or fraud cannot be fully explained in that way, another exception must be admitted to the denial of the right of rescission of executed sales by the English law. This second exception would then consist of cases where the property was wholly worthless so that there was a total failure of consideration. Difficult questions may arise in applying the principles of rescission to contracts where the goods are sold in lots or in instalments. On the one hand if a certain sum of money was paid with direct reference to a particular instalment which was never delivered, the buyer may no doubt recover the payment;³⁵ and it is equally clear that if a lump price is fixed for all the goods the buyer cannot recover any portion of the price, because part of the goods were not delivered.³⁶ An intermediate case arises where the price is fixed by weight or measure. In such a contract though it is not contemplated that several payments shall be made, and the contract is, therefore, not divisible, it has been held that a buyer who receives less than the quantity for which he has paid may keep what he has received and recover on the basis of partial failure of consideration that portion of the price for which no

that the buyer could do afterward would divest it. The question is, Did the property pass?" See also Blackburn, *Sale* (2d ed.), 495; 4 Col. L. Rev., p. 195.

³⁴ *Shipton v. Casson*, 5 B. & C. 378; *Oxendale v. Wetherell*, 9 B. & C. 386. But of these cases the editor of the second edition of Blackburn, *Sale*, says (p. 501): "But it seems more than doubtful, on principle, whether he [the buyer] could do so if the property had passed to him in the absence of some agreement, expressed or implied." In *Colonial Ins. Co. v. Adelaide Ins. Co.*, 12 A. C. 128, 138, the suggestion is, however, again made that the buyer in the case sup-

posed might return part of the goods. Whatever difficulty there may be in reconciling this with the general rule of the English law forbidding rescission after the property has passed, the right of the buyer seems well settled. See also *Polhemus v. Heiman*, 45 Cal. 573; *Bowker v. Hoyt*, 18 Pick. 555, 558. (But in Massachusetts, at least, rescission is allowed of an executed sale for breach of promise.)

³⁵ See *Young & Conant Mfg. Co. v. Wakefield*, 121 Mass. 91; *Raphael v. Reinsteint*, 154 Mass. 178, 28 N. E. 141.

³⁶ *Miner v. Bradley*, 22 Pick. 457.

equivalent has been furnished by the seller.³⁷ Where the seller's breach of promise or warranty is regarded as ground for the rescission of an executed sale as well as of an executory contract, most of the difficulties alluded to in this section disappear. In such jurisdictions, subject to limitations of time and election of remedies, the buyer may return what he has received and recover what he has paid.³⁸

§ 601. Right to specific performance — Provisions of the Sales Act.—

Sec. 68. SPECIFIC PERFORMANCE.— Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as to the court may seem just.

This section follows section 52 of the English Sale of Goods Act. Some changes in wording, however, have been made. The English section begins with the following words: "In an action for breach of contract to deliver specific or ascertained goods, the court may, if it thinks fit, on the application of the plaintiff," and, thereafter, proceeds as in the American act. At the end of the English section the following words, which have been dropped from the American act, have been added: "And the application by the plaintiff may be made at any time before judgment or decree." Courts of equity have very closely restricted their jurisdiction in regard to contracts for the sale of personal property. It would sometimes promote justice if the courts were somewhat more ready to allow specific performance of

³⁷ *Devaux v. Conolly*, 8 C. B. 640. In this case the buyer ordered two parcels of terra japonica of 25 and 150 tons, respectively, at 18s per cwt. The price was paid before the arrival of the goods. On their arrival it appeared that the weight of the lots

was only 24 and 132¾ tons. The buyers took the goods and sold them, and were held entitled to recover from the seller the portion of the price which had been overpaid. See also *Hill v. Rewee*, 11 Metc. 268, 272.

³⁸ See *infra*, § 608.

contracts to sell goods in cases where for any reason damages did not seem adequate. This section of the act will perhaps dispose courts to enlarge somewhat the number of cases where specific performance is allowed. It is worth noting that on the Continent of Europe³⁹ and in Scotland⁴⁰ specific performance is allowed without any other limitations than those which the circumstances of the case necessarily impose.

§ 602. **Specific enforcement of sales of personal property.**—If damages are an adequate remedy, a court of equity will never grant specific performance, and it has been held, with perhaps too great stringency, that for breach of contracts for the sale of goods damages are, as a rule, an adequate remedy. In a few exceptional cases, however, specific performance has been granted, as for slaves,⁴¹ works of art,⁴² heirlooms and property valuable for sentimental reasons,⁴³ vessels,⁴⁴ valuable documents of various kinds.⁴⁵ Much litigation has arisen in regard to the right to demand specific performance of a contract to sell stock. In England, though a contract for the sale of government bonds (or stock, as it is called in England,) is not specifically enforceable because such securities are always to be had by any person in

³⁹ 9 Harv. L. Rev. 78; 22 Harv. L. Rev. 161.

⁴⁰ *Stewart v. Kennedy*, 15 A. C. 75, 102, 105.

⁴¹ *Murphy v. Clark*, 9 Miss. 221; *Williams v. Howard*, 3 Murph. 74; *Young v. Burton*, 1 McMull. Eq. 255; *Womack v. Smith*, 11 Humph. 478, 54 Am. Dec. 51; *Summers v. Bean*, 13 Gratt. 404. In this respect, as in some other respects, the law relating to slaves followed the doctrines more commonly applicable to real property.

⁴² *Fells v. Reed*, 3 Ves. 70 (an engraved tobacco box); *Lowther v. Lowther*, 13 Ves. 95 (a painting by Titian); *Falcke v. Gray*, 4 Drew. 651 (rare china jars).

⁴³ *Pusey v. Pusey*, 1 Vern. 273 (a horn); *Thorn v. Commissioners of Public Works*, 32 Beav. 490 (old stone from Westminster bridge); *Wilkinson v. Stitt*, 175 Mass. 581, 56

N. E. 830 (prize cup); *Onondaga Nation v. Thacher*, 53 N. Y. App. Div. 561, 65 N. Y. Suppl. 1014; *affd.*, 169 N. Y. 584, 62 N. E. 1098 (belts of wampum).

⁴⁴ *Hart v. Herwig*, L. R. 8 Ch. 860, 866; *Batthyany v. Bouch*, 50 L. J. Q. B. 421.

⁴⁵ *Williams v. Carpenter*, 14 Colo. 477, 24 Pac. 558; *McMullen v. Vanzant*, 73 Ill. 190 (promissory note); *Pattison v. Skillman*, 34 N. J. Eq. 344 (papers relating to a title); *McGowin v. Remington*, 12 Pa. St. 56, 51 Am. Dec. 584 (maps and charts); *Dock v. Dock*, 180 Pa. St. 14, 36 Atl. 411, 57 Am. St. Rep. 617 (letters); *Battalion Westerly Rifles v. Swan*, 32 R. I. 333, 47 Atl. 1090, 84 Am. St. Rep. 849 (book belonging to a company of militia). In some of these cases at least the documents had no pecuniary value.

the market,⁴⁶ a contract for the sale of shares in a corporation is specifically enforceable.⁴⁷ In the United States the test adopted is whether the shares can readily be secured in the market; if not, specific performance is allowed, but otherwise relief must be sought in an action at law for damages.⁴⁸ A contract for the sale of a patent will be specifically enforced,⁴⁹ or a copyright.⁵⁰ In some cases, though goods may of themselves not be of a kind which would ordinarily induce a court of equity to give specific performance, the importance of the goods in the particular case, and the difficulty of acquiring them, except through the defendant, will induce the court to decree specific performance.⁵¹ Another reason has been suggested for giving the vendee of future personalty sometimes at least a lien upon the

⁴⁶ *Cud v. Rutter*, 1 P. Wms. 570; *Nuthrown v. Thornton*, 10 Ves. 161.

⁴⁷ *Duncuft v. Albrecht*, 12 Sim. 189; *Shaw v. Fisher*, 5 De G. M. & G. 596, 606; *Cheale v. Kenward*, 3 De G. & J. 27; *Poole v. Middleton*, 29 Beav. 646 (*Patent Fuel Co.*); *Paine v. Hutchinson*, L. R. 3 Ch. 388.

⁴⁸ *Hyer v. Richmond Traction Co.*, 168 U. S. 471, 488, 18 S. Ct. 114, 42 L. ed. 547; *Ross v. Union Pacific Ry. Co.*, 1 Woolw. 26; *Treasurer v. Commercial Coal Co.*, 23 Cal. 390; *Krouse v. Woodward*, 110 Cal. 638, 42 Pac. 1084; *Frue v. Houghton*, 6 Colo. 318; *Cowles v. Whitman*, 10 Conn. 121, 124, 25 Am. Dec. 60; *Diamond Co. v. Todd*, 6 Del. Ch. 163, 180, 14 Atl. 27; *Adams v. Messinger*, 147 Mass. 185, 17 N. E. 491, 9 Am. St. Rep. 679; *New England Trust Co. v. Abbott*, 162 Mass. 148, 154, 38 N. E. 432; *Cushman v. Thayer Mfg. Co.*, 76 N. Y. 365, 369, 370, 32 Am. Rep. 315; *Johnson v. Brooks*, 93 N. Y. 337, 343; *White v. Schuyler*, 1 Abb. Pr. (N. S.) 300; *Ashe v. Johnson's Admr.*, 2 Jones Eq. 149; *Northern Ry. Co. v. Walworth*, 193 Pa. St. 207, 44 Atl. 253, 74 Am. St. Rep. 683 (explaining *Foll's App.*; 91 Pa.

St. 434, 36 Am. Rep. 671); *Manton v. Ray*, 18 R. I. 672, 29 Atl. 998, 49 Am. St. Rep. 811; *Bumgardner v. Leavitt*, 35 W. Va. 194, 13 S. E. 67, 12 L. R. A. 776; *Avery v. Ryan*, 74 Wis. 591, 596, 43 N. W. 317.

⁴⁹ *Cogent v. Gibson*, 33 Beav. 557; *Hull v. Pitrat*, 45 Fed. Rep. 94; *Whitney v. Burr*, 115 Ill. 289, 3 N. E. 434; *Adams v. Messinger*, 147 Mass. 185, 17 N. E. 491, 9 Am. St. Rep. 679; *Spears v. Willis*, 151 N. Y. 443, 45 N. E. 849; *Reese's Appeal*, 122 Pa. St. 392, 15 Atl. 807; *Valley Iron Works Co. v. Goodrick*, 102 Wis. 436, 78 N. W. 1096.

⁵⁰ *Sweet v. Cater*, 11 Sim. 572.

⁵¹ *Equitable Gas Light Co. v. Baltimore Coal Tar Co.*, 63 Md. 285 (agreement to sell all the coal tar produced by the defendant's gas works. This was indispensable to the plaintiff's business and could not be obtained elsewhere except at a great distance); *Gloucester Glue Co. v. Russia Cement Co.*, 154 Mass. 92, 27 N. E. 1005, 12 L. R. A. 563, 26 Am. St. Rep. 214 (agreement to sell fish skins, the supply being controlled by the defendant).

property. In a few cases⁵² the insolvency of the seller has been stated as a possible ground for enforcing specifically a contract to sell goods of a sort not ordinarily within the jurisdiction of equity, and these suggestions have been adopted in one Illinois decision.⁵³ If the seller is insolvent, obviously a judgment for damages will not adequately protect the buyer, but on the other hand the law regarding delivery and retention of possession, and also the law of bankruptcy, materially qualify if not destroy the right of a court of equity to enforce the promise. As to delivery and retention of possession it is obvious that a promise to sell future goods can surely have no greater effect than an actual sale of existing goods, so that at least it may safely be said that wherever the latter transaction would not be valid without delivery against creditor of the seller or against purchasers from him, the effect of the former transaction must equally be limited. Unless rights of such creditors or purchasers have actually attached, however, retention of possession would not be material. But it is the law of bankruptcy that most clearly shows the error of basing an equitable lien on the insolvency of the vendor. Insolvency is the very circumstance which makes it improper for the seller to carry out his contract. Even against the seller himself, when no purchasers or attaching creditors have complicated the situation, it cannot be permissible for a court of equity to decree specific performance on the ground of his insolvency in this country while a statute like the present Bankruptcy Act is in force. To do so is nothing less than ordering the defendant to commit an act of bankruptcy; for, since insolvency is regarded as a necessary basis of the equity, until insolvency there is but a contract cognizable at law and giving no equitable interest in the property. To satisfy such a contract is an act of bankruptcy under the present statute, as under the Bankruptcy Act of 1867. Even more clearly, if the rights of creditors or of a trustee in bankruptcy have in fact attached, a court of equity cannot be

⁵² *Doloret v. Rothschild*, 1 Sim. & St. 590, 598; *Dowling v. Betjemann*, 2 Johns. & H. 544; *Dilburn v. Youngblood*, 85 Ala. 449, 451, 5 So. 175; *Treasurer v. Commercial Coal Co.*, 23 Cal. 390, 393; *Williams v. Carpenter*,

14 Colo. 477, 24 Pac. 558; *Ames v. Witbeck*, 179 Ill. 458, 475, 53 N. E. 969; *Allen v. Freeland*, 3 Rand. 170, 174; *Avery v. Ryan*, 74 Wis. 591, 600, 43 N. W. 317.

⁵³ *Parker v. Garrison*, 61 Ill. 250.

justified in attempting, in violation not only of the maxim that equality is equity, but also of the spirit if not the letter of a binding statute, to give property to a specific creditor when the only reason for so doing is insolvency, the very state of affairs which is the foundation for proceedings in bankruptcy and the division of the property among all creditors alike.

§ 603. Buyer's remedies for breach of warranty — Provisions of Sales Act.—

Sec. 69. REMEDIES FOR BREACH OF WARRANTY.—(1.) Where there is a breach of warranty by the seller, the buyer may, at his election —

(a.) accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price;

(b.) accept or keep the goods and maintain an action against the seller for damages for the breach of warranty;

(c.) refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty;

(d.) rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.

(2.) When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.

(3.) Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale.

(4.) Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon return-

ing or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price.

(5.) Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section 53.

(6.) The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(7.) In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

This section differs materially from the corresponding section of the English Sale of Goods Act.⁵⁴ The most noticeable change which has been made is the allowance of the right of rescission in the American act for reasons which will be stated subse-

⁵⁴ Sec. 53. (1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may (a) set up against the seller the breach of warranty in diminution or extinction of the price; or (b) maintain an action against the seller for damages for the breach of warranty. (2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events,

from the breach of warranty. (3) In the case of breach of warranty of quality such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty. (4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price, does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage. (5) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this act.

quently.⁵⁵ The English act is also open to objection for apparently not allowing rejection of the goods for breach of warranty where the property has not passed. The only way to avoid this construction is by asserting that there can be no warranty in an executory contract to sell.⁵⁶ The American act also differs from the English act in not allowing the buyer both to recoup for the diminished value of goods bought and also to maintain an action for breach of warranty. In construing the American act it will be observed that no limitation is put upon the word "warranty" in the first sentence. Accordingly, the section applies both to implied warranties and to express warranties, both of quality and of title; and under the broad definition of express warranties in section 12, any promise in regard to the goods, as well as affirmations fulfilling the requisites there laid down, will come within the meaning of the word. It must also be observed that section 49 to some extent qualifies section 69 (1) (a) and (b).

§ 604. **Election of remedies for breach of warranty.**—Various possibilities are open to the buyer when the seller has been guilty of a breach of a promise or warranty. It may be supposed: (1) That the property in the goods has passed, (2) that it has not. In the second case supposed the buyer, as has already been seen,⁵⁷ may refuse to accept the goods. How far he has the right to take the goods and thereafter seek redress for the seller's breach of obligation has also been previously considered,⁵⁸ and that discussion is applicable if it be supposed that the property in the goods has passed. But it still remains to be considered what remedy the buyer has after the property has passed in cases where the acceptance of the goods or the failure to give notice of defects has not deprived him of a right to redress. Three remedies are allowed him under the Sales Act, and two, at least, of these three remedies are generally recognized at common law.

⁵⁵ Section 608.

⁵⁶ This seems to be the view taken in Benjamin, Sale (5th Eng. ed.), p. 1003: "The authorities go to show that the question whether a stipulation as to quality is collateral depends upon whether the property has passed." The English act itself contains nothing to aid the reader in

determining what is a collateral warranty and what is a condition. See criticisms of the act on this point, *supra*, §§ 178-182, and also Benjamin (5th Eng. ed.), pp. 566, 1003.

⁵⁷ Sales Act, § 11 (2); *supra*, § 178. See also § 184.

⁵⁸ See Sales Act, § 49, and *supra*, § 484 *et seq.*

These three remedies are: (1) Recoupment, (2) an action or counterclaim for damages, (3) rescission.

§ 605. **Recoupment.**—The right of recoupment has been much confused in our law with the rights of set-off and counterclaim, and the words are frequently used indiscriminately, but a distinction should be observed. Set-off is a statutory right and was first allowed in the reign of *Queen Anne*.⁵⁹ The right was confined to cases where both the claim of the plaintiff and the crossclaim of the defendant were liquidated debts. So narrow a right was frequently of little avail and modern statutes of counterclaim have much extended the right. The statutes are not identical, but allow in general a defendant to litigate in an action brought against him a cognate claim of his own, whether for a liquidated sum or not. Had these broad statutes been passed earlier there would probably have been little occasion for the development of the doctrine of recoupment, for a defendant by means of counterclaim, in most cases, can get the same redress and more than he can by means of recoupment. This, however, is not true in every case. The theory of recoupment is that the plaintiff's damages are cut down to an amount which will compensate him for the value of what he has given. In many cases this remedy is equivalent in its results to the ordinary right of a defendant under statutes of counterclaim to have any damages to which he is entitled deducted by way of counterclaim from the contract price, but the theory on which the amount is arrived at under the doctrine of recoupment and under the doctrine of counterclaim is different. Under the doctrine of recoupment the theory is that the defendant is not bound to perform the contract on his part, but he has received something of value for which he ought to pay. Under the doctrine of counterclaim the defendant does not seek to avoid his obligation under the contract but claims the right to enforce the plaintiff's obligations and to deduct the plaintiff's liability for breach of that obligation from the amount due from himself. In some cases, moreover, these remedies will not produce the same result. It may be that the imperfection of the plaintiff's per-

⁵⁹ IV & V Anne, c. 17; later extended by 2 Geo. II, c. 22, § 13, and 8 Geo. II, c. 24, §§ 4 and 5.

formance was due to an accident for which neither he nor the defendant is responsible and for which consequently the plaintiff is not liable in damages, yet the defendant ought not to be compelled to pay the full price but only the value of the performance he has received.⁶⁰ Again a case may be supposed where the imperfection of the plaintiff's performance, though wrongful, has not caused the defendant any damages.⁶¹ Moreover any consequential damages to which the defendant would be entitled cannot be considered under recoupment. Such damages must be based on the enforcement of the seller's obligation, not on a cutting down of the buyer's obligation to the value of what he has received. The matter may be summed up by saying that by means of counterclaim both sides of the contract are enforced in the same litigation, while by means of recoupment the defendant is allowed to avoid the contract which was made and substitute in its stead a *quasi-contractual* obligation for the value of what he has received. So the doctrine is stated by Parke, B., in the leading case on the subject in the law of sales.⁶² "Formerly, it was the practice, where an action was brought for an agreed price of a specific chattel sold with a warranty, or of work which was to be performed ac-

⁶⁰ This case is covered partly by section 7 of the Sales Act, and partly under section 73 it is left to the rules of the common law governing impossibility.

⁶¹ An interesting illustration of this possibility is found in a German decision reported in 34 Seuffert's Archiv, 426. The defendant hired a steamer of the plaintiff for the purpose of carrying passengers to see the manœuvres of the German navy on a certain day. The plaintiff warranted that 200 passengers could sit on the deck, allowing ten square feet for each. The defendant agreed to pay 800 marks. The action was for this price, the defense that there was deck room for but 125 passengers, and that the defendant was, therefore, liable for but 125/200 of the price. The plaintiff's reply to this was that

the deficiency had caused the defendant no damage (apparently because he had been unable to sell even 125 tickets to the boat), and the defendant admitted this. The Imperial Court held that the defendant was liable for but 500 marks. If he had chosen, he could have refused the steamer altogether, but he might take the steamer, and as the plaintiff had warranted a particular quality which had a direct relation to the price fixed, the latter was not entitled to that price unless the quality existed. An English or American court would probably not admit here that no damage had been caused, but would rather hold that furnishing an inferior steamer of itself involved damage.

⁶² *Mondel v. Steel*, 8 M. & W. 858.

according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross-action for breach of the warranty or contract;⁶³ in which action, as well the difference between the price contracted for and the real value of the articles or of the work done, as any consequential damage, might have been recovered; and this course was simple and consistent. In the one case, the performance of the warranty not being a condition precedent to the payment of the price, the defendant, who received the chattel warranted, has thereby the property vested in him indefeasibly, and is incapable of returning it back; he has all that he stipulated for as the condition of paying the price, and, therefore, it was held that he ought to pay it, and seek his remedy on the plaintiff's contract of warranty. In the other case, the law appears to have construed the contract as not importing that the performance of every portion of the work should be a condition precedent to the payment of the stipulated price, otherwise the least deviation would have deprived the plaintiff of the whole price; and, therefore, the defendant was obliged to pay it, and recover for any breach of contract on the other side. But after the case of *Basten v. Butter*,⁶⁴ a different practice, which had been partially adopted before in the case of *King v. Boston*,⁶⁵ began to prevail and, being attended with much practical convenience, has been since generally followed; and the defendant is now permitted to show that the chattel by reason of the noncompliance with the warranty in the one case, and the work in consequence of the non-performance of the contract in the other, were diminished in value.⁶⁶ It is not so easy to reconcile these deviations from the ancient practice with principle, in those particular cases above mentioned, as it is in those where an executory contract, such as this, is made for a chattel, to be manufactured in a particular manner, or goods to be delivered according to a sample;⁶⁷ where the party may refuse to receive, or may return in a reasonable time, if the article is not such as bargained for; for in these cases

⁶³ Parke, B., was speaking before counterclaim was allowed in England. This was not allowed until the Judicature Act of 1873.

⁶⁴ 7 East, 479.

⁶⁵ 7 East, 481, note.

⁶⁶ Citing *Kist v. Atkinson*, 2 Campb. 63; *Thornton v. Place*, 1 M. & Rob. 218.

⁶⁷ Citing *Germaine v. Burton*, 3 Stark. 32.

the acceptance or nonreturn affords evidence of a new contract on a *quantum valebat*; whereas, in a case of a delivery with a warranty of a specific chattel, there is no power of returning, and consequently no ground to imply a new contract; and in some cases of work performed, there is difficulty in finding a reason for such presumption. It must, however, be considered, that in all these cases of goods sold and delivered with a warranty, and work and labor, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established; and that it is competent for the defendant, in all of those, not to set off, by a proceeding in the nature of a cross-action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent; but no more." The English practice referred to in the preceding extract has been followed in this country, though the distinction pointed out between recoupment and a counterclaim for damages has not always been carefully observed.⁶⁸

§ 606. **Recoupment in the civil law.**—It seems probable that the doctrine of recoupment was borrowed from the civil law; at least, both in the classical Roman Law and in modern civil law the remedy is a recognized one for a defendant sued for a breach of an obligation. The right of the defendant thus to reduce the

⁶⁸ Withers v. Greene, 9 How. 213, 13 L. ed. 109; Lyon v. Bertram, 20 How. 149, 154, 15 L. ed. 847; Polhemus v. Heiman, 45 Cal. 573; McAlpin v. Lee, 12 Conn. 129, 30 Am. Dec. 609; Bradley v. Rea, 14 Allen, 20; Judd v. Dennison, 10 Wend. 512; Falconer v. Smith, 18 Pa. St. 130, 55 Am. Dec. 611; Huntington v. Lombard, 22 Wash. 202, 60 Pac. 414. In Cragin v. Fowler, 34 Vt. 326, 80 Am. Dec. 680, the court held that unless there was entire failure of consideration the buyer was not entitled to

have the price abated. In some cases though the word "recoupment" is used, what is evidently meant is a counterclaim for damages. See Springfield, etc., Co. v. Barnard, etc., Co., 81 Fed. Rep. 261, 49 U. S. App. 438, 26 C. C. A. 389; Underwood v. Wolf, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40; Harrow Spring Co. v. Whipple Harrow Co., 90 Mich. 147, 51 N. W. 197, 30 Am. St. Rep. 421; Perry Mfg. Co. v. Tobin, 106 Wis. 286, 82 N. W. 154.

damages for which he was liable was called in classical Roman Law the *actio æstimatoria* or *quantum minoris*.⁶⁹ The remedy exists in France,⁷⁰ and presumably in the numerous countries whose law is derived from Roman sources through France.⁷¹ It is in Germany, however, that the right seems most carefully considered and accurately defined.⁷²

§ 607. **Action or counterclaim for damages.**—It is fundamental that the breach of an obligation gives rise to a right of action for damages. It is unnecessary to cite authorities for so plain a point. It is enough to refer to the numerous cases previously collected where warranties have been enforced.⁷³ In most of these cases the method of enforcement was by an action or counterclaim for damages. How far the buyer's right of action is qualified by the fact that he has accepted the goods has also been previously considered.⁷⁴ The same principle is applicable to warranties of title, as to warranties of quality. In case of a warranty of title, however, it must be borne in mind that the question is in dispute whether the right of action arises immediately on completion of the bargain or not until the buyer has been dispossessed by the true owner.⁷⁵ And a difference between the rule of damages commonly applied for breach of such a warranty and that applied for breach of a warranty of quality will be hereafter treated.⁷⁶ It is not uncommon for warranties expressly to state that the buyer shall have the right to rescind the transaction for breach of warranty, and that on the returning of the goods in such event the buyer shall either be entitled to have his money back or to have other goods instead of those first taken.⁷⁷ Con-

⁶⁹ Hunter, Roman Law, 505; Sal-kowski, Roman Law, 602; Moyle, Sale in Civil Law, 194, 210-212.

⁷⁰ Code Civil, Art. 1644.

⁷¹ See for example *McVeigh v. Lusier*, 13 Lower Canada, 265.

⁷² Sections 462 and 463 of the Bürgerlichen Gesetzbuch allow the buyer the choice of rescission, damages for breach of obligation, or reduction of the purchase price ("Preismin-derung" as recoupment is called), for breach of warranty.

⁷³ See *supra*, § 194 *et seq.*

⁷⁴ *Supra*, § 484 *et seq.*

⁷⁵ As to this, see *supra*, § 221.

⁷⁶ *Infra*, § 615.

⁷⁷ *Davis v. Robinson*, 67 Iowa, 355, 25 N. W. 280; *Hefner v. Haynes*, 89 Iowa, 616, 57 N. W. 421; *McCormick Harvesting Co. v. Brower*, 88 Iowa, 607, 55 N. W. 537; *Hallowell v. McLaughlin*, 136 Iowa, 279, 111 N. W. 428; *Acker v. Kimmie*, 37 Kans. 276, 15 Pac. 248; *Champion Machine Co. v. Mann*, 42 Kans. 372, 22 Pac. 417; *Walters v. Akers*, 31 Ky. L. Rep. 259, 101 S. W. 1179; *Sandwich Mfg.*

ditions are often in such contracts imposed upon the right of rescission, and if imposed, of course must be observed in order to entitle the buyer to rescission. It has sometimes been contended that such an express provision for rescission amounted in effect to an agreement that this right should be the only right available to the buyer for breach of warranty. No doubt a contract may provide for rescission as a sole remedy.⁷⁸ The mere fact, however, that the contract provides that the buyer may rescind the contract and return the goods does not of itself exclude the buyer from pursuing other remedies allowed by law for breach of warranty.⁷⁹ It has been held in two cases that no action would lie for breach of warranty unless the property in the goods had passed to the buyer.⁸⁰ Such decisions illustrate the confusion of mind some-

Co. v. Feary, 34 Neb. 411, 51 N. W. 1026; McCormick Harv. Mach. Co. v. Knoll, 57 Neb. 790, 78 N. W. 394; Davis v. Iverson, 5 S. Dak. 295, 58 N. W. 796.

⁷⁸ McCormick Harvesting Mach. Co. v. Brower, 94 Iowa, 144, 62 N. W. 700; Tyler v. Augusta, 88 Me. 504, 34 Atl. 406; Hills v. Bannister, 8 Cowen, 32; Himes v. Kiehl, 154 Pa. St. 190, 25 Atl. 632; Wasatch Orchard Co. v. Morgan Canning Co., 32 Utah, 229, 89 Pac. 1009, 12 L. R. A. (N. S.) 540. In such cases commonly the contract provides that the buyer may return the goods and be entitled to receive new goods of the sort bargained for. The contract may provide merely for the repair of the goods if as originally delivered not conformable to the warranty. Aultman v. Gunderson, 6 S. Dak. 226, 60 N. W. 859; Gaar v. Hicks (Tenn. Ch., 1897), 42 S. W. 455; Lewis v. Hubbard, 1 Lea, 436, 27 Am. Rep. 775; Wasatch Orchard Co. v. Morgan Canning Co., 32 Utah, 229, 89 Pac. 1009.

⁷⁹ Evers v. Haddem, 70 Fed. Rep. 648; Shupe v. Collender, 56 Conn. 489, 15 Atl. 405, 1 L. R. A. 339; Elwood v. McDill, 105 Iowa, 437, 75 N. W. 340; Kemp v. Freeman, 42 Ill.

App. 500; Love v. Ross, 89 Iowa, 400, 56 N. W. 528; Hefner v. Haynes, 89 Iowa, 616, 57 N. W. 421; Hallowell v. McLaughlin, 136 Iowa, 279, 111 N. W. 428; Douglass Axe Mfg. Co. v. Gardner, 10 Cush. 88; Mandel v. Butties, 21 Minn. 391; Fitzpatrick v. Osborne, 50 Minn. 261, 52 N. W. 861; Perrine v. Serrell, 30 N. J. L. 454; Osborne v. McQueen, 67 Wis. 392, 29 N. W. 636; Park v. Richardson, 81 Wis. 399, 51 N. W. 572. Compare Walters v. Akers, 31 Ky. L. Rep. 259, 101 S. W. 1179.

⁸⁰ Bunday v. Columbus Machine Co., 143 Mich. 10, 106 N. W. 379, 5 L. R. A. (N. S.) 475; Frye v. Milligan, 10 Ont. 509. These were both cases of conditional sales where the buyer had taken possession of the property and paid part of the price. The result of the decisions was that the buyer was compelled to pay the full price and afterward seek redress on the warranty. It would logically follow from the decisions, although the cases did not actually involve the point, that in an action even for the last instalment of the price, the buyer would not be allowed to set-off or recoup damages for breach of the warranty.

times caused by the word "warranty." In the cases in question there was a promise on the part of the seller given for good consideration, and that promise had been broken to the buyer's damage. There was, therefore, a right of action. Doubtless the damages which the plaintiff might recover if he were not the absolute owner of the goods would not be the same as if he were.

§ 608. **Rescission.**—The remedies of recoupment and of an action or counterclaim for damages are generally admitted without dispute; but the third remedy, that of rescission, has been the cause of much discussion. It has been objected that rescission, as it involves a transfer of title back from the buyer to the seller, can only be accomplished by mutual assent and, further, that even if rescission were ordinarily permissible by the act of one party, it cannot properly be allowed where the obligation is collateral to the main contract as a warranty is said to be. As to the first of these objections, it has been shown in another connection that in many cases a transfer of title by the act of one party is allowed.⁸¹ As to the other objection, it should be observed that a warranty in the English law is not always collateral—in form at least. A promise which forms part of the description becomes a warranty when title passes.⁸² Still it is doubtless true that the typical warranty is collateral. Thus, a seller may sue for the price of a horse which he has sold and warranted sound without alleging in his declaration anything about the warranty.⁸³ From this the inference may be drawn that the price of the horse is promised in return for the transfer of title, and that the warranty is a collateral promise of which the consideration is not the price but the sale. This is doubtless the form the transaction takes, but the collateral character of the warranty is only formal. After reflection, no one can doubt that in such a bargain the inducement for the payment of the price or the promise to pay it is in an essential part, the giving of the warranty. The form which the

⁸¹ See *supra*, §§ 567–571.

⁸² *Supra*, § 183. For this reason in Benjamin, *Sale* (5th Eng. ed.), p. 1003, it is said that the question whether the promise is collateral depends upon whether the property in the goods has passed or not; but if a

promise is originally part of the seller's primary obligation, a mere transfer of the property can hardly change its character in this respect.

⁸³ *Parker v. Palmer*, 4 B. & Ald. 387; *Rogers v. Brown*, 103 Me. 478, 70 Atl. 206.

transaction takes justifies the court in applying the rules of pleading and procedure applicable to collateral stipulations and conditions subsequent; that is, the plaintiff need allege nothing about the matter, and the burden is on the defendant to allege and prove the existence of the collateral stipulation. To go farther than this, however, is to confuse matters of form with matters of substance. The remedy of rescission, if allowed at all, is allowed on broad principles of justice. The basis of the remedy is that the buyer has not bought what he bargained for. The desirability of such a remedy depends purely on the business customs of a community and on whether it appeals to the natural sense of justice. Do merchants who value their reputation for fair dealing take back goods which they have untruthfully, though innocently, asserted possessed particular qualities? Do reasonable buyers who have bought goods under such circumstances expect the seller to take back the goods and refund the price. These are the essential inquiries, and there can be little doubt of the answers. If a sale is induced by fraudulent statements, rescission is admittedly proper.⁸⁴ And if a seller knows of the falsity of the statements he makes which constitute a warranty, he is fraudulent, and the bargain may be rescinded in jurisdictions which deny the remedy of rescission for breach of warranty generally.⁸⁵ The morality of taking advantage afterward of false statements innocently made, by insisting on retaining the advantage of a sale induced thereby, is almost as questionable as that of making knowingly false statements to bring about the sale.⁸⁶ It is a difficult question of fact, and one which arises in very many cases of broken warranty, how far the seller knew that his warranty was false. It is a

⁸⁴ See *infra*, § 647.

⁸⁵ *Dawson v. Pennaman*, 65 Ga. 698; *Johnson v. Harley*, 121 Ga. 83, 48 S. E. 685; *Owens v. Sturges*, 67 Ill. 366; *Freyman v. Knecht*, 78 Pa. St. 141, 144; *Nelson v. Martin*, 105 Pa. St. 229; *Gates v. Bliss*, 43 Vt. 299.

⁸⁶ In *Prewitt v. Trimble*, 92 Ky. 176, 183, 17 S. W. 356, 36 Am. St. Rep. 586, the court said: "It is a settled rule that even when one who brings about a contract by misrepresentation commits no fraud because

his representation was, when made, innocent in the ordinary sense, still, if when the fact of its falsity becomes known he refuses to relinquish the advantage, upon offer of reciprocal relinquishment received by the injured party, it would make him guilty of constructive fraud and the contract subject to rescission by a court of equity."

practical advantage if the decision of this question becomes immaterial as it does where rescission is allowed for breach of warranty.⁸⁷ So far as concerns the law actually prevailing, authorities are nearly divided. England,⁸⁸ and a number of States in this country,⁸⁹ deny the buyer any right of rescission. Many jurisdictions in the United States, however, allow rescission of an executed sale for breach of warranty.⁹⁰ The decisions which allow

⁸⁷ An interesting analogy to the allowance of this remedy may be found in the law governing innocent misrepresentation. Though it is not yet perhaps fully established that such misrepresentations give a right of rescission, the recent tendency of the law is strongly in that direction. See *Redgrave v. Hurd*, 20 Ch. Div. 1; *Derry v. Peek*, 14 A. C. 337, 347; *Newman v. Claflin*, 107 Ga. 89, 32 S. E. 943; *Holcomb v. Noble*, 69 Mich. 396, 37 N. W. 497.

⁸⁸ *Street v. Blay*, 2 B. & Ad. 456; *Gompertz v. Denton*, 1 Cr. & M. 207; *Dawson v. Collis*, 10 C. B. 523; *Sale of Goods Act*, §§ 11 (1) (b), 53 (1), 62 (1). Before the decision of *Street v. Blay*, the English law was sometimes supposed to allow rescission; Lord Eldon had so ruled in *Curtis v. Hannay*, 3 Esp. 82, and the law was so stated by Mansfield, C. J., in *Caswell v. Coare*, 1 Taunt. 566, 567. Also by Starkie, Evidence, p. 645. But this was criticised in Long, Sale, 215.

⁸⁹ *Thornton v. Wynn*, 12 Wheat. 183, 6 L. ed. 595; *Lyon v. Bertram*, 20 How. 149, 15 L. ed. 847; *Trumbull v. O'Hara*, 71 Conn. 172, 41 Atl. 546; *Worcester Mfg. Co. v. Waterbury Brass Co.*, 73 Conn. 554, 48 Atl. 422 (but the law of Connecticut since the passage of the Sales Act allows rescission); *Woodruff v. Graddy*, 91 Ga. 333, 17 S. E. 264, 44 Am. St. Rep. 33; *Hutchinson Lumber Co. v. Dickerman*, 127 Ga. 328, 56 S. E. 491; *Pound v. Williams*, 119 Ga. 904,

47 S. E. 218; Ga. Code, § 3556; *Crabtree v. Kile*, 21 Ill. 180; *Owens v. Sturges*, 67 Ill. 366; *Kemp v. Freeman*, 42 Ill. App. 500 (but see *Sparling v. Marks*, 86 Ill. 125); *Marsh v. Low*, 55 Ind. 271; *Hoover v. Sidener*, 98 Ind. 290; *Wulschner v. Ward*, 115 Ind. 219, 222, 17 N. E. 273; *Lightburn v. Cooper*, 1 Dana, 273; *H. W. Williams Transportation Line v. Darius Cole Transportation Co.*, 129 Mich. 209, 88 N. W. Rep. 473; *Merrick v. Wiltse*, 37 Minn. 41, 33 N. W. 3; *Lynch v. Curfman*, 65 Minn. 170, 68 N. W. 5 (compare *Close v. Crossland*, 47 Minn. 500, 50 N. W. 694); *Voorhees v. Earl*, 2 Hill, 288, 38 Am. Dec. 588; *Cary v. Gruman*, 4 Hill, 625, 40 Am. Dec. 299; *Muller v. Eno*, 14 N. Y. 597; *Day v. Pool*, 52 N. Y. 416, 11 Am. Rep. 719; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 269, 23 N. E. 372, 16 Am. St. Rep. 753; *Kase v. John*, 10 Watts. 107, 36 Am. Dec. 148; *Freyman v. Knecht*, 78 Pa. St. 141; *Eshleman v. Lightner*, 169 Pa. St. 46, 32 Atl. 63; *Kauffman Milling Co. v. Stuckey*, 40 S. C. 110, 18 S. E. 218; *Hull v. Caldwell*, 3 S. Dak. 451, 54 N. W. 100; *Allen v. Anderson*, 3 Humph. 581; *Wright v. Davenport*, 44 Tex. 164; *Hoadley v. House*, 32 Vt. 179, 76 Am. Dec. 167; *Matteson v. Holt*, 45 Vt. 336; *Hulet v. Achey*, 39 Wash. 91, 80 Pac. 1105; *Mooers v. Gooderham*, 14 Ont. 451.

⁹⁰ *Pacific Guano Co. v. Mullen*, 66 Ala. 582; *Thompson v. Harvey*, 86 Ala. 519, 5 So. 825; *Hodge v. Tufts*, 115 Ala. 366, 22 So. 422; *Plant v.*

rescission do not generally make the right dependent on the importance of the warranty or the character of the breach of it.⁹¹

Condit, 22 Ark. 454, 458; Berman v. Woods, 33 Ark. 351 (but see Mason v. Bohannan, 79 Ark. 435, 96 S. W. 181); Righter v. Roller, 31 Ark. 170, 173; Polhemus v. Heiman, 45 Cal. 573; Hoult v. Baldwin, 67 Cal. 610, 8 Pac. 440 (compare Cal. Civil Code, § 1786); Collins v. Tigner (Del. Sup.), 60 Atl. 978; Rogers v. Hanson, 35 Iowa, 283; Upton Mfg. Co. v. Huiske, 69 Iowa, 557, 29 N. W. 621; Eagle Iron Works v. Des Moines Ry. Co., 101 Iowa, 280, 70 N. W. 193; Timken Carriage Co. v. Smith, 123 Iowa, 554, 99 N. W. 183; Whalen v. Gordon (Iowa), 95 Fed. Rep. 305, 37 C. C. A. 70; Craver v. Hornburg, 26 Kans. 94; Weybrick v. Harris, 31 Kans. 92, 1 Pac. 271; Gale Mfg. Co. v. Stark, 45 Kans. 606, 26 Pac. 8, 23 Am. St. Rep. 739; La. Code, Art. 2520; Flash v. American Glucose Co., 38 La. Ann. 4 (based on the civil law); Cutler v. Gilbreth, 53 Me. 176; Milliken v. Skillings, 89 Me. 180, 36 Atl. 77 (see also Noble v. Buswell, 96 Me. 73, 51 Atl. 244); Teymon v. Mitchell, 1 Md. Ch. 496; McCeney v. Duvall, 21 Md. 166; Horner v. Parkhurst, 71 Md. 110, 17 Atl. 1027 (compare Horn v. Buck, 48 Md. 358, 372; Columbian Iron Works v. Douglas, 84 Md. 44, 64, 34 Atl. 1118, 33 L. R. A. 103, 57 Am. St. Rep. 362); Bradford v. Manly, 13 Mass. 139, 7 Am. Dec. 122; Perley v. Balch, 23 Pick. 283, 34 Am. Dec. 56; Dorr v. Fisher, 1 Cush. 271, 273; Bryant v. Isburgh, 13 Gray, 607, 74 Am. Dec. 655; Smith v. Hale, 158 Mass. 178, 33 N. E. 493, 35 Am. St. Rep. 485; Gilmore v. Williams, 162 Mass. 351, 352, 38 N. E. 976; Branson v. Turner, 77 Mo. 489; Johnson v. Whitman Co., 20 Mo. App. 100; Kerr v. Emerson, 64 Mo. App. 159; St. Louis Brewing Assn. v. McEnroe, 80 Mo. App. 429; Ed-

wards v. Noel, 88 Mo. App. 434; Davis v. Hartlerode, 37 Neb. 864, 56 N. W. 731 (see also McCormick Harvesting Mach. Co. v. Knoll, 57 Neb. 790, 78 N. W. 394); Sloan v. Wolf Co., 124 Fed. Rep. 196, 59 C. C. A. 612; Canham v. Plano Mfg. Co., 3 N. Dak. 229, 55 N. W. 583 (compare N. Dak. Civil Code, § 3988); Byers v. Chapin, 28 Ohio St. 300; Boothby v. Scales, 27 Wis. 626; Croninger v. Paige, 48 Wis. 229, 4 N. W. 106; Warder v. Fisher, 48 Wis. 338, 4 N. W. 470; Minnesota Threshing Co. v. Wolfram, 96 Wis. 481, 71 N. W. 809; Parry Mfg. Co. v. Tobin, 106 Wis. 286, 82 N. W. 154; Optenberg v. Skelton, 109 Wis. 241, 244, 85 N. W. 356. To these jurisdictions should now be added Arizona, Connecticut, New Jersey and Rhode Island, because of their enactment of the Sales Act. In Massachusetts and Ohio where the act has also passed the decisions cited above from those States indicate that the law previously in force as to this matter was clearly that which the Sales Act codifies. See also Sparling v. Marks, 86 Ill. 125; Spring v. Slayden-Kirksey Mills, 106 Ill. App. 579, 582; Walker, Evans & Cogswell Co. v. Ayer, S. C. , 61 S. E. 557; Southern Brass Co. v. Exeter Mach. Works, 109 Tenn. 67, 70 S. W. 614; Mader v. Jones, 1 Russ. & Chesley, 82. In California and North Dakota, the Code provides (Cal. Civil Code, § 1786; N. Dak. Civil Code, § 3988): "The breach of a warranty entitles the buyer to rescind an agreement for a sale, but not an executed sale, unless the warranty was intended by the parties to operate as a condition." The force of this provision depends on the effect given it by the

The Federal courts apply either doctrine which is locally in force, rather than a single rule based on decisions of the Supreme Court of the United States.⁹² If several articles are bought for a sepa-

Supreme Courts of the States in question. The section permits rescission of an executed sale if the warranty was intended to operate as a condition. If this intention could be sought only in express words the result would be the same as the English law. But that does not seem to be the result the California or North Dakota courts reach. In *Hoult v. Baldwin*, 67 Cal. 610, the title to a machine seems to have passed and there was both a collateral warranty in writing that the machine would do good work and also, under the Code, implied warranties of fitness. The court said: "Having taken the machine then under a warranty, whether it be that expressed in the writing or provided by the Code, or both, the defendant had the right, if there was a breach of the warranty, that is, if in any respect the machine was not what it was warranted to be, to rescind the sale by returning or offering to return it to the plaintiffs." In *Canham v. Plano Manufacturing Co.*, 73 N. Dak. 229, 55 N. W. 583, a machine was sold with a warranty, apparently collateral. The buyer gave three notes, two of which he subsequently paid. This action was to recover back the money so paid and the amount of the third note which had been negotiated. The machine was kept and used for over a year. During this time the agent of the seller repeatedly promised to put it in order and requested the plaintiff to keep it. These facts were important as excusing the plaintiff from the imputation of *laches*, but there was no evidence of fraud or of any agreement to take the machine back if it

did not work. It certainly cannot be thought that the title had not passed. There was a new warranty given after the sale that the machine would do good work the next season which the court held given for good consideration. The court say: "There being a breach of a former warranty, plaintiff had it in his power to return the binder and have back his notes or a new machine in place of the defective one." The new warranty given instead, the court said, "amounted, in effect, to a keeping of the machine by the plaintiff on trial, with a right to return it next year if it should fail to work as stipulated by defendant's agent."

⁹¹ In *Gale Mfg. Co. v. Stark*, 45 Kans. 606, 26 Pac. 8, such a distinction was at least suggested, as the court confined its allowance of the remedy to cases "where the property purchased and received is substantially different from what it was warranted to be, and will not answer the purpose for which it was warranted." In Louisiana, which derives its law of sales from the Roman Law, the breach of implied warranty (or, in the language of the civil law, the redhibitory defect) must be such as to render the thing sold either useless or its use so imperfect or inconvenient that the buyer would not have purchased it had he known of the defect. In case of an express warranty the requisites for rescission are even more severe. It is necessary that the quality warranted should have been the principal motive for making the purchase. La. Code, Art. 2520.

⁹² In *Thornton v. Wynn*, 12 Wheat. 183, 6 L. ed. 595, and *Lyon v. Ber-*

rate price with a warranty applicable to each article, and the warranty as to one or more articles is broken, rescission may be had for such articles as do not comply with the warranty.⁹³

§ 609. **Rescission in the civil law.**—It is interesting to observe in the civil law the same tendency that is to be found in the common law. The Roman Law, like the English, started with the doctrine *caveat emptor*. The seller was not liable for defective quality unless he made express representations in regard to the goods or warranted them.⁹⁴ Under the Empire, however, it became established that certain material defects in the property sold would give rise to a right of rescission.⁹⁵ It will be noticed that for such defects as would be included in the common law under the head of implied warranties, the Roman Law imposed no liability on the seller other than to take back what he had sold and return the price. The situation was looked upon as we should look upon a sale induced by mistake, rather than as a case where the seller had been guilty of a breach of contract. It was true in both the earlier and the later classical Roman Law, however, that for mere breach of a contract in regard to the goods, the buyer had no right of rescission.⁹⁶ The modern civil law has, however, widely extended the buyer's right of rescission. Not only has the seller the right in all civil law countries to return goods sold with an implied warranty if they have material defects, but a failure of

tram, 20 How. 149, 15 L. ed. 847, the Supreme Court of the United States held that rescission was not allowable, but in these cases the law was still unsettled in the jurisdictions where the cases arose. The Circuit Court of Appeals in recent decisions has followed without comment the local law of Iowa, Nebraska, and Massachusetts, in each of which States rescission is allowed, rather than the rule suggested by the Supreme Court in the cases above referred to. *Whalen v. Gordon* (Iowa), 95 Fed. Rep. 305, 37 C. C. A. 70; *Sloan v. Wolf Co.* (Neb.), 124 Fed. Rep. 196, 59 C. C. A. 612; *Lawley & Son Corp. v. Park* (Mass.), 138 Fed. Rep. 31, 70 C. C. A. 399.

⁹³ *Young & Conant Mfg. Co. v. Wakefield*, 121 Mass. 91. It would seem essential that a separate contract for each article existed. The mere fact that a separate price was made for each article will not be enough. See *Barrie v. Earle*, 143 Mass. 1, 8 N. E. 639, 58 Am. Rep. 126. But a separate price is evidence, though not conclusive, of a separate contract. See *supra*, § 70.

⁹⁴ Moyle, *Sale in the Civil Law*, 189.

⁹⁵ *Ibid.* 194.

⁹⁶ *Ibid.* 201; Hunter, *Roman Law*, 498; Larombière, *Obligations* (ed. 1885), III, 85.

the goods to conform to representations or promises now generally gives the same right. In France rescission is allowed broadly as a remedy for breach of any mutual obligation,⁹⁷ and the wide influence of French Law on the legislation of other countries makes it probable that the law is similar in most countries on the Continent of Europe and in South America.⁹⁸ In Germany the buyer has a similar right.⁹⁹

§ 610. **Buyer must put seller in statu quo.**—The right of rescission is an alternative remedy based on equitable principles and must be confined within equitable limits. Not simply in regard to rescission for breach of warranty but in regard to rescission of contracts generally it is the law that the party seeking to rescind cannot do so if he has obtained a benefit under the contract which he cannot restore.¹ This rule is applied very strictly in England but less strictly here. Courts which allow rescission for breach of warranty do not regard the temporary use by the buyer necessary to discover the defect as such a benefit to the buyer

⁹⁷ 13 Harv. L. Rev. 85.

⁹⁸ See *c. g. supra*, note 91, as to the law of Louisiana.

⁹⁹ 13 Harv. L. Rev. 95; Bürgerliches Gesetzbuch, § 462. The provisions of the German Civil Code as to remedies of breach of warranties are as follows: "§ 462. On account of a defect for which the seller is responsible under the provisions of sections 459, 460, the purchaser may demand annulment of the sale (i. e., cancellation). (The purchaser may elect either the one or the other remedy, unless the law provides otherwise, as in the case of a sale of cattle, §§ 481, 487.) § 463. If a promised quality in the thing sold was absent at the time of the purchase (not 'at the time when the risk passes,' as in the case provided for by section 459), the purchaser may demand compensation for non-performance, instead of cancellation or reduction. The same rule applies if the seller has fraudulently concealed a defect. § 464. If the pur-

chaser accepts a defective thing although he knows of the defect, he is entitled to the claims specified in sections 462, 463, only if on acceptance he reserves his rights on account of the defect. § 465. Cancellation or reduction is affected if the seller, on demand (Such a demand amounts to a proposal which is binding on the purchaser. § 145.) by the purchaser, declares his consent thereto. § 466. If the purchaser asserts against the seller a defect of quality, the seller may offer cancellation and require him to declare within a fixed reasonable period whether he demands cancellation. In such a case cancellation may be demanded only before the expiration of the period. (After the expiration of the period reduction is the only remedy open to the purchaser, except in the case of the sale of a thing designated by species. § 480.)"

¹ Wald's Pollock, Contracts (3d ed.), 342.

or such an injury to the goods as to preclude the right of rescission.² But if the goods are injured or destroyed, he cannot rescind.³ Unless the seller was guilty of fraud this is probably true, though the destruction or injury is without the buyer's fault.⁴ An exception has, however, been made where the injury to the goods was caused by the very defect against which the seller warranted.⁵ In seeking rescission the buyer must take the position of an actor. As has been seen⁶ when the buyer rejects goods because they are not what the contract requires, the buyer is under no obligation to return the goods; he may simply refuse to regard them as his. But where the property in the goods has passed and the buyer wishes to revest the property in the seller, a return or offer to return the goods is necessary. "It is not sufficient for a buyer who has taken delivery of the goods at the vendor's place of business merely to express a willingness or make a proposal to return the goods, or simply to give notice to the seller that he holds the goods subject to his order, or to request him to come and take them back. But, if he would rescind the contract, he must return or tender back the goods to the seller at the place of delivery, unless, upon making the offer so to do, he is relieved of the obligation, as

² See cases cited *supra*, § 608, note 90.

³ *Curtis v. Hannay*, 3 Esp. 82; *Aultman v. Wirth*, 54 Ill. App. 17; *Libby v. Haley*, 91 Me. 331, 39 Atl. 1004; *McKnight v. Nichols*, 147 Pa. St. 158, 23 Atl. 399.

⁴ It is well settled that the risk is on the buyer where a sale is made by the terms of which he has an option to return, until he exercises the option. See *supra*, § 273. There is no reason to suppose that the rule would be otherwise where the right to return depended on a privilege given by the law instead of on agreement of the parties.

⁵ Thus in *Smith v. Hale*, 158 Mass. 178, 33 N. E. 403, 35 Am. St. Rep. 485, it was held that a buggy, the springs of which were warranted strong, might be returned though one of the springs had been broken while

in the buyer's possession. So in *Lawley & Son Corp. v. Park*, 138 Fed. Rep. 31, 70 C. C. A. 399, a yacht warranted of a certain material was held returnable by the buyer though it had been seriously injured, the injury being due to the defective material of which it was constructed. So in *Rosenthal v. Rambo*, 165 Ind. 584, 76 N. E. 404, 3 L. R. A. (N. S.) 678, it was held that even though the contract provided as a condition of return that the horse sold should be in as sound condition when returned as when sold it might be returned though in worse condition than when bought, when such unsoundness resulted from the natural development of a disease existing at the time of the sale. See also *Pitcher v. Webber*, 103 Me. 101, 68 Atl. 593.

⁶ *Supra*, §§ 496, 497.

stated by a refusal to receive them if tendered.”⁷ The buyer need not, however actually deliver the goods to the seller unless the seller repays any portion of the price which has been paid. The buyer has a lien on the goods to secure such repayment.⁸

§ 611. **Prompt election necessary.**—As in other cases, for instance fraud or mistake, where rescission of a transaction is admitted, the injured party must act promptly. If, knowing that the goods were not what he had a right to expect, the buyer still retains them, he may not thereby be deprived of a right to sue the seller for the injury,⁹ but he is precluded from asserting a right to withdraw from the transaction altogether.¹⁰

§ 612. **Buyer's remedies are mutually exclusive.**—It seems to be generally assumed that if the buyer elects the remedy of rescission he is thereby precluded from bringing an action for damages and it has been so decided.¹¹ The Sales Act adopts this rule. As an original question, at least where a contract preceded the actual sale, it might be argued with some force that the buyer should have a right to rescind the transfer of property without rescinding the contract, and in this way restore the property to the seller and yet hold him liable in damages for failure to keep his contract. The right of the buyer to recoup because of the diminished value of the goods sold, and yet to bring an action later to recover consequential damages for breach of the warranty, has been upheld in England in a leading case.¹² The court there said “that in the action in which recoupment had been allowed the buyer could not recover consequential damages and that, therefore, recovery should be allowed in the subsequent action on the warranty.” It is true that in the former action the consequential damages could not be set up, but if the buyer elects a remedy which deprives him of a right to recover certain damages, the court cannot undo his election. In theory it seems clear that the right of re-

⁷ *Milliken v. Skillings*, 89 Me. 180, 36 Atl. 77, quoted and followed in *Mundt v. Simpkins*, Neb., 115 N. W. 325.

⁸ *E. T. Kenney Co. v. Anderson*, 26 Ky. L. Rep. 367, 81 S. W. 663.

⁹ As to this see *supra*, § 484 *et seq.*

¹⁰ See cases cited *supra*, § 608, note

90; *Upton Mfg. Co. v. Huiske*, 69 Iowa, 557, 29 N. W. 621.

¹¹ *Heagney v. J. I. Case Mach. Co.* (Neb.), 96 N. W. 175; *McCormick Machine Co. v. Brown* (Neb.), 98 N. W. 697; *Mundt v. Simpkins* (Neb.), 115 N. W. 325.

¹² *Mondel v. Steel*, 8 M. & W. 858.

coupment must be based on the assumption that not simply the sale is rescinded but the whole contract to buy and sell. The buyer may stand on his contract, in which case he is liable for the price agreed, and may sue or counterclaim for the seller's failure to perform his contract, or he may assert in effect that the goods are not what the contract called for, and that he will substitute for his liability on that contract a *quasi*-contractual obligation to pay the value of what he has received. Accordingly it has been held in Massachusetts, and it seems rightly, that the buyer must elect between these two remedies.¹³ Under the Sales Act it is clear that the buyer can have but a single remedy for breach of warranty.

§ 613. **Damages for defective quality — General rule.**—The general measure of damage for breach of warranty of quality is the difference between the value of the article actually furnished the buyer and the value the article would have had if having the qualities which it was warranted to have.¹⁴ Whether the action is in tort or contract is immaterial. In either form of action the buyer is seeking redress for the failure of the article to

¹³ *Gilmore v. Williams*, 162 Mass. 351, 38 N. E. 976; *Berman v. Henry N. Clark Co.*, 194 Mass. 248, 80 N. E. 480.

¹⁴ *English v. Spokane Com. Co.*, 57 Fed. Rep. 451, 15 U. S. App. 218, 6 C. C. A. 416; *McDonald v. Kansas City Bolt Co.*, 149 Fed. Rep. 360, 365, 79 C. C. A. 298, 8 L. R. A. (N. S.) 1110; *Herring v. Skaggs*, 62 Ala. 180, 73 Ala. 446, 34 Am. Rep. 4; *Florence v. Pattillo*, 105 Ga. 577, 32 S. E. 642; *Moore Furniture Co. v. Sloane*, 166 Ill. 457, 46 N. E. 1128, 64 Ill. App. 581; *Elwood v. Harting*, 21 Ind. App. 408, 52 N. E. 621; *Alpha Checkrower Co. v. Bradley*, 105 Iowa, 537, 75 N. W. 369; *Loomis Milling Co. v. Vawter*, 8 Kans. App. 437, 57 Pac. 43; *Sharpe v. Bettis*, 17 Ky. L. Rep. 673, 32 S. W. 395; *Central Trust Co. v. Arctic Ice Machine Co.*, 77 Md. 202, 238, 26 Atl. 493; *Ponce v. Smith*, 84 Me. 266, 24 Atl. 854; *Noble v. Fagnant*, 162 Mass. 275,

38 N. E. 507; *Macted v. Fowler*, 94 Mich. 106, 53 N. W. 921; *Hansen v. Gaar*, 63 Minn. 94, 65 N. W. 254; *Miamisburg Twine & Cordage Co. v. Wohlhuter*, 71 Minn. 484, 74 N. W. 175; *McCormick Harvesting Machine Co. v. Heath*, 65 Mo. App. 461; *Hogan v. Shuart*, 11 Mont. 498, 28 Pac. 969; *Burr v. Redhead*, 52 Neb. 617, 621, 72 N. W. 1058; *Hooper v. Story*, 155 N. Y. 171, 49 N. E. 773; *Huyett & Smith Co. v. Gray*, 124 N. C. 322, 32 S. E. 718; *Aultman v. Ginn*, 1 N. Dak. 402, 48 N. W. 336; *Himes v. Kiehl*, 154 Pa. St. 190, 25 Atl. 632; *Western Twine Co. v. Wright*, 11 S. Dak. 521, 78 N. W. 942, 44 L. R. A. 438; *Danner v. Fort Worth Implement Co.*, 18 Tex. Civ. App. 621, 45 S. W. 856; *Case Plow Works v. Niles & Scott Co.*, 90 Wis. 590, 63 N. W. 1013; *Parry Mfg. Co. v. Tobin*, 106 Wis. 286, 82 N. W. 154.

conform to the warranty, not for the injury suffered by the purchase of an article worth less than the price paid for it. Even in an action for deceit, where fraud is part of the cause of action the great weight of authority supports the same rule. That is a defrauded seller is allowed not merely to be replaced in his original position, but is entitled to be put in the position he would have occupied had the representations been true.¹⁵ He is, therefore, entitled to recover from one who fraudulently induced him to sell goods to an insolvent corporation the full price promised even though this includes a profit.¹⁶ The contrary view, however, confining the damages in deceit to the value of what the plaintiff parted with, less the value of what he received, has the support of the Supreme Court of the United States,¹⁷ and of some State courts.¹⁸ This

¹⁵ In the following cases the rule was applied to sales of personal property: *Mayer v. Dyer*, 57 Ark. 441, 21 S. W. 1064; *Boddy v. Henry*, 113 Iowa, 462, 85 N. W. 771, 53 L. R. A. 769; *Drake v. Holbrook*, 23 Ky. L. Rep. 1941, 66 S. W. 512; *Nash v. Insurance & Trust Co.*, 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753; *Whiting v. Price*, 172 Mass. 240, 51 N. E. 1084, 70 Am. St. Rep. 262; *Bank of Atchison v. Byers*, 139 Mo. 627, 659, 41 S. W. 325; *Noyes v. Blodgett*, 58 N. H. 502; *Lunn v. Shermer*, 93 N. C. 164; *Potter v. Necedah Lumber Co.*, 105 Wis. 25, 30, 80 N. W. 88, 81 N. W. 118. The same principle was applied to sales of land in *Matlock v. Reppy*, 47 Ark. 148, 14 S. W. 546; *Gustafson v. Rustemeyer*, 70 Conn. 125, 39 Atl. 104, 39 L. R. A. 644, 66 Am. St. Rep. 92; *Williams v. McFadden*, 23 Fla. 143, 1 So. 618, 11 Am. St. Rep. 345; *Antle & Bro. v. Sexton*, 137 Ill. 410, 27 N. E. 691; *Van Velsor v. Seeberger*, 59 Ill. App. 322; *Nysewander v. Lowman*, 124 Ind. 584, 24 N. E. 355; *Speed v. Hollinsworth*, 54 Kans. 436, 38 Pac. 496; *Wright v. Roach*, 57 Me. 600; *Estell v. Myers*, 56 Miss. 800; *Caldwell v. Henry*, 76 Mo. 254, 257; *Page v. Parker*, 43

N. H. 363, 80 Am. Dec. 172; *Pryor v. Foster*, 130 N. Y. 171, 29 N. E. 123; *Fargo Gas & Coke Co. v. Fargo Gas & Electric Co.*, 4 N. Dak. 219, 59 N. W. 1066, 37 L. R. A. 593; *Line-rode v. Rasmussen*, 63 Ohio St. 545, 59 N. E. 220; *Beasley v. Swinton*, 46 S. C. 426, 24 S. E. 313; *Augur v. Smith*, 90 Tenn. 729, 18 S. W. 398; *Hecht v. Metzler*, 14 Utah, 408, 48 Pac. 37, 60 Am. St. Rep. 906; *Shanks v. Whitney*, 66 Vt. 405, 29 Atl. 367.

¹⁶ *Shaw v. Gilbert*, 111 Wis. 165, 86 N. W. 188.

¹⁷ *Smith v. Bolles*, 132 U. S. 125, 10 S. C. 39, 33 L. ed. 279; *Sigafus v. Porter*, 179 U. S. 116, 21 S. C. 34, 44 L. ed. 113. These decisions have been followed in the lower Federal courts. *Wilson v. New U. S. Ranch Co.*, 73 Fed. Rep. 994, 36 U. S. App. 634, 20 C. C. A. 244; *Rockefeller v. Merritt*, 76 Fed. Rep. 909, 40 U. S. App. 666, 35 L. R. A. 633, 22 C. C. A. 608; *Nashua Savings Bank v. Burlington Electric Co.*, 100 Fed. Rep. 673.

¹⁸ *Buschman v. Codd*, 52 Md. 202, 209; *Reynolds v. Franklin*, 44 Minn. 30, 46 N. W. 139, 20 Am. St. Rep. 540; *Wallace v. Hallowell*, 56 Minn. 501, 58 N. W. 292; *Crater v. Binninger*, 33 N. J. L. 513, 97 Am. Dec.

also seems to be the law of England.¹⁹ At first sight it may seem that the latter rule is clearly and universally correct, confining as it does the plaintiff's recovery to a restitution of what he lost by entering into the transaction. The real explanation of the broader rule, at least in cases of sales, seems to be that the defendant in deceit is not simply a fraudulent person, he is a warrantor of the truth of his statement. The injured person may, because of fraud, elect to rescind the transaction and claim restitution of what he has parted with, or he may demand that the representations be made good. As has been seen, ordinary warranties where no fraud exists may be enforced by action of tort.²⁰ The addition of the element of deceit cannot deprive the injured person of the rights which would be his if this element were lacking, and if the representation on which he relied were a warranty and nothing more.²¹ A practical reason for the enforcement of the broader rule may be found in the fact that under the other rule a fraudulent person can in no event lose anything by his fraud. He runs the chance of making a profit if he successfully carries out his plan and is not afterward brought to account for it; and if he is brought to account, he at least will lose nothing by his misconduct.²²

737; *Cawston v. Sturgis*, 29 Or. 331, 43 Pac. 656; *High v. Berret*, 148 Pa. St. 261, 23 Atl. 1004; *McCord-Collins Commerce Co. v. Levi*, 21 Tex. Civ. App. 109, 50 S. W. 606; *Tacoma v. Tacoma L. & W. Co.*, 17 Wash. 458, 482, 50 Pac. 55.

¹⁹ *Peek v. Derry*, 37 Ch. D. 541; *McConnel v. Wright*, [1903] 1 Ch. 546. So in *Johnstone v. Hall*, 10 Manitoba, 161.

²⁰ See *supra*, § 197.

²¹ It may be urged that in some cases the representations on which an action of deceit may be based would not amount to a warranty if the element of deceit were lacking. Under the broad rule defended *supra* (§ 197 *et seq.*), this will not often be true of misrepresentations of goods sold. In any case where it is true, the allowance of the broader

rule of damages in effect holds the defendant as a warrantor because of his deceit, a result not easy to support, since it involves the consequence that an alternative remedy should exist in *assumpsit*.

²² In *Morse v. Hutchins*, 102 Mass. 439, 440, this was thus expressed by Mr. Justice Gray: "To allow the plaintiff only the difference between the real value of the property and the price which he was induced to pay for it would be to make an advantage lawfully secured to the innocent purchaser in the original bargain inure to the wrongdoer; and, in proportion as the original price was low, would afford a protection to the party who had broken, at the expense of the party who was ready to abide by, the terms of the contract."

§ 614. **Consequential damages.**— In some cases the buyer suffers special damage far exceeding the value of the goods promised him, and if the consequential damages thus caused are natural consequences of the breach of warranty, the plaintiff is generally allowed to recover them.²³ If one sell an animal warranting it to be sound, when in fact it is infected with disease, the seller is responsible for damages resulting from a communication of the disease to the buyer's other animals in an action on the warranty.²⁴ And if a man sells hay or grain for the purpose of being fed to cattle and it contains a substance which poisons the buyer's cattle, the seller is responsible for the injury.²⁵ One who sells barrels with a warranty is liable for the buyer's loss of the contents owing to defects in the barrels.²⁶ The buyer of heating apparatus which fails to fulfill a warranty may recover for the loss caused by having the building without heat.²⁷ One who purchases warranted machinery which owing to breach of the warranty cannot be used may recover for the loss of time and labor before the machine can be replaced.²⁸ But the buyer of a warranted harvesting machine was not allowed to recover for injury to his grain caused by the inability to obtain another machine when the warranted machine broke.²⁹ Labor expended in reasonable efforts making

²³ In *Borradaile v. Brunton*, 8 Taunt. 535, a chain cable was warranted to last two years, and on its breaking and letting go an anchor which was attached to it, the buyer was allowed to include in his damages the value of the anchor. In *Dushane v. Benedict*, 120 U. S. 630, 30 L. ed. 810, rags were warranted as clean which were in fact infected and caused smallpox to break out in the purchaser's mill, thereby causing expense and delay. The seller was held liable.

²⁴ *Black v. Elliott*, 1 F. & F. 595; *Smith v. Green*, 1 C. P. D. 92; *Snowden v. Waterman*, 105 Ga. 384, 31 S. E. 110; *Joy v. Bitzer*, 77 Iowa, 73, 41 N. W. 575, 3 L. R. A. 184; *McKee v. Jones*, 67 Miss. 405, 7 So. 348; *Stranahan Co. v. Coit*, 55 Ohio St. 398, 45 N. E. 634; *Packard v. Slack*, 32 Vt. 9.

²⁵ *Wilson v. Dunville*, 4 L. R. Ir. 249, 6 L. R. Ir. 210; *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440; *Coyle v. Baum*, 3 Okla. 695, 716, 41 Pac. 389.

²⁶ *Poland v. Miller*, 95 Ind. 387, 48 Am. Rep. 730; *Tatro v. Brower*, 118 Mich. 615, 77 N. W. 274.

²⁷ *Tower v. Pauly*, 67 Mo. App. 632; *Laufer v. Boynton Furnace Co.*, 84 Hun, 311, 32 N. Y. Suppl. 362; *Russell v. Corning Mfg. Co.*, 49 N. Y. App. Div. 610, 63 N. Y. Suppl. 640.

²⁸ *New York Mining Co. v. Fraser*, 130 U. S. 611, 622, 9 S. Ct. 665, 32 L. ed. 1031; *Sinker v. Kidder*, 123 Ind. 528, 24 N. E. 341; *Aultman v. Stout*, 15 Neb. 586, 19 N. W. 464; *Erie Iron Works v. Barber*, 106 Pa. St. 125, 51 Am. Rep. 508.

²⁹ *Fuller v. Curtis*, 100 Ind. 237, 50 Am. Rep. 786.

warranted goods conform to the just requirement of the buyer may be recovered for.³⁰ Injury caused by using warranted goods in manufacturing other articles is recoverable unless the buyer was negligent or unreasonable in failing to discover the defects before using the goods.³¹ Where seeds are bought with a warranty, the loss or diminished value of the crop may be included in damages recovered.³² Similarly where defective trees are sold the seller, if the defect is a breach of warranty, is liable for the difference between the value of the land with such trees as were promised and with inferior trees or no trees, if the trees fail to grow.³³ On the other hand it has been held that damages for breach of a warranty of a wagon could not include an injury caused by the death of a horse in consequence of the defect in the wagon.³⁴ The general principle allowing consequential dam-

³⁰ *Fox v. Stockton Harvester Works*, 83 Cal. 333, 23 Pac. 295; *Whitehead Machine Co. v. Ryder*, 139 Mass. 366, 31 N. E. 736.

³¹ *Smith v. Johnson*, 15 T. L. R. 179; *Bagley v. Cleveland Rolling Mill*, 21 Fed. Rep. 159; *Nye v. Snyder*, 56 Neb. 754, 77 N. W. 118; *Smith v. Foote*, 81 Hun, 128, 30 N. Y. Suppl. 679; *Wait v. Borne*, 123 N. Y. 592, 25 N. E. 1053.

³² *Crutcher v. Elliott*, 13 Ky. L. Rep. 592; *Haycroft v. Walden*, 14 Ky. L. Rep. 892; *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438, 38 N. J. L. 496, 20 Am. Rep. 425; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Landreth v. Wycoff*, 67 N. Y. App. Div. 145, 73 N. Y. Suppl. 388; *Reiger v. Worth*, 127 N. C. 230, 37 S. E. 217, 52 L. R. A. 362. But see *Butler v. Moore*, 68 Ga. 780, 45 Am. Rep. 508; *Hurley v. Buchi*, 10 Lea, 346.

³³ *Shearer v. Park Nursery Co.*, 103 Cal. 415, 37 Pac. 412, 42 Am. St. Rep. 125; *Long v. Pruyn*, 128 Mich. 57, 87 N. W. 88, 92 Am. St. Rep. 443. Other recent cases involving the recovery of consequential damages are *Hodge v. Tufts*, 115 Ala.

366, 22 So. 422; *Alpha Checkrower Co. v. Bradley*, 105 Iowa, 537, 75 N. W. 369; *Kester v. Miller*, 119 N. C. 475, 26 S. E. 115; *Aultman v. McDonough*, 110 Wis. 263, 85 N. W. 980; *Fisher v. Bertram*, 100 Ill. App. 542; *Union Bank v. Blanchard*, 65 N. H. 21, 18 Atl. 90; *Halstead Lumber Co. v. Sutton*, 46 Kans. 192, 26 Pac. 444; *Punteney-Mitchell Mfg. Co. v. T. G. Northwall Co.*, 66 Neb. 5, 91 N. W. 863; *Leavitt v. Fiberloid Co.*, 196 Mass. 440, 82 N. E. 682. See also *Randall v. Newson*, 2 Q. B. D. 102; *McDonald v. Kansas City Bolt Co.*, 149 Fed. Rep. 360, 79 C. C. A. 298, 8 L. R. A. (N. S.) 1110; *Burr v. Redhead Co.*, 52 Neb. 617, 72 N. W. 1058.

³⁴ *Schurmeier v. English*, 46 Minn. 306, 48 N. W. 1112. Compare this decision with *Randall v. Newson*, 2 Q. B. D. 102, where the seller of a carriage pole was held liable for injury to the buyer's horses caused by the defective condition of the pole. See further as questioning the buyer's right to consequential damages, *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4, 73 Ala. 446; *Jones v. Ross*, 98 Ala. 448, 13 So. 319.

ages naturally resulting from a breach of warranty is not much disputed, but the question of what consequential damages are too remote is not always decided in the same way. Especially where personal injury is caused by the defect in the warranted article to a third person, and the buyer is compelled to pay damages to the person injured, it is disputed whether the buyer can recover these damages from the seller. By the weight of authority he is allowed to do so, and this result seems correct, at least if the defect in the thing sold was of a sort likely to cause the injury which in fact took place.³⁵ The principle does not seem essentially different where the injury is to the buyer himself. If there is a difference, the liability of the seller seems clearer, but even in this case some courts hold that the damages are too remote.³⁶ It is beyond

³⁵ In *Mowbray v. Merryweather*, [1895] 2 Q. B. 640, the defendant agreed to supply the plaintiff with necessary apparatus for unloading a cargo from a ship belonging to the defendant, which the plaintiff had contracted to unload, furnished a defective chain which broke and injured a person in the plaintiff's employ. The plaintiff settled his liability with the injured person and was allowed to recover for the money thus paid. Similar decisions are *Vogan v. Oulton*, 81 L. T. (N. S.) 435; *Boston Woven Hose Co. v. Kendall*, 178 Mass. 232, 59 N. E. 637, 51 L. R. A. 781, 86 Am. St. Rep. 478. On the other hand in *Rode v. Arney*, 115 Ill. App. 629, where the buyer's wife was injured owing to breach of warranty of a wagon, it was held that the buyer could not recover for loss of his wife's services on the ground that the damage was not such as to reasonably have been anticipated.

³⁶ In *Jones v. Ross*, 98 Ala. 448, 13 So. 319, the buyer bought a horse by which he was injured. He was not allowed to recover on the theory that his injury was due to the failure of the horse to comply with the sel-

ler's warranty without proof of a *scicnter*. So in *Birdsinger v. McCormick Machine Co.*, 183 N. Y. 487, 76 N. E. 611, 3 L. R. A. (N. S.) 1047, a buyer of an agricultural machine was not allowed to recover for injuries which he suffered owing to the defects in the warranted machine. Two judges dissented. This decision seems opposed to two earlier decision of the Appellate Division of the New York Supreme Court (*Bruce v. Fiss Horse Co.*, 47 N. Y. App. Div. 273, 62 N. Y. Suppl. 96; *Wood v. Anthony*, 79 N. Y. App. Div. 111, 79 N. Y. Suppl. 829). It may be that the New York court would hold the injury sufficiently proximate, and the seller liable for it if the warranty were by its terms specifically aimed at the precise defect which caused the injury. On the other hand the seller in *Tyler v. Moody*, 111 Ky. 191, 63 S. W. 433, 54 L. R. A. 417, 98 Am. St. Rep. 406, was held liable for personal injuries suffered by the buyer from the bursting of an acetyline gas machine which was warranted to be absolutely safe and unable to generate enough gas to explode. See also cases in the preceding note which held the seller liable for injuries to

the scope of this work to consider the liability of a manufacturer in tort for negligence for injuries caused by defects in goods of his manufacture. It is enough to say that this question is one that must be separately considered.³⁷ Another kind of case which has given rise to the question of consequential damages is where a buyer who purchases goods with a warranty resells them with a similar warranty and, the goods proving defective, is held liable in damages. He is allowed to recover these damages over against the person from whom he originally bought them.³⁸ What consequential damages are too remote is a question of degree. The cases previously cited indicate that most courts are rather liberal in allowing the plaintiff damages for such injuries as are clearly due to the breach of warranty. A few illustrations may be given of cases where the damage was held too remote. Damages due to the diminished value of patents belonging to the buyer and the loss of profits from other contracts owing to defective cement used by the buyer in a building were held too remote.³⁹ Expected profits, unless they very plainly would have been made, are not allowable.⁴⁰ The expense of erecting a building for machinery bought with a warranty has been held not allowable as part of the damages for breach of warranty.⁴¹ If the buyer's own fault or

a third person. *A fortiori* it may be supposed these courts would hold the seller liable for injuries to the buyer.

³⁷ See *Watson v. Augusta Brewing Co.*, 124 Ga. 121, 52 S. E. 152, 110 Am. St. Rep. 157, 1 L. R. A. (N. S.) 1178, and note thereto.

³⁸ *Hammond v. Bussey*, 20 Q. B. D. 79; *Bagley v. Cleveland Rolling Mill Co.*, 21 Fed. Rep. 159; *Reggio v. Braggiotti*, 7 Cush. 166; *Carleton v. Lombard*, 19 N. Y. App. Div. 297, 46 N. Y. Suppl. 120; affirmed, without opinion, 162 N. Y. 628, 57 N. E. 1106; *Reese v. Miles*, 99 Tenn. 398, 41 S. W. 1065; *Cleave v. King*, 3 N. Z. L. R. 277 (C. A.). See also *Nashua Steel Co. v. Brush*, 91 Fed. Rep. 213, 50 U. S. App. 461, 33 C. C. A. 456; *Ryerson v. Chapman*, 66 Me. 557.

³⁹ *Ralph v. Rathburn Co.*, 75 Fed. Rep. 971, 39 U. S. App. 297, 21 C. C. A. 584.

⁴⁰ *Glidden v. Pooler*, 50 Ill. App. 36; *Love v. Ross*, 89 Iowa, 400, 56 N. W. 528. See also *Georgia Code*, cited in *Butler v. Moore*, 68 Ga. 780, 45 Am. Rep. 508. In *St. Louis Brewing Assn. v. McEnroe*, 80 Mo. App. 429, loss of custom owing to the bad quality of beer furnished was not allowed as an element of damage. Compare *Swain v. Schieffelin*, 134 N. Y. 471, 31 N. E. 1025, 18 L. R. A. 385, where loss of trade caused by selling ice cream in which poisonous matter bought from the defendant had been placed was allowed as an element of damage.

⁴¹ *Huyett & Smith Co. v. Gray*, 111 N. C. 87, 15 S. E. 939. See also *Herring v. Skaggs*, 62 Ala. 180, 34 Am.

negligence contributed to the injury he cannot recover consequential damages, since such damages were under the circumstances not proximately due to the breach of warranty.⁴²

§ 615. **Damages for breach of warranty in title.**— There is no reason on principle why different rules should govern the measure of damages for breach of warranty of title and the measure of damages for breach of warranty of quality, and the Sales Act makes no distinction in regard either to the remedies or the measure of damages, except that no attempt is made to define what damages “directly and naturally result” from breach of a warranty of title.⁴³ Considerable difference of decision exists in the law of this country, however, in regard to warranties of title. As has been previously stated,⁴⁴ many jurisdictions hold that no right of action accrues to the buyer until his possession has been disturbed.^{44a} Even jurisdictions which do not directly deny the right of an action often hold that while the buyer retains undisturbed possession, he can only recover nominal damages.⁴⁵ A distinction should here be observed, failure to notice which has perhaps caused some confusion. If the seller has not title to the goods the buyer not only may sue upon the warranty for damages, but may also rescind the transaction for failure of consideration according to principles previously stated.⁴⁶ This latter right must certainly be allowed wherever rescission is allowed for breach of warranty of quality, and probably courts which do not allow the remedy of rescission in that case would generally do so where the title was defective, on the ground of total failure of

Rep. 4, 73 Ala. 446; *Jones v. Ross*, 98 Ala. 448, 13 So. 319; *Fuller v. Curtis*, 100 Ind. 237, 50 Am. Rep. 786; *Schurmeier v. English*, 46 Minn. 306, 48 N. W. 1112, cited *supra*, note 34.

⁴² *Nashua Steel Co. v. Brush*, 91 Fed. Rep. 213, 50 U. S. App. 461, 33 C. C. A. 456; *Razey v. J. B. Colt Co.*, 106 N. Y. App. Div. 103, 94 N. Y. Suppl. 59.

⁴³ The whole of section 69 is applicable both to warranties of quality

and warranties of title except subsection (7), which is applicable to warranties of quality only.

⁴⁴ *Supra*, § 221.

^{44a} See *supra*, § 221.

⁴⁵ *Patrick, etc. v. Swinney*, 5 Bush, 421; *Close v. Crossland*, 47 Minn. 500, 50 N. W. 694 (covenant against incumbrances); *Burt v. Dewey*, 40 N. Y. 283, 100 Am. Dec. 482; *McGiffin v. Baird*, 62 N. Y. 329; *O'Brien v. Jones*, 91 N. Y. 193.

⁴⁶ See *supra*, § 608.

consideration.⁴⁷ It is obvious that such redress cannot be allowed to a buyer who still retains possession of the goods. This would be inconsistent with the principle that one who seeks rescission must return anything that he has received. Accordingly the buyer must return the goods to the seller or discharge his duty in the premises by surrendering them to the true owner. If the buyer has not already paid the price, the natural way of asserting rescission is in answer for an action for the price. Decisions which hold that the buyer has no defense while still retaining the goods⁴⁸ do not necessarily involve the conclusion that the buyer has no right of action, though often cited as so deciding. Jurisdictions which deny the buyer more than nominal damages until eviction sometimes take fine and hardly tenable distinctions in this respect between different kinds of actions or warranties. Thus, where the seller fraudulently represents that he has title, it seems to be admitted that an immediate cause of action for substantial damages lies.⁴⁹ In some jurisdictions the distinction is taken between express and implied warranties. It has been held in Kentucky that though no right of action arises immediately for breach of express warranty,⁵⁰ a right of action arises immediately on the sale where there has been merely an implied warranty.⁵¹ But this distinction has been properly disapproved.⁵² In Missouri with as little reason the converse of the Kentucky rule was suggested; namely, that for breach of an express warranty an action arises immediately, but for breach of an implied warranty no action arises until damage.⁵³ Not only is it disputed when

⁴⁷ *Eicholz v. Bannister*, 17 C. B. (N. S.) 708. This was an action to recover back the price. But see *Hull v. Caldwell*, 3 S. Dak. 451, 454, 54 N. W. 100.

⁴⁸ For example, *Johnson v. Oehmig*, 95 Ala. 189, 10 So. 430, 36 Am. St. Rep. 204; *Sumner v. Gray*, 4 Ark. 467, 38 Am. Dec. 39; *Joslin v. Caughlin*, 27 Miss. 852; *Wanser v. Messler*, 29 N. J. L. 256; *Hull v. Caldwell*, 3 S. Dak. 451, 54 N. W. 100.

⁴⁹ *Sumner v. Gray*, 4 Ark. 467, 38

Am. Dec. 39; *Case v. Hall*, 24 Wend. 102, 35 Am. Dec. 605; *Hull v. Caldwell*, 3 S. Dak. 451, 455, 54 N. W. 100.

⁵⁰ *Tipton v. Triplett*, 1 Metc. (Ky.) 570.

⁵¹ *Pusey's Trustee v. Wathen*, 90 Ky. 473, 14 S. W. 418.

⁵² *Gross v. Kierski*, 41 Cal. 111; *Hodges v. Wilkinson*, 111 N. C. 56, 15 S. E. 941, 17 L. R. A. 545.

⁵³ *Matheny v. Mason*, 73 Mo. 677, 680, 39 Am. Rep. 541.

the buyer's cause of action or right to substantial damages arises, but also what is the basis for calculating substantial damages when the right to them has arisen. On principle it would seem clear that the buyer's damage is the full value of the goods, irrespective of the price paid for them, and this rule finds considerable support.⁵⁴ In Massachusetts the value of the goods is thus allowed even though a buyer has not been dispossessed.⁵⁵ It is sometimes said that the value is to be taken as of the time when the wrong was committed,⁵⁶ which would be either the time of the sale or the time of dispossession, according to the doctrine held by the court in question. But whatever the time of the wrong there seems no reason for refusing to admit evidence of subsequent circumstances, as mitigating or increasing proximately the damages. This was well brought out in a recent Minnesota decision.⁵⁷ The court said: "It seems that the charge to the jury was that the vendee was entitled to recover as damages the value of the property when it was taken from him, and damages were awarded on this basis, and that in passing upon the motion the court held its charge to have been erroneous, and that it should have stated that the vendee's damages were the price paid for the chattel. Unless we are to lose sight of the cardinal principal which governs when estimating and awarding damages in civil actions, which is simply compensation to the injured party, the court was right in its charge, and wrong when it concluded that an error had been committed."⁵⁸ In many cases fol-

⁵⁴ *Rowland's Admr. v. Shelton*, 25 Ala. 217; *Marlatt v. Clary*, 20 Ark. 251; *Dabovich v. Emeric*, 12 Cal. 171; *Grose v. Hennessey*, 13 Allen, 389; *Brown v. Pierce*, 97 Mass. 46, 93 Am. Dec. 57; *Hendrickson v. Back*, 74 Minn. 90, 76 N. W. 1019; *Hoffman v. Chamberlain*, 40 N. J. Eq. 663, 5 Atl. 150, 53 Am. Rep. 783. The earlier Massachusetts and Tennessee decisions of *Eaton v. Mellus*, 7 Gray, 566, and *Crittenden v. Posey*, 1 Head, 311, are inconsistent with the later decisions in those States cited above.

⁵⁵ *Gross v. Hennessey*, 13 Allen, 389.

⁵⁶ *Rowland's Admr. v. Shelton*, 25 Ala. 217.

⁵⁷ *Hendrickson v. Back*, 74 Minn. 90, 76 N. W. 1019.

⁵⁸ The court continued: "It was held in *Close v. Crossland*, 47 Minn. 500, 50 N. W. 694, in a case involving this very question, that the damages are the actual loss, which is the value of the chattel purchased. Of course, there might be circumstances which would affect any particular case. Under the rule established by the granting of the motion, the damages actually sustained might be more or might be less than the re-

lowing the analogy of the law governing covenants in conveyances of real estate,⁵⁹ it has been held that the buyer can recover only the purchase money with such expenses as he may have properly incurred in defending his title.⁶⁰ This rule virtually confines the remedy of the buyer to rescission and restitution, a remedy to which the injured buyer is undoubtedly entitled if he so elects, but it is a violation of general principles of contracts to deny him in an action on the contract such damages as will put him in as good a position as he would have occupied had the contract been kept. It is of course true that even if the value of the goods furnishes the measure of damages, in the absence of evidence to the contrary the price will be regarded as fixing that value.⁶¹ The buyer who has been dispossessed is also entitled to recover as consequential damages, any expense reasonably incurred in defending his right to the goods against the true owner.⁶² Among such expenses should be included reasonable fees paid to buyer's counsel.⁶³

covery, depending on the real value of the chattel when the paramount title was asserted as against the vendee; that is, whether the real value was more or less than the price paid. A good illustration of this is found in the present case. Defendant purchased in 1892, agreeing to pay \$75 for the harvester and binder in question. He gave his note for this sum to his vendor, plaintiff's intestate, and the note in suit was given in renewal in 1894. The machine was mortgaged, but no claim for possession was asserted until 1895, and it was then worth but \$25. Defendant had the possession and the use for three years, during which time the property would materially decrease in value. His actual loss when the paramount title or right was asserted was the value of the property when taken away from him, and his loss would have been the same if he had bought the machine for \$10 in 1892."

⁵⁹ See Rawle, *Covenants for Title*, § 161 *et seq.*

⁶⁰ *Ellis v. Gosney's Heirs*, 7 J. J. Marsh. 109; *Noel v. Wheatley*, 30 Miss. 181; *Armstrong v. Percy*, 5 Wend. 535; *Arthur v. Moss*, 1 Or. 193; *Hudson v. Norwood*, 13 Tex. Civ. App. 662, 35 S. W. 1075; *Cranberry v. Hawpe*, 30 Tex. 409; *Goss v. Dysant*, 31 Tex. 186; *Duecker v. Goeres*, 104 Wis. 29, 36, 80 N. W. 91; *Confederation Life Assn. v. Labatt*, 27 Ont. App. 321.

⁶¹ *Hoffman v. Chamberlain*, 40 N. J. Eq. 663, 5 Atl. 150, 53 Am. Rep. 783.

⁶² *Rowland v. Shelton*, 25 Ala. 217; *Marlatt v. Clary*, 20 Ark. 251; *Johnson v. Meyers' Exr.*, 34 Mo. 255; *Armstrong v. Percy*, 5 Wend. 535.

⁶³ *Harding v. Larkin*, 41 Ill. 413; *Thurston v. Spratt*, 52 Me. 202; *Ryerson v. Chapman*, 66 Me. 557; *Allis v. Nininger*, 25 Minn. 525; *Balte v. Bedemiller*, 37 Or. 27, 60 Pac. 601, 82 Am. St. Rep. 737. The contrary was held, as it seems erroneously, in *Reggio v. Braggiotti*, 7 Cush. 166; *Clark v. Mumford*, 62 Tex. 531.

§ 616. Interest and special damages — Provisions of Sales Act.—

Sec. 70. INTEREST AND SPECIAL DAMAGES.—

Nothing in this act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

This follows exactly section 54 of the English Sale of Goods Act. In regard to the matters covered in this section, there is nothing peculiar in the law of sales, and the application to the law of warranty of general principles governing special damages has been considered in the preceding section. These principles cover the seller's obligation for default, and for breach of the buyer's obligation to pay money special damages are not allowed.⁶⁴ Interest is regarded as sufficient compensation.⁶⁵

⁶⁴ Sutherland, Damages, §§ 76-78.

⁶⁵ Sutherland, Damages, §§ 328, 329.

PART VI.

STATUTORY INTERPRETATION AND UNCODIFIED RULES AFFECTING THE VALIDITY OF SALES.

CHAPTER XIX.

INTERPRETATION OF SALES ACT.

Section 617. Rules of interpretation in Sales Act.

618. Force of custom.

619. Definitions in the Sales Act.

620. Value.

621. In good faith.

622. Closing sections of the Sales Act.

§ 617. **Rules of interpretation in Sales Act.**—The last part of the Sales Act is concerned with certain rules for its interpretation. They are as follows:

Sec. 71. VARIATION OF IMPLIED OBLIGATIONS.—Where any right, duty, or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale.

Sec. 72. RIGHTS MAY BE ENFORCED BY ACTION.—Where any right, duty or liability is declared by this act, it may, unless otherwise by this act provided, be enforced by action.

Sec. 73. RULE FOR CASES NOT PROVIDED FOR BY THIS ACT.—In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall continue to apply to contracts to sell and to sales of goods.

Sec. 74. INTERPRETATION SHALL GIVE EFFECT TO PURPOSE OF UNIFORMITY.— This act shall be so interpreted and construed, if possible, as to effectuate its general purpose to make uniform the law of those states which enact it.

Sec. 75. PROVISIONS NOT APPLICABLE TO MORTGAGES.— The provisions of this act relating to contracts to sell and to sales do not apply, unless so stated, to any transaction in the form of a contract to sell or a sale which is intended to operate by way of mortgage, pledge, charge, or other security.

Of these sections, section 71 is copied from section 55 of the English Sale of Goods Act, except that the word "custom" has been substituted for "usage." Section 72 follows exactly section 57 of the English act. Section 73 is based upon section 61 (2) of the English act with some change in wording, however.¹ This section makes it clear that the Sales Act does not attempt to deal with certain matters which are, however, of great importance in the law of sales. As to these matters the common law governs and the rules of the common law are discussed hereafter.² Section 74 is not contained in the English act, and introduces a new principle of interpretation which it is hoped the courts may carefully regard. Generally when a part of the law is codified, the courts in considering the effect of the Code have regard to the law of the jurisdiction as it existed before the passage of the Code. And if the Code appears to have been intended not as remedial legislation, but rather to state in exact form law previously existing, the implication is strong that the rule of the Code is similar to that previously in force. The primary purpose of the Sales Act is to introduce uniformity, and though in the main it purports to state law previously existing, it is not the law of any one

¹The English act reads: "61 (2). The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this act, and in particular the rules relating to the law of principal and agent [see *e. g.*, *Keighley v. Durant*, [1901] A. C. 240, a contract made by one person in his

name, on behalf of another, but without authority of the latter, cannot be ratified], and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods."

²See *infra*, § 623 *et seq.*

State, but, where the law in the several States differs, what may be regarded as the better doctrine. Accordingly no inference is permissible that the law of any particular State is intended to be codified. The law of all the States must be considered, and the purpose to unify that law must be borne in mind. Section 75 follows section 60 (4) of the English act, except that in conformity with the wording of the American act, "contracts of sale," and "contract of sale," have been changed to "contracts to sell and to sales," and to "contracts to sell or a sale;" and the words "unless so stated" have been inserted in the American act. Though this act does not generally purport to deal with the peculiar rules of mortgage law, there are a few cases where mortgage relations, or similar ones, are covered.³

§ 618. **Force of custom.**— The rule governing the effect of usage and custom, in the law of sales, is identical with the rule in all contractual agreements. The general rule is thus expressed: "Particular usages and customs of trade or business must be known by the party to be affected by them, or they will not be binding, unless they are so notorious, universal, and well established, that his knowledge of them will be conclusively presumed."⁴ "General commercial usages — all men being presumed to know the law — all men are presumed to know and no one will be heard to contradict the presumption."⁵ The application of these general principles to some particular cases has been considered previously.⁶

§ 619. **Definitions in the Sales Act.**—

Sec. 76. DEFINITIONS.—(1.) In this act, unless the context or subject matter otherwise requires —

"Action" includes counterclaim, set-off and suit in equity.

"Buyer" means a person who buys or agrees to buy goods or any legal successor in interest of such person.

³ For example see sections 20 (2), 22 (a).

⁴ 12 Cyc. 1041, giving a number of illustrations.

⁵ 12 Cyc. 1044, giving illustrations.

⁶ As to custom to regard something as acceptance and receipt under the Statute of Frauds, see *supra*, § 84,

note. As to proof by usage of an intention to sell an undivided share of a mass, see *supra*, § 186. As to the qualification of warranty by custom, see *supra*, § 246. As to the effect of custom on the law governing documents of title, see §§ 404-444.

“ Defendant ” includes a plaintiff against whom a right of set-off or counterclaim is asserted.

“ Delivery ” means voluntary transfer of possession from one person to another.

“ Divisible contract to sell or sale ” means a contract to sell or a sale in which by its terms the price for a portion or portions of the goods less than the whole is fixed or ascertainable by computation.

“ Document of title to goods ” includes any bill of lading, dock warrant, warehouse receipt or order for the delivery of goods, or any other document used in the ordinary course of business in the sale or transfer of goods, as proof of the possession or control of the goods, or authorizing or purporting to authorize the possessor of the document to transfer or receive, either by indorsement or by delivery, goods represented by such document.

“ Fault ” means wrongful act or default.

“ Fungible goods ” means goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit.

“ Future goods ” means goods to be manufactured or acquired by the seller after the making of the contract of sale.

“ Goods ” include all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

“ Order ” in sections of this act relating to documents of title means an order by indorsement on the document.

“ Person ” includes a corporation or partnership or two or more persons having a joint or common interest.

“ Plaintiff ” includes defendant asserting a right of set-off or counterclaim.

“ Property ” means the general property in goods, and not merely a special property.

“ Purchaser ” includes mortgagee and pledgee.

“ Purchases ” includes taking as a mortgagee or as a pledgee.

“ Quality of goods ” includes their state or condition.

“ Sale ” includes a bargain and sale as well as a sale and delivery.

“Seller” means a person who sells or agrees to sell goods, or any legal successor in interest of such person.

“Specific goods” means goods identified and agreed upon at the time a contract to sell or a sale is made.

“Value” is any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, constitutes value where goods or documents of title are taken either in satisfaction thereof or as security therefor.

(2.) A thing is done “in good faith” within the meaning of this act when it is in fact done honestly, whether it be done negligently or not.

(3.) A person is insolvent within the meaning of this act who either has ceased to pay his debts in the ordinary course of business or can not pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he is insolvent within the meaning of the federal bankruptcy law or not.

(4.) Goods are in a “deliverable state” within the meaning of this act when they are in such a state that the buyer would, under the contract, be bound to take delivery of them.

Many of these definitions are copied from section 62 of the English Sales of Goods Act, but the following definitions in the American act are not found in the English statute: “Divisible contracts,” “fungible goods,” “order,” “person,” “purchaser,” “purchases,” “value.” To the English definition of “buyer” and “seller,” the words “or any legal successor in interest of such person” have been added. “Defendant” under the English act seems simply to be defined with reference to Scotch cases. The definition of “document of title” in the English act is adopted by reference from the Factors’ Act of 1889,⁷ and the definition in the American act is substantially like that in the English act.⁸ In subsection (3) the last clause of the paragraph has been added

⁷ 52 & 53 Vict., c. 45, § 1 (4).

⁸ The English definition is: “The expression ‘document of title’ shall include any bill of lading, dock warrant, warehouse keeper’s certificate, and warrant or order for the delivery of goods, and any other document

used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.”

in order to avoid possible confusion from the definition of insolvency in the Federal Bankruptcy Act.⁹ That act provides that "a person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."¹⁰ This definition was wholly a novelty in the law, and while it may be calculated to promote justice in the law of bankruptcy, the important question in the law of contracts and sales is not whether a debtor's property at a fair valuation exceeds his debts, but whether he can and does pay his debts as they mature. In general the definitions in the Sales Act are not intended to establish a rule of law but merely to define exactly the meaning of words so that the terms in which rules of law are stated in the other sections of the act may be perfectly definite. This is not true, however, of the definition of "value" in subsection (1) or of the definitions of "in good faith," and "insolvent," in the subsections (2) and (3). These definitions in defining a word or a phrase virtually enact a rule of law. As to the meaning of "insolvent," enough has already been said, but "value," and "in good faith," must be further considered.

§ 620. **Value.**—The importance of value is to give to a purchaser from one whose title was only voidable an indefeasible title. The word "value" is used in the Sales Act only in connection with the phrases "purchaser for value," or "purchase for value." The English Sale of Goods Act contains no definition of value, and the definition in the American Sales Act is borrowed with some changes from the Negotiable Instruments Law.¹¹ The question involved has been much litigated in the law of negotiable paper, and it was almost uniformly held prior to the enactment

⁹ Act of July 1, 1898, c. 541, 30 St. at L. 544.

¹⁰ Section 1 (15).

¹¹ Crawford, Negotiable Instruments Law, § 51: "Consideration, What Constitutes.—Value is any

consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time."

of the Negotiable Instruments Law that the cancellation or payment of an antecedent debt was sufficient value to make an indorsee a purchaser for value.¹² By the great weight of authority, the transfer of a negotiable instrument to secure a precedent debt also made the indorsee a holder for value. There was, however, considerable dissent from this view.¹³ Many courts have taken a distinction between chattels and negotiable paper, so that it has been generally held that taking chattels even in absolute payment of a pre-existing debt does not constitute the holder a purchaser for value.¹⁴ But in England,¹⁵ and in some States in this country,¹⁶ it is held that such a person is a purchaser for value. On principle the latter view seems clearly right. The cancellation of the debt is a surrender of something valuable. The answer made to this argument is that the original debt will be revived if the goods are taken from the purchaser, but this amounts only to saying that the value can be restored, and there is no recognized principle that a purchaser for value shall not be allowed to hold property transferred to him if the value which he has given can be and is restored to him. It is also generally held in this country that one who takes chattels as collateral security for an antecedent debt is not a purchaser for value.¹⁷

¹² Daniel, Negotiable Instruments, § 184.

¹³ Daniel, Negotiable Instruments, § 820 *et seq.* In New York it was early held in *Coddington v. Bay*, 20 Johns. 637, 11 Am. Dec. 342, that such an indorsee was not a purchaser for value, and this case was followed in a number of jurisdictions.

¹⁴ Commercial Bank v. Pirie, 82 Fed. Rep. 799, 49 U. S. App. 596, 27 C. C. A. 171; *Bard v. Van Etten*, 72 Ark. 494, 82 S. W. 836; *Henderson v. Gibbs*, 39 Kans. 679, 18 Pac. 526; *Hurd v. Bickford*, 85 Me. 217, 27 Atl. 107, 35 Am. Rep. 353; *Schloss v. Feltus*, 103 Mich. 525, 61 N. W. 797; *Case Works v. Ross*, 74 Mo. App. 437; *Sleeper v. Davis*, 64 N. H. 59, 6 Atl. 201; *Eaton v. Davidson*, 46 Ohio St. 355, 21 N. E. 442; *Belleville*

Works v. Samuelson, 16 Utah, 234, 52 Pac. 282; *Woonsocket Rubber Co. v. Loewenberg*, 17 Wash. 29, 48 Pac. 785, 61 Am. St. Rep. 902.

¹⁵ *Leask v. Scott*, 2 Q. B. D. 376.

¹⁶ *Pelham v. Chattahoochee Grocery Co.*, 146 Ala. 216, 41 So. 12, 119 Am. St. Rep. 19; *Butters v. Haughwout*, 42 Ill. 18, 89 Am. Dec. 401; *Horton v. Williams*, 21 Minn. 187; *Shufeldt v. Pease*, 16 Wis. 659.

¹⁷ *Reid v. Bird*, 15 Colo. App. 116, 61 Pac. 353; *Adam, Meldrum Co. v. Stewart*, 157 Ind. 678, 61 N. E. 1002, 87 Am. St. Rep. 240; *Cox Shoe Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316; *Phelps v. Samson*, 113 Iowa, 145, 84 N. W. 1051; *Goodwin v. Mass. Loan & Trust Co.*, 152 Mass. 189, 25 N. E. 100; *Edson v. Hudson*, 83 Mich. 450, 47 N. W. 347; *Kemper v. Kidder*

Some States, however, here also regard the taker as a purchaser for value.¹⁸ It is more difficult in the case of one who takes merely for security to find, logically, a giving of value than where the debt is absolutely extinguished. It is to be observed, however, that though one who takes as security in fact gives no value at the time of taking the goods, his subsequent conduct is almost sure to be affected by the possession of the security. Even though forbearance is not expressly bargained for, the effect of conveying security is almost inevitably to cause the creditor to forbear or diminish his efforts to obtain satisfaction of his claim from other sources. A practical reason may be added for dealing in the same way with one who takes goods as security, and one who takes goods as absolute payment. Frequently it is easy to color a transaction so that the holder of the goods may be able to make it appear that the goods were given either as payment or security, as may be most favorable to his interests.¹⁹ There seems no reason to distinguish what constitutes value where negotiable paper is purchased and where property of other sorts is purchased. The purchaser for value of negotiable paper may get greater rights than the purchaser for value of property of other kinds, but it seems an unnecessary and undesirable complication of the law to maintain a distinction as to what constitutes value. This is especially true so far as chattel property is concerned, since such property is frequently transferred by means of bills of lading and warehouse receipts. In view of the large degree of negotiability given such documents, it would be unfortunate to distinguish them from negotiable paper in respect to the defini-

Bank, 81 Mo. App. 280; Phenix Iron Works v. McEvony, 47 Neb. 228, 66 N. W. 290, 53 Am. St. Rep. 527; Tate v. Security Trust Co., 63 N. J. Eq. 559, 52 Atl. 313; Button v. Rathbone, 126 N. Y. 187, 192, 27 N. E. 266.

¹⁸ Chapman v. Hughes, 134 Cal. 641, 658; Knox v. McFarran, 4 Colo. 586, 596; Kranert v. Simon, 65 Ill. 344.

¹⁹ In Pomeroy Equity Jurisprudence (3d ed.), § 749, the author lays

stress on this point. See also (*ibid.*) a number of authorities collected on the general question whether a conveyance as satisfaction or as security for an antecedent debt is a giving of value. The cases cited in previous notes in this section relate exclusively to chattel property, but analogies may be drawn from cases in regard to property of other kinds.

tion of value.²⁰ An attaching creditor is to be distinguished from a creditor to whom the debtor has given property for security. No transfer of title by the owner of the legal title is made by mere attachment, and an attaching creditor, therefore, acquires no greater rights in the attached property than the debtor himself had.²¹ It must be observed, however, that where the defect in the title of the property is due to fraud against creditors, this rule does not apply.²² For the same reason that an attaching creditor is not a purchaser for value, an assignee in bankruptcy or a trustee or assignee under a general assignment for the benefit of creditors is not a purchaser for value.²³ Under a proper construction of the Sales Act it seems that not only is one who takes goods in payment of or as security for an antecedent debt a purchaser for value, but so also is one who takes goods, giving in return an executory promise if the terms of the promise are such that it is "consideration sufficient to support a simple contract." This doctrine is perhaps opposed to general legal understanding,²⁴ but is not unsupported by authority.²⁵ Upon principle there seems

²⁰ An antecedent debt was held value supporting the transfer of a warehouse receipt in *Davis v. Russell*, 52 Cal. 611; *Bishop v. Fulkerth*, 68 Cal. 607, 10 Pac. 122; *Cavallaro v. Texas, etc., R. R. Co.*, 110 Cal. 348, 42 Pac. 918, 52 Am. St. Rep. 94. So for the transfer of a bill of lading. *White v. Pulley* (Ala.), 27 Fed. Rep. 436; *Tiedman v. Knox*, 53 Md. 612. If other bills of lading are surrendered in exchange for the one in question, clearly value has been given. *Midland Nat. Bank v. Missouri Pacific R. R. Co.*, 132 Mo. 492, 33 S. W. 521, 53 Am. St. Rep. 505; *Midland Nat. Bank v. Missouri, Kan. & Tex. R. R. Co.*, 62 Mo. App. 531.

²¹ *Thompson v. Rose*, 16 Conn. 71, 41 Am. Dec. 121; *Oswego Starch Factory v. Lendrum*, 57 Iowa, 573, 10 N. W. 900, 42 Am. Rep. 53; *Jordan v. Parker*, 56 Me. 557; *Tarr v. Smith*, 68 Me. 97; *Atwood v. Dearborn*, 1 Allen, 483, 79 Am. Dec. 755; *Thaxter*

v. Foster, 153 Mass. 151, 26 N. E. 434; *Bradley v. Obear*, 10 N. H. 477; *Fitzsimmons v. Joslin*, 21 Vt. 129, 52 Am. Dec. 46. But an attaching creditor is a purchaser for value in Illinois. *Van Duzor v. Allen*, 90 Ill. 499.

²² Cases of this sort are considered *infra*, § 639 *et seq.*

²³ *Ex parte Fitz*, 2 Low. 519; *Donaldson v. Farwell*, 93 U. S. 631, 23 L. ed. 993; *Ratcliffe v. Sangston*, 18 Md. 383; *Bussing v. Rice*, 2 Cush. 48; *Wallace v. Cohen*, 111 N. C. 103, 15 S. E. 892; *Belding v. Frankland*, 8 Lea, 67, 41 Am. Rep. 630. In Virginia, however, such persons are held purchasers for value. *Wickham v. Martin*, 13 Gratt. 427; *Oberdorfer v. Meyer*, 88 Va. 384, 13 S. E. 756.

²⁴ See *Ames' Cases Trusts* (2d ed.), p. 287.

²⁵ *Everitt v. Farmers' & Merchants Bank*, Neb. , 117 N. W. 401.

no good reason why a purchaser should be deprived of the benefit of his bargain because his obligation to pay is executory. The original owner or claimant of the goods should not have the right to deprive the innocent purchaser of the goods, but should be obliged to get relief from the enforcement, for his advantage, of the obligation of the purchaser to pay the price.

§ 621. **In good faith.**—The question has been much litigated in the law of negotiable paper whether a purchaser who bought a bill or note, honestly believing that no equity existed against the seller's title, can be deprived of the benefit of his purchase because had he not been negligent he would have known of such an equity. The law has finally been settled with almost complete uniformity²⁶ that if the purchaser made his purchase honestly, his negligence, or even gross negligence, will not deprive him of the rights of a purchaser for value in good faith. The Sales Act adopts the rule that has become established in the law of negotiable instruments. As was said in the previous section, there seems no reason to distinguish the meaning of "purchaser for value in good faith without notice" in the law of negotiable instruments and in the law of sales. The rights of such a person may indeed differ, but who is such a person should present the same inquiry. Such is the law of England.²⁷ And in many jurisdictions in this country, in decisions chiefly relating to conveyances of property fraudulent against creditors of the grantor, it is settled that there is a distinction between "knowledge and reasonable cause to have such knowledge. To hold a purchaser liable for the fraud of the seller it must be shown that at the time of

²⁶ Daniel, *Negotiable Instruments*, § 770 *et seq.*

²⁷ In *Jones v. Smith*, 1 Hare, 43, 56, Wigram, V. C., in dealing with the case of a mortgage of real estate said: "If, in short, there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of facts which the *res gestæ* would suggest to a prudent mind; if mere want of caution, as distinguished from

fraudulent and willful blindness, is all that can be imputed to the purchaser; there the doctrine of constructive notice will not apply; there the purchaser will, in equity, be considered, as in fact he is, a *bona fide* purchaser, without notice. This is clearly Sir Edward Sugden's opinion (*Vend. & Pur.*, Vol. 3, pp. 471, 472, ed. 10); and with that sanction I have no hesitation in saying it is mine also."

the purchase he had knowledge of the fraud, if he was a purchaser for valuable consideration.”²⁸ But in this class of cases at least the commoner rule in this country is that if the purchaser has knowledge of facts which would put a reasonable man on inquiry, and such inquiry would have disclosed the truth, the purchaser cannot be given the protection of a *bona fide* purchaser.²⁹ The close connection between fraudulent conveyances and preferences in bankruptcy law may have contributed to cause so many courts to adopt this rule. By the express words of the bankruptcy statutes of 1867 and 1898, a creditor who has received a preference, having reasonable cause to believe that it was improperly given, must refund the payment.

²⁸ *Pierce v. O'Brien*, 189 Mass. 58, 60, 75 N. E. 61, citing earlier Massachusetts decisions. To the same effect are *Knower v. Cadden Clothing Co.*, 57 Conn. 202, 17 Atl. 580; *Brown v. Foree*, 7 B. Mon. 357, 46 Am. Dec. 519; *State v. Mason*, 112 Mo. 374, 20 S. W. 629, 34 Am. St. Rep. 390; *affd.*, 179 U. S. 328, 44 L. ed. 214; *Hern v. Due*, 79 Mo. App. 322; *White v. Million*, 102 Mo. App. 437, 76 S. W. 733; *Batavia v. Wallace* (Mo.), 102 Fed. Rep. 240, 42 C. C. A. 310; *Coolidge v. Heneky*, 11 Or. 327, 8 Pac. 281; *Lyons v. Leahy*, 15 Or. 8, 13 Pac. 643, 3 Am. St. Rep. 133; *Parker v. Conner*, 93 N. Y. 118, 45 Am. Rep. 178; *Bush v. Roberts*, 111 N. Y. 278, 18 N. E. 732, 7 Am. St. Rep. 741.

²⁹ *Shauer v. Alterton*, 151 U. S. 607, 38 L. ed. 286; *Re Knopf*, 146 Fed. Rep. 109 (D. C., S. C.); *Dokken v. Page*, (N. Dak.) 147 Fed. Rep. 438, 77 C. C. A. 674; *Smith v. Collins*, 94 Ala. 394, 10 So. 334; *Dyer v. Taylor*, 50 Ark. 314, 7 S. W. 258; *Godfrey v. Miller*, 80 Cal. 420, 22 Pac. 290; *Smith v. Wellborn*, 75 Ga. 799; *Sanders v. Muegge*, 91 Ind.

214; *Mathison v. Prescott*, 86 Ill. 493; *Bardes v. First Nat. Bank*, 122 Iowa, 443, 98 N. W. 284; *Urdangen & Greenberg Bros. v. Doner*, 122 Iowa, 533, 98 N. W. 317; *Gollob v. Martin*, 33 Kans. 252, 6 Pac. 267; *Biddinger v. Wiland*, 67 Md. 359, 10 Atl. 202; *Williams v. Snebly*, 92 Md. 9, 48 Atl. 43; *Bedford v. Penny*, 58 Mich. 424, 25 N. W. 381; *Holcombe v. Ehrmanntraut*, 46 Minn. 397, 49 N. W. 191; *Manwaring v. O'Brien*, 75 Minn. 512, 78 N. W. 1; *Tuteur v. Chase*, 66 Miss. 476, 6 So. 241, 4 L. R. A. 832, 14 Am. St. Rep. 577; *Glover v. Hargadine-McKittrick Co.*, 62 Neb. 483, 87 N. W. 170; *Moore v. Williamson*, 44 N. J. Eq. 496, 15 Atl. 587, 1 L. R. A. 336; *Greenwell v. Nash*, 13 Nev. 286; *Anderson v. Blood*, 152 N. Y. 285, 46 N. E. 493, 57 Am. St. Rep. 515; *Dean v. Connelly*, 6 Barr, 239; *Mosely v. Gainer*, 10 Tex. 393; *Mills v. Howeth*, 19 Tex. 257, 70 Am. Dec. 331; *Hickman v. Trout*, 83 Va. 478, 3 S. E. 131; *Reed v. Loney*, 22 Wash. 433, 61 Pac. 41; *Keneweg Co. v. Schilansky*, 47 W. Va. 287, 34 S. E. 773; *Hooser v. Hunt*, 65 Wis. 71, 26 N. W. 442.

§ 622. Closing sections of the Sales Act.—

Sec. 77. INCONSISTENT LEGISLATION REPEALED.—All acts or parts of acts inconsistent with this act are hereby repealed.

Sec. 78. TIME WHEN THE ACT TAKES EFFECT.
— This act shall take effect on the day of one thousand
nine hundred and

Sec. 79. NAME OF ACT.— This act may be cited as the
Sales Act.

Sections 78 and 79 are adopted from the English Sales of Goods Act. The provisions of section 77 are not found in the English act, but the section merely expresses the rule of law that would be applicable if it were not expressed. A question has arisen under the Sales Act in Massachusetts³⁰ whether when the Act went into effect, section 4 (the Statute of Frauds) immediately became applicable to all contracts and sales though entered into before the act became effective. It was urged that this section relates solely to the remedy, and might well be applied irrespective of when the cause of action arose; but it seems that the act should be construed as a whole, and so regarded is inapplicable to any contracts or sales made before it became effective.

³⁰ In an unreported case in the Superior Court. The ruling finally made was by consent of counsel, and therefore inconclusive.

CHAPTER XX.

FRAUD AND MISREPRESENTATION.

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 - 650. Rescission allowed only against fraudulent person.
 - 651. Remedies for transfers in fraud of creditors.
 - 652. Remedies for fraud against subsequent purchasers.

§ 623. **Certain invalidating circumstances not governed by Sales Act.**—Section 73 of the Sales Act provides that invalidating circumstances such as fraud, misrepresentation, duress, mistake, bankruptcy, shall be given the effect which they would have at common law. The act itself does not to any considerable extent purport to deal with these questions. The list of invalidating causes in section 73 is not exhaustive, and at least two other causes may be added—impossibility and illegality. The most important of those enumerated are fraud and misrepresentation, and to them the present chapter is devoted.

§ 624. **Definition of fraud.**—Fraud may become important either for the purpose of giving the defrauded person a right to sue the fraudulent person for damages in an action of deceit, or its equivalent, or to enable the defrauded person to rescind the transaction. The requirements of the law for these two purposes are not always identical. It is undoubtedly true that wherever the circumstances are such as to warrant an action for deceit for inducing a person to enter into a bargain to buy or sell goods, they will certainly warrant an avoidance or rescission of the bargain. The converse is not, however, true. There are cases where the belief of the deceived person is not due to such a positive or such a fraudulent misrepresentation as would justify an action of deceit.¹ The essential element of fraud that must exist in any case properly brought within that designation is a mistake of one party as to a material fact induced by the other in order that it may be acted upon, or (in cases where there is a duty of disclosure) at least taken advantage of with knowledge of its falsity to secure action. Generally all the requirements of the action of deceit will be found to exist. These are: (1) A false representation of material facts. (2) Knowledge of the falsity of the representations by the person making them. (3) Ignorance

¹In *Peek v. Gurney*, L. R. 6 H. L. 377, 403, Lord Cairns said: "Mere nondisclosure of material facts, however morally censurable, however that nondisclosure might be a ground in a proper proceeding at a proper time for setting aside an allotment or a purchase of shares, would in my opinion form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false." And, in *Derry v. Peek*, 14 A. C. 337, 359, Lord Herschell said: "Where rescission is claimed it is only necessary to prove that there was mis-

representation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. In an action of deceit, on the contrary, it is not enough to establish misrepresentation alone; it is conceded on all hands that something more must be proved to cast liability upon the defendant, though it has been a matter of controversy what additional elements are requisite. I lay stress upon this because observations made by learned judges in actions for rescission have been cited and much relied upon at the bar by counsel for the respondent. Care must obviously be observed in applying the language used in relation to such actions to an action of deceit."

of the falsity on the part of the person to whom the representations were made. (4) Intent that the representations should be acted on by the person to whom they were made. (5) Action by such person to his damage.² The applications of these principles to cases in the law of sales will hereafter appear, but it should be said that the principles as applied in the law of sales are not peculiar to that branch of the law. If the mistake of one party is induced by the other with neither knowledge of the error nor willful indifference in regard to it there is misrepresentation but not fraud. And there is simply mistake if the erroneous belief was not induced by the other party.

§ 625. **Differences of fraud in nature and legal effect.**—IN this treatise the concern is with fraud only in connection with sales, and here it is especially important to observe a fundamental distinction. Fraud may induce a person to assent to do something which he would not otherwise have done, or it may induce him to believe that the act which he does is something other than it actually is. In the first case the act of the defrauded person is effectual though voidable; in the second case the act of the defrauded person is void. This distinction most commonly arises in the law of negotiable paper. Where a person is induced to sign or indorse a bill or note in the belief that he is signing something else, he cannot really be said to have made or indorsed the bill or note, and if liable at all is liable because of negligence.³ Illustrations of the same principle in the law of sales will be given in a subsequent section.⁴ It is important also to observe whether the fraudulent person induces the defrauded person to assent to a transfer of title or merely to assent to a transfer of possession. In the latter case the fraudulent person can transfer no better title

² Bigelow, Torts, § 110.

³ *Foster v. McKinnon*, L. R. 4 C. P. 704, is the leading case for this doctrine. In this case the defendant signed a bill of exchange under the belief fraudulently induced that he was signing a guaranty. It was held that the instrument was void even in the hands of the *bona fide* purchaser, Byles, J., saying: "The defendant

never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature." Numerous other decisions bring out the same principle. See Wald's *Pollock, Contracts* (3d ed.), 585; Daniel, *Negotiable Instruments*, § 650 *et seq.*

⁴ Section 635.

even to a *bona fide* purchaser for value without notice than any possessor of goods without title.⁵

§ 626. **Differences of fraud in regard to the person affected.**— Though the legal effect of fraud does not depend on the person affected by it, it will be convenient in considering the common kinds of frauds to classify them in this way. Accordingly the division may be made: (1) Fraud on the seller. (2) Fraud on the buyer. (3) Fraud on creditors. (4) Fraud on subsequent buyers. In all these cases, however, the same fundamental principles are applicable; therefore, these fundamental principles will first be considered and then as a matter of practical convenience the common applications to the various cases just suggested will be considered.

§ 627. **Materiality of representation.**— It is laid down in the cases that a misrepresentation must be material in order that the law may take notice of it as a fraud.⁶ If, however, a party to a

⁵ The distinction was brought out in *Levy v. Cooke*, 143 Pa. St. 607, 614, where Sterett, C. J., said: "If the owner intended to transfer the property in the goods, as well as their possession, the transaction is a sale, and the property passes, however fraudulent the device may have been; but if he intended to part with nothing more than the bare possession, there is no sale and no property passes. In the former case the contract is not void *ab initio*, but voidable at the election of the vendor. Such voidable contracts may be affirmed and enforced, or they may be rescinded by the vendor at his election; but in the meantime, and until he does elect, if his vendee transfers the goods, in whole or in part, to an innocent third person for a valuable consideration, the right of the original vendor will be subordinate to that of such innocent third person." This language was quoted with approval in *Canadian Bank v. Baum*, 187 Pa. St. 48, 52, 40 Atl. 975. See also *Baehr v. Clark*, 83 Iowa, 313, 49

N. W. 840; *National Bank of Commerce v. Chicago, B. & N. Ry. Co.*, 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566; *Heilbronn v. McAleenan*, 1 N. Y. Suppl. 875; *Rohrbough v. Leopold*, 68 Tex. 254, 4 S. W. 460.

⁶ *McGar v. Williams*, 26 Ala. 469, 62 Am. Dec. 739; *Williams v. McFadden*, 23 Fla. 143, 1 So. 618, 11 Am. St. Rep. 345; *Clem v. Newcastle, etc.*, R. R. Co., 9 Ind. 488, 68 Am. Dec. 653; *Wight v. Shelby R. R. Co.*, 16 B. Mon. 4, 63 Am. Dec. 522; *Long v. Woodman*, 58 Me. 49; *Hedden v. Griffin*, 136 Mass. 229, 49 Am. Rep. 25; *Dawe v. Morris*, 149 Mass. 188, 21 N. E. 313, 4 L. R. A. 158, 14 Am. St. Rep. 404; *Hall v. Johnson*, 41 Mich. 286, 2 N. W. 55; *Stone v. Robie*, 66 Vt. 245, 29 Atl. 257. It was held in *Penn Ins. Co. v. Crane*, 134 Mass. 56, that it was a question of law for the court whether a misrepresentation was material. But the contrary decisions of *Sharp v. Ponce*, 74 Me. 470, and *Davis v. Davis*, 97 Mich. 419, 56 N. W. 774, seem better.

bargain has made misrepresentations for the purpose of inducing action by the other, and the other party has acted, relying upon the misrepresentations, it seems that the former should not be allowed to deny that misrepresentations which have effectively served a fraudulent purpose were material.⁷ This in effect is saying that any misrepresentations which were intended to bring about a particular result and which do bring about that result are material. It is probable that in cases where the question of materiality has been regarded as vital the question whether the misrepresentation was an essential inducement to enter into the transaction has also generally been in the mind of the court.

§ 628. **Matters of opinion.**—Two questions arise in regard to fraudulent statements of opinion. The first question involves the dividing line between statements of fact and opinion. The second question concerns the liability of one who fraudulently expresses what is confessedly an opinion in order to induce action by the other party. Closely analogous questions arise in the law of warranty and full discussion has previously been given⁸ of the liability as a warrantor of one who makes statements in regard to goods which may be regarded as matters of opinion. The dividing line separating statements of fact from statements of opinion is confessedly hard to draw. In a doubtful case the determination of it is one of fact for the jury.⁹ The question to be determined is whether the speaker must properly have been understood as asserting absolutely the truth of his statements, or only a belief that the facts corresponded with his statements. In determining this question, not simply the form of speech used but also the subject-matter of the remark must be considered. Any statement may be put in the form of an expression of opinion by the use of such words as "I think," or, "I believe." But even when statements positive in form are made, the hearer may often know perfectly well that the expression is necessarily one of opinion. Statements that things are "good," or "valuable," or "large," or "strong," necessarily involve to some extent an exercise of individual judgment, and

⁷ *Smith v. Kay*, 7 H. L. C. 750.

Kimball v. Bangs, 144 Mass. 321, 11

⁸ *Supra*, § 202.

N. E. 113.

⁹ *Dawson v. Graham*, 48 Iowa, 378;

even though made absolutely, the hearer must know, can only be based on the speaker's opinion. In contracts for the sale of goods the question whether a statement is one of fact or opinion will arise in regard to statements of the quantity; quality, or value of the goods; or statements in regard to the pecuniary responsibility of the buyer. Illustration of such cases are given in the note below.¹⁰ All these matters, however, may sometimes be the subject of statements of fact as distinguished from opinion. It is obvious that the quantity of goods may usually be exactly determined and a false statement to the effect that it has been determined to be a certain amount is fraudulent.¹¹ So state-

¹⁰ QUANTITY.—*Cole v. Smith*, 26 Colo. 506, 58 Pac. 1086 (the seller agreed to sell a herd of cattle running on the range which, as the buyer knew, had not been rounded up for a long time, and a number of which were confessedly unknown. It was held that an action of deceit would not lie for a misrepresentation of the number); *Brockhaus v. Schilling*, 52 Mo. App. 73 (on the sale of a quantity of liquor open to inspection it was held that an inaccurate statement that it would last a certain length of time could not form the basis of a claim for fraud). QUALITY.—A statement by a seller that a patent is valid, or that a machine is effective, are statements of opinion. *Chalmers v. Harding*, 17 L. T. (N. S.) 571; *Reeves v. Corning*, 51 Fed. Rep. 74; *Huber v. Gugenheim*, 89 Fed. Rep. 598; *Tabor v. Peters*, 74 Ala. 90, 49 Am. Rep. 804; *Hunter v. McLaughlin*, 43 Ind. 38; *Neidefer v. Chastain*, 71 Ind. 363, 36 Am. Rep. 198; *Bigler v. Flickinger*, 55 Pa. St. 279. Many other illustrations in regard to expression of opinion in regard to quality of goods are collected under the head of warranty, *supra*, § 203. VALUE.—*Gordon v. Butler*, 105 U. S. 553, 26 L. ed. 1166; *Schramm v. O'Connor*, 98 Ill. 539;

Evans v. Gerry, 174 Ill. 595, 51 N. E. 615; *Cronk v. Cole*, 10 Ind. 485; *Kennedy v. Richardson*, 70 Ind. 524; *Burns v. Mahannah*, 39 Kans. 87, 17 Pac. 319; *Poland v. Brownell*, 131 Mass. 138, 41 Am. Rep. 215; *Deming v. Darling*, 148 Mass. 504, 20 N. E. 107, 2 L. R. A. 743; *Lynch v. Murphy*, 171 Mass. 307, 50 N. E. 623; *Johnson v. Seymour*, 79 Mich. 156, 44 N. W. 341; *Page v. Parker*, 43 N. H. 363, 80 Am. Dec. 172; *Uhler v. Semple*, 20 N. J. Eq. 288; *Chrysler v. Canaday*, 90 N. Y. 272, 43 Am. Rep. 166. PECUNIARY RESPONSIBILITY.—*Haycraft v. Creesy*, 2 East, 92; *Gainsford v. Blackford*, 7 Price, 544; *People's Savings Bank v. James*, 178 Mass. 322, 59 N. E. 807; *Lyons v. Briggs*, 14 R. I. 222, 51 Am. Rep. 372; *Jude v. Woodburn*, 27 Vt. 415. See further as to representations of this sort, *infra*, § 636.

¹¹ *Lewis v. Jewell*, 151 Mass. 345, 24 N. E. 52, 21 Am. St. Rep. 454 (where a knowingly false statement of the number of yards of carpet on the floors of a house was held ground for an action of deceit. Nor was it material that the buyer might have measured the carpets had he chosen to do so); *Birdsey v. Butterfield*, 34 Wis. 52 (in this case the sellers of cattle asserted that they would weigh

ments of the quality of goods may often be in regard to matters subject to exact determination.¹² So any false statements in regard to the basis of value, as the cost or price paid by a third person, are fraudulent if made with knowledge of their falsity.¹³ Even statements of value without specification of the basis of

on the average over 900 pounds. In fact the average weight was about 835 pounds. It was held that the buyer might recoup damages for the deceit in an action on a note given for the price).

¹² *Jackson v. Collins*, 39 Mich. 557. See also s. c., *Collins v. Jackson*, 54 Mich. 186, 19 N. W. 947. The defendant sold a stock of goods representing them as new, well-selected, and salable, and that old goods in the stock had been removed. It was also represented that the stock contained over \$8,000 worth of new goods and that they had been bought at the lowest market price. It was held these representations furnished ground for an action of deceit. So in *Stewart v. Stearns*, 63 N. H. 99, 56 Am. Rep. 496, representations that goods were "clean and desirable" and that they were of "good styles and salable" were held to render the seller liable. The numerous decisions collected under the head of warranty may also be referred to.

¹³ *Gluckstein v. Barnes*, [1900] A. C. 240, 247; *Zang v. Adams*, 23 Colo. 408, 48 Pac. 509, 58 Am. St. Rep. 249; *Green v. Bryant*, 2 Ga. 66; *Teachout v. Van Hoesen*, 76 Iowa, 113, 40 N. W. 96, 1 L. R. A. 664, 14 Am. St. Rep. 206; *Dorr v. Cory*, 108 Iowa, 725, 78 N. W. 682; *Johnson v. Gavitt*, 114 Iowa, 183, 86 N. W. 256; *Potter v. Potter*, 65 Ill. App. 74; *Caswell v. Hunton*, 87 Me. 277, 32 Atl. 899; *Braley v. Powers*, 92 Me. 203, 42 Atl. 362; *Pendergast v. Reed*, 29 Md. 398, 96 Am. Dec. 539; *McAleer v. Horsey*, 35 Md. 439; *Kil-*

gore v. Bruce, 166 Mass. 136, 138, 44 N. E. 108; *Stony Creek Co. v. Smalley*, 111 Mich. 321, 69 N. W. 722; *Van Epps v. Harrison*, 5 Hill, 63, 40 Am. Dec. 314; *Sandford v. Handy*, 23 Wend. 260; *Fairchild v. McMahon*, 139 N. Y. 290, 34 N. E. 779, 36 Am. St. Rep. 701; *Townsend v. Felthousen*, 156 N. Y. 618, 51 N. E. 279; *Somers v. Richards*, 46 Vt. 170; *Paetz v. Stoppleman*, 75 Wis. 510 (*Stoppleman v. Paetz*, 44 N. W. 834). See also *Coolidge v. Rhodes*, 199 Ill. 24, 64 N. E. 1074; *Conlan v. Roemer*, 52 N. J. L. 53, 57, 18 Atl. 858; *Edelman v. Latshaw*, 180 Pa. St. 419, 36 Atl. 926. Some early cases in Massachusetts and Maine treated statements of cost as similar to statements of value and, therefore, as not constituting fraud, though made with intent to deceive, but this doctrine has been discredited by the cases cited above; and although followed in a few jurisdictions must be regarded as erroneous. *Holbrook v. Connor*, 60 Me. 578, 11 Am. Rep. 212; *Bishop v. Small*, 63 Me. 12; *Richardson v. Noble*, 77 Me. 390; *Hemmer v. Cooper*, 8 Allen, 334; *Cooper v. Lovering*, 106 Mass. 77; *Way v. Ryther*, 165 Mass. 226, 42 N. E. 1128; *Gassett v. Glazier*, 165 Mass. 473, 43 N. E. 193; *Boles v. Merrill*, 173 Mass. 491, 494, 53 N. E. 894, 73 Am. St. Rep. 308. See also *Mackenzie v. Seiberger*, 76 Fed. Rep. 108, 40 U. S. App. 188, 22 C. C. A. 83; *Tuck v. Downing*, 76 Ill. 71; *Elerick v. Reid*, 54 Kans. 579, 38 Pac. 814; *Sowers v. Parker*, 59 Kans. 12, 51 Pac. 888.

the estimate have been in some cases held actionable, especially when made by one supposed to have expert knowledge.¹⁴ Likewise statements as to pecuniary condition, even though expressed in somewhat indefinite language, may involve the assertion as a fact that the buyer has sufficient means to make his payment for the goods sure.¹⁵ As has been seen in connection with the law of warranty,¹⁶ there is a growing unwillingness on the part of the courts to allow statements to be made without liability, which are calculated to induce, and do induce, action on the part of the hearer. Where the statement is made with fraudulent intent, there is still more reason for regarding it as a ground of liability of the natural impression given by the statement is that certain matters of fact are true, even though the statement is couched in the form of an opinion or relates to a matter as to which certainty is impossible.¹⁷ Moreover, even if a statement is confessedly merely an opinion, and is understood to be such,

¹⁴ *Cruess v. Fessler*, 39 Cal. 336; *Loaiza v. Superior Court*, 85 Cal. 11, 30, 24 Pac. 707, 9 L. R. A. 376; *McDowell v. Caldwell*, 116 Iowa, 475; *Dawe v. Morris*, 149 Mass. 188, 191, 21 N. E. 313, 4 L. R. A. 158, 14 Am. St. Rep. 404; *Welch v. Olmstead*, 90 Mich. 492, 51 N. W. 541; *Maxted v. Fowler*, 94 Mich. 106, 53 N. E. 921; *Griffin v. Farrier*, 32 Minn. 474, 21 N. W. 553; *Haven v. Neal*, 43 Minn. 315, 45 N. W. 612; *Byrne v. Stewart*, 124 Pa. St. 450, 17 Atl. 19.

¹⁵ Thus a statement falsely made that a man was doing a "safe business" and that his "note was sure to be paid" is fraud. *Thompson v. Rose*, 16 Conn. 71, 41 Am. Dec. 121. So a statement that a note indorsed by the firm of the speaker was as "good as the Bank of England," when in fact the firm was insolvent, was a fraud and it was held immaterial whether the speaker knew of the insolvency or not. *Rothschild v. Maek*, 115 N. Y. 1, 21 N. E. 726. In Vermont, however, it was held that the statement of a buyer that he was

"safe to be trusted and given credit to" did not amount to fraud. *Jude v. Woodburn*, 27 Vt. 415.

¹⁶ *Supra*, §§ 202, 203.

¹⁷ The remarks of Bowen, L. J., in *Smith v. Land, etc., Corporation*, 23 Ch. D. 7, 15, are worth observing: "It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of a fact, about the conditions of a man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion."

nevertheless, it is an assertion of a fact; namely, that the speaker has a certain opinion, and this fact may be one upon which the other party relies, and perhaps justifiably, in entering into the bargain.¹⁸ It has been held that even a promise amounts to a representation of fact that the promisor is of a certain state of mind.¹⁹ Still more clearly an expression of opinion is an assertion that the speaker is of a certain state of mind. The authorities recognize that if an opinion is falsely and fraudulently rendered by one professing to have expert skill, or special knowledge, it is legal fraud.²⁰ It may fairly be urged, therefore, that the reason why a misstatement of opinion does not ordinarily amount to actionable fraud is not because the statement is one of opinion merely, for misstatements of opinion may be actionable; but rather because it is unreasonable to place reliance on such statements unless made by one who has, or purports to have, expert knowledge or peculiar means of information not accessible to the other party; and that it is assumed that no such reliance was placed on the statements unless made by such a person.

§ 629. **Matters of law.**—It is well settled that statements of law though false and fraudulent do not generally constitute actionable fraud.²¹ The ground upon which this rule properly rests

¹⁸ *Infra*, § 630.

¹⁹ See § 630, *infra*.

²⁰ *McCormick v. Garnett*, 5 De G. M. & G. 278; *McGar v. Williams*, 26 Ala. 469, 62 Am. Dec. 739; *Worley v. Moore*, 77 Ind. 567; *Coulter v. Clark*, 160 Ind. 311, 66 N. E. 739; *Picard v. McCormick*, 11 Mich. 68; *Eaton v. Winnie*, 20 Mich. 156, 4 Am. Rep. 377; *Kost v. Bender*, 25 Mich. 515; *Coulter v. Minion*, 139 Mich. 200; *Griffin v. Farrier*, 32 Minn. 474, 21 N. W. 553; *Carlton v. Hulett*, 49 Minn. 308, 51 N. W. 1053; *Estell v. Myers*, 54 Miss. 174; *People v. Peckens*, 153 N. Y. 576, 591, 47 N. E. 883; *Erie Iron Works v. Barber*, 106 Pa. St. 125, 51 Am. Rep. 508; *King v. Doolittle*, 1 Head, 77, 84.

²¹ *Hirschfield v. London, etc., Ry.*, 2 Q. B. D. 1; *Eaglesfield v. Marquis of*

Londonderry, 4 Ch. D. 693 (C. A.); *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203; *Sturm v. Boker*, 150 U. S. 312, 14 S. Ct. 99, 37 L. ed. 1093; *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327, 20 S. Ct. 906, 43 L. ed. 1088; *Reeves v. Corning*, 51 Fed. Rep. 774; *Beall v. McGehee*, 57 Ala. 438; *Jordan v. Pickett*, 78 Ala. 331; *Champion v. Woods*, 79 Cal. 17, 21 Pac. 534, 12 Am. St. Rep. 126; *Fish v. Cleland*, 33 Ill. 243; *Hooker v. Midland Steel Co.*, 215 Ill. 444, 74 N. E. 445, 106 Am. St. Rep. 170; *Burt v. Bowles*, 69 Ind. 1; *Grant v. Grant*, 56 Me. 573; *Thompson v. Phoenix Ins. Co.*, 75 Me. 55, 46 Am. Rep. 357; *Carter v. Harden*, 78 Me. 528, 7 Atl. 392; *Jaggard v. Winslow*, 30 Minn. 263, 15 N. W. 242; *Ætna Ins. Co. v. Reed*, 33 Ohio St. 283; *Cartwright v.*

is well expressed as follows: "A representation of what the law will or will not permit to be done is one on which the party to whom it is made has no right to rely; and if he does so it is his folly, and he cannot ask the law to relieve him from the consequences. The truth or falsehood of such a representation can be tested by ordinary vigilance and attention. It is an opinion in regard to the law, and is always understood as such."²² In some cases the reason for the rule will fail, and in such cases misrepresentation of law, like misrepresentation of opinion, will be actionable. A misrepresentation of law by a lawyer to a layman, or a misrepresentation of law by any one who has or purports to have expert knowledge and, therefore, is enabled to impose on another, is fraudulent.²³ Statements of law bear a resemblance to statements of opinion in this also that a statement which literally taken is merely an expression of a conclusion of law may, in effect, amount to an assertion of the truth of certain facts. Thus an assertion that goods have been attached,

Dickinson, 88 Tenn. 476, 489, 12 S. W. 1030, 19 Am. St. Rep. 910; *Gormely v. Gymnastic Assn.*, 55 Wis. 350, 13 N. W. 242.

²² *Fish v. Cleland*, 33 Ill. 243; quoted with approval in *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203. The importance of a just understanding of the reason of the rule is illustrated by the case of *Wood v. Roeder*, 50 Neb. 476. In that case a misrepresentation of the Statute of Limitations in another State was held actionable, and the court said that "a misrepresentation which includes the opinion of a law of another State is without the rule," which governs misrepresentations of law generally. See also *Upton v. England*, 3 Dill. 496, 501; *Bethell v. Bethell*, 92 Ind. 318. It may be doubted whether a misstatement of foreign law should stand on any different ground in this respect from a misstatement of

domestic law, unless perhaps there be a difference in degree. See *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327, 341, 20 S. Ct. 906, 43 L. ed. 1088. The question in any case should be, Was the reliance of the injured party justified by the relation between the parties or the expert knowledge which the maker of the statement purported to have?

²³ See *Townsend v. Cowles*, 31 Ala. 428; *Cowles v. Townsend*, 37 Ala. 77; *Peter v. Wright*, 6 Ind. 183; *Lamb v. Lamb*, 130 Ind. 273, 30 N. E. 36, 30 Am. St. Rep. 227; *Titus v. Rochester Ins. Co.*, 97 Ky. 567, 31 S. W. 127, 53 Am. St. Rep. 426; *Motherway v. Wall*, 168 Mass. 333, 47 N. E. 135; *Cooke v. Nathan*, 16 Barb. 342; *Haviland v. Willetts*, 141 N. Y. 35, 35 N. E. 958; *Kline v. Kline*, 57 Pa. St. 120, 98 Am. Dec. 206; *Moreland v. Atchison*, 19 Tex. 303; *Shuttler v. Brandfuss*, 41 W. Va. 201.

though involving a statement of law, also involves a statement of seizure in fact.²⁴

§ 630. **Promises and predictions.**— It is frequently said that a promissory statement cannot be the basis of an action for deceit. It is undoubtedly true that failure to perform a promise cannot amount to fraud.²⁵ And in many jurisdictions, without consideration of the question whether a promise was made with an intention not to perform it, it is held that the making of the promise cannot be an actionable fraud.²⁶ It has been pointed

²⁴ *Burns v. Lane*, 138 Mass. 350. The following illustration was put by Jessel, M. R., in *Eaglesfield v. Marquis of Londonderry*, 4 Ch. D. 693, "Suppose a man is asked by a tradesman whether he can give credit to a lady, and the answer is 'You may; she is a single woman of large fortune.' It turns out that the man who gave that answer knew that the lady had gone through a ceremony of marriage with a man who was believed to be a married man, and that she had been advised that that marriage ceremony was null and void, though it had not been declared so by any court, and it afterward turned out that they were all mistaken, that the first marriage of the man was void, so that the lady was married. He does not tell the tradesman all these facts, but states that she is single. That is a statement of fact. If he had told him the whole story and all the facts, and said, 'Now you see the lady is single,' that would have been a misrepresentation of law."

²⁵ *Piedmont Land Co. v. Piedmont Foundry Co.*, 96 Ala. 389, 11 So. 332; *Hirsch v. Hirsch*, 21 Ark. 342; *Burton v. Platter*, 53 Fed. Rep. 901, 10 U. S. App. 657, 4 C. C. A. 95; *Feeney v. Howard*, 79 Cal. 525, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162; *Adams v. Schiffer*, 11 Colo. 15, 17 Pac. 21, 7 Am. St. Rep. 202;

Harrington v. Rutherford, 38 Fla. 321, 21 So. 283; *Dickinson v. Atkins*, 100 Ill. App. 401; *Hayes v. Burkam*, 51 Ind. 130; *Hubbard v. Long*, 105 Mich. 442, 63 N. W. 644; *Witt v. Cuenod*, 9 N. Mex. 143, 50 Pac. 328; *Patterson v. Wright*, 64 Wis. 289, 25 N. W. 10.

²⁶ *Sawyer v. Prickett*, 19 Wall. 146, 22 L. ed. 105; *Farris v. Strong*, 24 Colo. 107, 48 Pac. 963; *Gage v. Lewis*, 68 Ill. 604; *Murray v. Smith*, 42 Ill. App. 548; *Chambers v. Mitchell*, 123 Ill. App. 595; *Bethell v. Bethell*, 92 Ind. 318; *Balue v. Taylor*, 136 Ind. 368, 36 N. E. 269; *Robinson v. Reinhart*, 137 Ind. 674, 36 N. E. 519; *Dawe v. Morris*, 149 Mass. 188, 21 N. E. 313, 4 L. R. A. 158, 14 Am. St. Rep. 404; *Estes v. Desnoyers Shoe Co.*, 155 Mo. 577, 56 S. W. 316; *Perkins v. Lougee*, 6 Neb. 220; *Gallagher v. Brunel*, 6 Cow. 346; *Fisher v. N. Y. Common Pleas*, 18 Wend. 608; *Watkins v. West Wytheville Co.*, 92 Va. 1, 22 S. E. 554; *Tufts v. Weinfeld*, 88 Wis. 647, 60 N. W. 992; *Milwaukee Brick Co. v. Schoknecht*, 108 Wis. 457, 84 N. W. 838; *James Music Co. v. Bridge*, Wis. , 114 N. W. 1108. And in *Burrill v. Stevens*, 73 Me. 395, 399, 40 Am. Rep. 366, the court said that "a design not to pay according to the contract is not equivalent to an intention never to pay for the goods,

out, however, that when a promise is made with intention not to perform it, the promisor is guilty of misrepresentation.²⁷ And in a number of cases, generally of recent date, the doctrine seems broadly accepted that a promise which the promisor does not intend to carry out is a mis-statement of material fact.²⁸ The question becomes important chiefly where the buyer of goods at the time of the purchase intends not to perform his express or implied promise to pay for them.²⁹ Though a prediction or gratuitous promise, when fraudulently made, involves a misrepresentation of mental condition similar to that when the promise is made for legal consideration, a difference is to be observed in the justification of the defrauded person in relying on the deceptive statements. Ordinarily predictions or promises wholly without consideration do not justify reliance.³⁰

§ 631. **Silence.**—It has been said that “there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor.”³¹ And it is undoubtedly the general rule that it is not necessarily fraudulent

and does not amount to an intention to defraud the seller outright, although it may be evidence of such a contemplated fraud.”

²⁷ “There must be a misstatement of an existing fact; but the state of a man’s mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man’s mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man’s mind is, therefore, a misstatement of fact.” *Edgington v. Fitzmaurice*, 29 Ch. D. 459, per Bowen, L. J.

²⁸ *Rogers v. Virginia-Carolina Chemical Co.*, 149 Fed. Rep. 1, 78 C. C. A. 615; *Ansley v. Bank of Piedmont*, 113 Ala. 467, 21 So. 59, 59 Am. St. Rep. 122; *Lawrence v. Gayetty*, 78 Cal. 126, 20 Pac. 382, 12 Am. St. Rep. 29; *Russ Lumber Co. v. Muscupiabe Land Co.*, 120 Cal. 521, 52

Pac. 995, 65 Am. St. Rep. 188; *Langley v. Rodriguez*, 122 Cal. 580, 55 Pac. 406, 68 Am. St. Rep. 70; *National Bank v. Mackey*, 5 Kans. App. 437, 49 Pac. 324; *Holdham v. Bentley*, 6 B. Mon. 428; *Price v. Reed*, 2 Harr. & G. 291; *Laing v. McKee*, 13 Mich. 124, 87 Am. Dec. 738; *Cerny v. Paxton & Gallagher Co. (Neb.)*, 110 N. W. 882, 10 L. R. A. (N. S.) 640; *Ivancovich v. Stern*, 14 Nev. 341; *Goodwin v. Horn*, 60 N. H. 485; *Hill v. Chamberlain*, 64 N. Y. App. Div. 609, 71 N. Y. Suppl. 639; *affd.*, 170 N. Y. 595, 63 N. E. 1117; *Troxler v. Building Co.*, 137 N. C. 51, 49 S. E. 58; *McFarland v. McGill*, 16 Tex. Civ. App. 298, 41 S. W. 402.

²⁹ The decisions on this point are collected in § 637, *infra*.

³⁰ *Bellairs v. Tucker*, 13 Q. B. D. 562; *Terhune v. Coker*, 107 Ga. 352, 33 S. E. 394.

³¹ *Smith v. Hughes*, L. R. 6 Q. B. 597, 607, per Blackburn, J.

for one party to a bargain consciously to take advantage of the ignorance or mistake of the other party, provided no words or acts of the former contribute to the mistake.³² Even silence when a direct question is asked has been regarded as not in itself a fraud,³³ though it would seem that a gesture or even an expression

³² The leading case for this doctrine is *Laidlaw v. Organ*, 2 Wheat. 178, 4 L. ed. 214. This was an action by the buyer of tobacco against the sellers to gain possession of it. There was evidence that before the sale the buyer, upon being asked by one of the sellers whether there was any news calculated to enhance its value, was silent although he had received news which the seller had not of the treaty of Ghent which terminated the War of 1812. The court below, on the ground that there was no evidence that the plaintiff had asserted or suggested anything to the sellers, calculated to impose upon them in regard to this news, directed a verdict for the plaintiff. On exceptions, the direction of the court was held erroneous. The question whether any imposition was practiced by the buyer upon the seller it was held should have been submitted to the jury. Though the actual decision of the case thus tends to the enlargement of the rights of the deceived party, the case is usually cited for the statement of Marshall, C. J., that it could not be laid down as matter of law that intelligence of extrinsic circumstances which might influence the price of the commodity and exclusively within the knowledge of the buyer must have been communicated to the seller. The case of *Smith v. Hughes*, L. R. 6 Q. B. 597, from which a quotation has been made in the text, is even more explicit. This was an action for the price of oats. The defendant (the buyer) refused to accept the oats or pay the price

because he had been under the impression when he agreed to buy the oats that they were old oats, whereas, in fact, they were new oats. The jury found that the seller believed the defendant to be under this impression. The judge at the trial directed the jury on this finding to return a verdict for the defendant. It was held by the Court of Appeals that there must be a new trial. The self-deception of the buyer did not enable him to avoid the contract even though known to the seller. See also *Turner v. Green*, [1895] 2 Ch. 205; *Greenhalgh v. Brindley*, [1901] 2 Ch. 324; *Cleveland v. Richardson*, 132 U. S. 318, 329, 10 S. Ct. 100, 33 L. ed. 381; *Blydenburgh v. Welsh*, Baldwin (U. S.) 331; *Morris v. Thompson*, 85 Ill. 16; *Dayton v. Kidder*, 105 Ill. App. 107; *Beninger v. Corwin*, 24 N. J. L. (4 Zab.) 257; *Paul v. Hadley*, 23 Barb. 521; *People's Bank v. Bogart*, 81 N. Y. 101; *Kintzing v. McElrath*, 5 Pa. St. 467; *Neill v. Shamburg*, 158 Pa. St. 263, 27 Atl. 992; *Rose v. Barclay*, 191 Pa. St. 594, 43 Atl. 385, 45 L. R. A. 392; *Fisher v. Budlong*, 10 R. I. 525, 527; *Fell v. Lloyd*, 4 Comm. (Australia) 572. A contrary decision is *Davis v. Reisinger*, 120 N. Y. App. Div. 766, 105 N. Y. Suppl. 603, where one who had agreed to buy Bassein rice like a sample which owing to the seller's mistake was Java rice, a more valuable kind, was not allowed to enforce the contract because he knew the sample was Java rice.

³³ *Laidlaw v. Organ*, 2 Wheat. 178, 4 L. ed. 214.

of the face might be enough in such a case to constitute actionable deceit. But there are exceptions to the rule. While it is nowhere held that collateral circumstances tending to enhance the value of the subject of the sale must be disclosed in the absence of some special relation between the parties, it is held in many States that if the subject-matter of the sale is materially defective to the knowledge of the seller, and the defect is latent, an action of deceit will lie in favor of a buyer who purchases the goods on the assumption that they are what they seem.³⁴ On the other hand, a person who knows that there is a mine on the land of another, of which the latter is ignorant, may, nevertheless, buy the land without disclosing the existence of the mine.³⁵ It may perhaps fairly be said that the offer of goods which appear to be of a certain character is itself a representation that they are what they seem.³⁶ But it is more difficult, where the buyer is guilty of fraudulent silence, to regard his offer as a representation that the seller's property is what it seems, and it is impossible to say that an offer by either party amounts to a representation that all collateral circumstances are what the other party supposes. It is certainly true that any active conduct or words which tend to produce an erroneous impression amount to fraud, and half

³⁴ *Armstrong v. Huffstutler*, 19 Ala. 51; *Turner v. Huggins*, 14 Ark. 21; *Parrish v. Thurston*, 87 Ind. 437; *Downing v. Dearborn*, 77 Me. 457, 1 Atl. 407; *Marsh v. Webber*, 13 Minn. 109; *Barron v. Alexander*, 27 Mo. 530; *Grigsby v. Stapleton*, 94 Mo. 423, 7 S. W. 421; *Joplin Water Co. v. Bathe*, 41 Mo. App. 285; *Hanson v. Edgerly*, 29 N. H. 343; *Wheeler v. Metropolitan Stock Exchange*, 72 N. H. 315, 320, 56 Atl. 754; *Jeffrey v. Bigelow*, 13 Wend. 518, 28 Am. Dec. 476; *Hadley & Hawkins v. Clinton County Importing Co.*, 13 Ohio St. 502; *Cardwell v. McClelland*, 3 Sneed, 150; *Paddock v. Strobridge*, 29 Vt. 470; *Maynard v. Maynard*, 49 Vt. 297. See also *Stewart v. Wyoming Rancho Co.*, 128 U. S. 383, 9 S. Ct. 101, 32 L. ed. 439; *Marcotte v. Allen*, 91 Me. 74, 77, 39

Atl. 346, 40 L. R. A. 185. But see *contra*, *Ward v. Hobbs*, 3 Q. B. D. 150, 4 A. C. 13; *Morris v. Thompson*, 85 Ill. 16; *Paul v. Hadley*, 23 Barb. 521.

³⁵ *Falcke v. Gray*, 38 L. J. Ch. 28, 31, quoting Lord Thurlow; *Smith v. Beatty*, 2 Ir. Eq. 456; *Caples v. Steel*, 7 Or. 491; *Harris v. Tyson*, 24 Pa. St. 347, 64 Am. Dec. 661. And see *Williams v. Spurr*, 24 Mich. 335; *Burt v. Mason*, 97 Mich. 127, 56 N. W. 365. But otherwise between partners. *Hanley v. Sweeny*, 109 Fed. Rep. 712, 43 C. C. A. 612. And such nondisclosure may afford ground for a court of equity to refuse specific performance of a contract. *Byars v. Stubbs*, 85 Ala. 266, 4 So. 755; *Ames, Cas. Equity Jurisprudence*, 373, note.

³⁶ *Paddock v. Strobridge*, 29 Vt. 470, and cases cited in note 34, *supra*.

the truth may be a lie in effect.³⁷ And it seems that active concealment also would be held fraudulent by some courts which would not hold mere silence sufficient, though it may seem difficult to make out an actual misrepresentation from acts of concealment unknown to the other party.³⁸ In some contracts other than those of sale, such as insurance and guaranty, failure to disclose material facts is already recognized by the law as fraudulent, and the tendency in the law of sales, as well as in other contracts, is doubtless toward requiring a somewhat higher degree of good faith than formerly, especially where the opportunities for information are not equally open to both parties.³⁹ In case a fiduciary relation exists between the parties, as that of trustee and *cestui que trust*, guardian and ward, lawyer and client, there seems no reason to doubt that the same requirements as to disclosure exist in contracts to sell and sales of personal property as in the case of other contracts.⁴⁰ A contract between buyer

³⁷ *Kenner v. Harding*, 85 Ill. 264, 28 Am. Rep. 615; *State v. Fox*, 79 Md. 514, 29 Atl. 601, 24 L. R. A. 679, 47 Am. St. Rep. 424; *Wegenaar v. Dechow*, 33 N. Y. App. Div. 12; *Croyle v. Moses*, 90 Pa. St. 250, 35 Am. Rep. 654; *George v. Johnson*, 6 Humph. 36, 44 Am. Dec. 288. See also *Van Houten v. Morse*, 162 Mass. 414, 38 N. E. 705, 26 L. R. A. 430, 44 Am. St. Rep. 373. This was not a case of sale but the discussion of the general question is interesting.

³⁸ "In an action of deceit, it is true that silence as to a material fact is not necessarily, as matter of law, equivalent to a false representation. But mere silence is quite different from concealment; *aliud est tacere, aliud celare*; a suppression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representa-

tion, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff." *Stewart v. Wyoming Rancho Co.*, 128 U. S. 383, 388, 9 S. Ct. 101, 32 L. ed. 439, per Gray, J. See also *Kenner v. Harding*, 85 Ill. 264; *Timmis v. Wade*, 5 Ind. App. 139, 31 N. E. 827; *Raeseide v. Hamm*, 87 Iowa, 720, 54 N. W. 1079; *Singleton's Admr. v. Kennedy*, 9 B. Mon. 222; *Croyle v. Moses*, 90 Pa. St. 250, 35 Am. Rep. 654.

³⁹ See *Gottschalk v. Kircher*, 109 Mo. 170, 184, 17 S. W. 905.

⁴⁰ *Smith v. Sweeney*, 69 Ala. 524; *Oliver v. Oliver*, 118 Ga. 362, 45 S.

and seller may be of such a character as to impose a fiduciary relation upon one or the other party, and such a relation involves a duty of disclosure.⁴¹ In many cases where the silence of a party to the contract is not such as to amount to actionable fraud or to justify the rescission of contract, a court of equity will, nevertheless, refuse to enforce specific performance of the contract, since this relief is in many cases denied where the bargain is inequitable even though legally enforceable.⁴²

§ 632. **Fraudulent person's knowledge of falsity.**—It is probably safe to say that a contract or sale may be rescinded for misrepresentation though the party making the misrepresentation did not know that it was false. Innocent misrepresentation is sufficient. For though the representation may have been made innocently, it would be unjust to allow one who has made false representations even innocently to retain the fruits of a bargain induced by such representations.⁴³ This is often called a doctrine of equity as distinguished from courts of law, and doubtless in its origin it was such; but, at the present time, it is rather a distinction between a right of rescission on the one hand whether that right is asserted in a court of equity, in a court of law, or

E. 232. Compare *Fletcher v. Bartlett*, 157 Mass. 113, 31 N. E. 760. As to the rule in contracts generally, see *Wald's Pollock, Contracts* (3d ed.), 734.

⁴¹ Thus in *Ennis v. Borner*, 100 Fed. Rep. 12, 40 C. C. A. 249, the seller sold three cargoes of ore, the price to be fixed on the basis of an analysis made by either of two chemists. The seller requested the buyer to submit a sample for analysis to either chemist he chose. The buyer had a sample analyzed by each chemist and sent a copy of the analysis which proved most favorable to himself to the seller with a check based thereon which the seller accepted. The buyer resold the ore in accordance with the other analysis. The court held the buyer was bound to report both analyses, and his failure to do so gave the seller a right to rescind his acceptance of the buy-

er's check as full payment. See also the remarks of *Brewer, J.*, in *Graffenstein v. Epstein*, 23 Kans. 443.

⁴² *Fothergill v. Phillips*, 6 Ch. App. 770; *Byars v. Stubbs*, 85 Ala. 256, 4 So. 755; *Hetfield v. Willey*, 105 Ill. 286; *Missouri River, etc., R. Co. v. Brickley*, 21 Kans. 275; *Woollums v. Horsley*, 93 Ky. 582, 20 S. W. 781; *Bean v. Valle*, 2 Mo. 103; *Margraf v. Muir*, 57 N. Y. 155.

⁴³ *Redgrave v. Hurd*, 20 Ch. D. 1; *Smith v. Chadwick*, 9 A. C. 187; *Smith v. Richards*, 13 Pet. 26. 10 L. ed. 42; *Black v. Walton*, 32 Ark. 321; *Shelton v. Ellis*, 70 Ga. 297; *Day v. Lown*, 51 Iowa, 364, 1 N. W. 786; *Matthey v. Wood*, 12 Bush, 293; *Cowley v. Smyth*, 46 N. J. L. 380, 50 Am. Rep. 432; *Pierce v. Tiersch*, 40 Ohio St. 168; *Adams v. Reed*, 11 Utah, 480, 40 Pac. 720; *Lowe v. Trundle*, 78 Va. 65; *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73.

without the aid of a court,⁴⁴ and an action for damages on the other hand. Nor is it necessary for purposes of estoppel that a statement shall have been made with knowledge of its untruth.⁴⁵ But in an action of tort for deceit, it is a disputed question whether anything short of a guilty state of mind on the part of the defendant will afford basis for the action. It may be supposed — (1) That false representations were made with belief in their truth and with reasonable care. (2) That such representations were made with belief in their truth but without reasonable care. (3) That such representations were made with conscious recklessness or doubt as to their truth. In the first of these cases there is admittedly no liability. In the third case, doubtless the defendant's liability would be generally conceded, for conscious recklessness implies a knowledge on the part of the defendant making the statement that what he has asserted as a fact may not be true, and he thereby has a guilty mind.⁴⁶ It is the second case which has given rise to considerable dispute in recent times. It is settled in England that the want of reasonable ground for believing an assertion is not of itself sufficient basis for an action of tort;⁴⁷ and this rule has been followed in some cases in the United States.⁴⁸ But it is also held in some States that the assertion of a fact, as a matter of positive knowledge, involves the assertion not simply of the fact, but of the knowledge; and if this knowledge is known not to exist by the person making the repre-

⁴⁴ As to this, see *supra*, § 567.

⁴⁵ *Freeman v. Cooke*, 2 Ex. 654; *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96, 6 S. Ct. 657, 29 L. ed. 811; *Bigelow, Estoppel* (4th ed.), 602.

⁴⁶ *Evans v. Edmonds*, 13 C. B. 777, 786; *Lehigh Zinc & Iron Co. v. Bamford*, 150 U. S. 665, 14 S. Ct. 219, 37 L. ed. 1215; *Trimble v. Reid*, 19 Ky. L. Rep. 604, 41 S. W. 319; *Weeks v. Currier*, 172 Mass. 53, 51 N. E. 416; *Arnold v. Teel*, 182 Mass. 1, 4, 64 N. E. 413; *Hadcock v. Osmer*, 153 N. Y. 604, 47 N. E. 923.

⁴⁷ *Derry v. Peek*, 14 A. C. 337; *Angus v. Clifford*, [1891] 2 Ch. 449, 464, 470.

⁴⁸ *Kimber v. Young*, 137 Fed. Rep. 744, 70 C. C. A. 178; *Boddy v. Henry*, 113 Iowa, 462; *Nash v. Minnesota Title Ins. Co.*, 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753, 47 Am. St. Rep. 489 (citing *Hammatt v. Emerson*, 27 Me. 308, 46 Am. Dec. 598; *Page v. Parker*, 40 N. H. 47. But see s. c., 43 N. H. 363, 80 Am. Dec. 172; *Cowley v. Smyth*, 46 N. J. L. 380, 50 Am. Rep. 432; *Chester v. Comstock*, 40 N. Y. 575); *Erie Iron Works v. Barber*, 106 Pa. St. 125, 51 Am. Rep. 508; *Lamberton v. Dunham*, 165 Pa. St. 129, 30 Atl. 716.

sentation he is guilty of a fraud, although he believes to be true the fact which he asserts.⁴⁹ This too seems logically sound, but the doctrine of other courts that whatever the defendant was under a duty to know he is to be treated as if he did know results in holding him liable for fraud, although he may have had no fraudulent intent.⁵⁰ It has been pointed out that the true ground of liability in such a case is negligence, and that the question should be governed by the principles controlling actions for negligence.⁵¹ Even in actions based on fraud, misstatement of a fact about which the defendant should have known is at least evidence that he did know the truth and fraudulently misrepresented it.⁵² And it is equally clear that it is not necessary for the defendant to have been sure that his statements were false; it is enough that he suspected they were.⁵³

§ 633. **Action in reliance on false impression.**— No legal wrong is caused by false and fraudulent representations unless they are acted upon. A result must be produced in order to give ground of complaint.⁵⁴ But it is not necessary that such representations

⁴⁹ *Munroe v. Pritchett*, 16 Ala. 785; *Jordan v. Pickett*, 78 Ala. 331; *Goodale v. Middaugh*, 8 Colo. App. 223, 46 Pac. 11; *Atlas Shoe Co. v. Bechard*, 102 Me. 197, 66 Atl. 390; 10 L. R. A. (N. S.) 245; *Fisher v. Mellen*, 103 Mass. 503; *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727; *Bullitt v. Farrar*, 42 Minn. 8, 43 N. W. 566, 6 L. R. A. 149, 18 Am. St. Rep. 485; *Johnson v. Gulick*, 46 Neb. 817, 65 N. W. 883, 50 Am. St. Rep. 629; *Hadcock v. Osmer*, 153 N. Y. 604, 47 N. E. 923.

⁵⁰ This doctrine is supported in *Neely v. Rembert*, 71 Ark. 91, 71 S. W. 259; *Watson v. Jones*, 41 Fla. 241, 25 So. 678; *Gerner v. Yates*, 61 Neb. 100, 84 N. W. 596; *Seale v. Baker*, 70 Tex. 283, 7 S. W. 742, 8 Am. St. Rep. 592; *Giddings v. Baker*, 80 Tex. 308, 16 S. W. 33. See also *Peoples' Nat. Bank v. Central Trust Co.*, 179 Mo. 648; *Tate v. Bates*, 118

N. C. 287, 24 S. E. 482, 54 Am. St. Rep. 719; *Houston v. Thornton*, 122 N. C. 365, 29 S. E. 827, 65 Am. St. Rep. 69.

⁵¹ See an article by Judge Jeremiah Smith on "Liability for Negligent Language," 14 H. L. R. 484; approved and followed in *Cunningham v. C. R. Pease Co.*, 74 N. H. 435, 69 Atl. 120.

⁵² This was admitted in *Derry v. Peek*, 14 A. C. 337. See also *Spead v. Tomlinson*, 73 N. H. 46, 59 Atl. 376, 68 L. R. A. 432.

⁵³ *Shackett v. Bickford*, 74 N. H. 57, 65 Atl. 252, 7 L. R. A. (N. S.) 646.

⁵⁴ *Attwood v. Small*, 6 C. & F. 232, 444; *Smith v. Kay*, 7 H. of L. Cas. 750, 775; *Macleay v. Tait*, [1906] A. C. 24; *Wagner v. National Ins. Co.*, 90 Fed. Rep. 395, 61 U. S. App. 691, 33 C. C. A. 121; *Moses v. Katzenberger*, 84 Ala. 95, 4 So. 237; *Darby v. Kroell*, 92 Ala. 607, 8 So. 384; *Hooker v. Midland Steel Co.*,

should have formed the only inducement for entering into a transaction; it is enough if they were a material inducement.⁵⁵ Where one to whom false statements are made undertakes to verify them and form a judgment of his own upon the facts, this will indicate a reliance on his own judgment rather than faith in the representations, and no relief can be had.⁵⁶ And the falsity of a statement may be so obvious as to preclude the inference that action was based in reliance upon it.⁵⁷ And if the falsity of representations is discovered before the transaction is finally entered into, they are immaterial.⁵⁸ Where representations have been made in regard to a material matter in the absence of evidence

215 Ill. 444, 74 N. E. 445, 106 Am. St. Rep. 170; *Bowman v. Carithers*, 49 Ind. 90; *Palmer v. Bell*, 85 Me. 352, 27 Atl. 250; *Ely v. Stewart*, 2 Md. 408; *Dawe v. Morris*, 149 Mass. 188, 192, 21 N. E. 313, 4 L. R. A. 158, 14 Am. St. Rep. 404; *Bilafsky v. Conveyancers' Title Ins. Co.*, 192 Mass. 504, 510, 78 N. E. 534; *Humphrey v. Merriman*, 32 Minn. 197, 20 N. W. 138; *Anderson v. Burnett*, 5 How. (Miss.) 165, 35 Am. Dec. 425; *American Assn. v. Bear*, 48 Neb. 455, 67 N. W. 500; *Brackett v. Griswold*, 112 N. Y. 454, 20 N. E. 376; *Hotchkin v. Third Nat. Bank*, 127 N. Y. 329, 27 N. E. 1050; *Foy v. Haughton*, 83 N. C. 467; *Trammell v. Ashworth*, 99 Va. 646, 39 S. E. 593; *Fowler v. McCann*, 86 Wis. 427, 56 N. W. 1085.

⁵⁵ *Clarke v. Dickson*, 6 C. B. (N. S.) 453; *Union Mfg. Co. v. East Alabama Bank*, 129 Ala. 292, 29 So. 781; *Spinks v. Clark*, 147 Cal. 439, 82 Pac. 45; *Safford v. Grout*, 120 Mass. 20; *Shaw v. Gilbert*, 111 Wis. 165, 86 N. W. 188. In *Macleay v. Tait*, [1906] A. C. 24, 26, Lord Halsbury said: "If the prospectus is calculated to induce people to take shares, and they do take shares, the prospectus, tainted with falsehood as it is, has acted as a whole, and people

cannot be expected to analyze their own mental sensations so minutely as to be able to explain what particular statement had induced them to become subscribers." In *Light v. Jacobs*, 183 Mass. 206, 66 N. E. 799, the court said: "It is not necessary that false representations should have been the sole or even the predominant motive."

⁵⁶ *Slaughter's Admr. v. Gerson*, 13 Wall. 379, 20 L. ed. 627; *Clark v. Reeder*, 158 U. S. 505, 525, 15 S. Ct. 849, 39 L. ed. 1070; *Hough v. Richardson*, 3 Story, 659; *Brown v. Smith*, 109 Fed. Rep. 26; *Brewer v. Arantz*, 124 Ala. 127, 26 So. 922; *Wheeler v. Dunn*, 13 Colo. 428, 22 Pac. 827; *Tuck v. Downing*, 76 Ill. 71; *Dady v. Condit*, 163 Ill. 511, 45 N. E. 224; *Hagee v. Grossman*, 31 Ind. 223; *Merritt v. Dufur*, 99 Iowa, 211, 68 N. W. 553; *Lilienthal v. Suffolk Brewing Co.*, 154 Mass. 185, 28 N. E. 151, 12 L. R. A. 821, 26 Am. St. Rep. 234; *Buxton v. Jones*, 120 Mich. 522, 79 N. W. 980; *Halls v. Thompson*, 1 Smedes & M. 443, 481, 482; *Phipps v. Buckman*, 30 Pa. St. 401; *Irby v. Tilsley*, 41 Wash. 211, 83 Pac. 97.

⁵⁷ *Trammell v. Ashworth*, 99 Va. 646, 652, 39 S. E. 593.

⁵⁸ *Pratt v. Philbrook*, 41 Me. 132.

showing the contrary, it will be presumed that the representations were relied on.⁵⁹

§ 634. **Unjustifiable reliance.**—It is no doubt true that relief is denied in many cases of fraudulent representations where the representations were such that no reasonable person ought to have relied upon them. It is on this ground that misrepresentations of opinion and of law are not actionable.⁶⁰ But in order to give a fraudulent person immunity for his statements, it is not enough that a more careful person might not have been deceived. It has indeed been held by the Supreme Court of the United States⁶¹ and by other courts, that if means were at hand by which the deceived person might have detected the untruth, the fraud will not be actionable.⁶² But this doctrine can hardly be accepted broadly to-day; misrepresentations frequently have the effect of causing the other party not to use the means of knowledge within his power. The modern tendency is certainly toward the doctrine that negligence in trusting to a misrepresentation will not excuse positive willful fraud or deprive the defrauded person of his remedy.⁶³ It is on the ground of unjustifiable re-

⁵⁹ *Hicks v. Stevens*, 121 Ill. 186, 11 N. E. 241. See also references to the analogous question in regard to warranties, *supra*, § 206.

⁶⁰ See *supra*, §§ 628, 629.

⁶¹ *Slaughter's Admr. v. Gerson*, 13 Wall. 379, 20 L. ed. 627; *Andrus v. St. Louis, etc., Refining Co.*, 130 U. S. 643, 647, 9 S. Ct. 645, 32 L. ed. 1054.

⁶² *Anschutz v. Miller* (C. C.), 20 Fed. Rep. 376; *Journal Printing Co. v. Maxwell*, 1 Pennew. 511, 43 Atl. 615; *Gatling v. Newell*, 12 Ind. 118; *Brown v. Leach*, 107 Mass. 364; *Poland v. Brownell*, 131 Mass. 138, 41 Am. Rep. 215; *Long v. Warren*, 68 N. Y. 426 (but see *Schumaker v. Mather*, 133 N. Y. 590, 595, 30 N. E. 755); *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613.

⁶³ *Redgrave v. Hurd*, 20 Ch. D. 1; *Henderson v. Henshall*, 54 Fed. Rep. 320, 7 U. S. App. 565, 4 C. C. A. 357; *Strand v. Griffith*, 97 Fed. Rep. 854,

38 C. C. A. 444; *Burroughs v. Guano Co.*, 81 Ala. 255, 1 So. 212; *Graham v. Thompson*, 55 Ark. 296, 299, 18 S. W. 58, 29 Am. St. Rep. 40; *Neely v. Rembert*, 71 Ark. 91, 71 S. W. 259; *Linington v. Strong*, 107 Ill. 295; *Hale v. Philbrick*, 42 Iowa, 81; *McDowell v. Caldwell*, 116 Iowa, 475, 89 N. W. 1111; *Lewis v. Jewell*, 151 Mass. 345, 24 N. E. 52, 21 Am. St. Rep. 454; *Jackson v. Collins*, 39 Mich. 557; *Maxfield v. Schwartz*, 45 Minn. 150, 47 N. W. 448, 10 L. R. A. 606; *Perry v. Rogers*, 62 Neb. 898, 87 N. W. 1063; *Albany Institution v. Burdick*, 87 N. Y. 40; *Fargo Gas & Coke Co. v. Fargo Gas & Electric Co.*, 4 N. Dak. 219, 59 N. W. 1066, 37 L. R. A. 593; *Chamberlin v. Fuller*, 59 Vt. 247, 9 Atl. 832; *Stone v. Moody*, 41 Wash. 680, 84 Pac. 617, 5 L. R. A. (N. S.) 799; *Warder v. Whitish*, 77 Wis. 430, 46 N. W. 540. In *Whiting v. Price*, 172 Mass. 240,

liance that relief is sometimes denied to those who execute written contracts without reading them, on the faith of representations as to the contents of the documents. If no relation of trust existed between the parties, and if the defrauded person was not so ignorant or illiterate as to excuse reliance of the superior knowledge of the other party, relief has sometimes been denied.⁶⁴ But the better view is rather to deny to one who has been guilty of positive fraud in inducing the other party to refrain from read-

51 N. E. 1084, 70 Am. St. Rep. 262, an action for false representations, it appeared that the plaintiff was induced to buy a bond on the faith of false representations. The defendant who made these representations gave as his source of information several persons, whom he named, living in the same town with the plaintiff and known to him. These persons the defendant advised the plaintiff to see and consult. The defendant asked an instruction that the plaintiff could not recover for such statements since he was referred to the sources of information. This request was refused, and the question was left to the jury whether the plaintiff ought to have inquired of the persons named. On exceptions this procedure was held correct, Holmes, J., saying: "It is true that in cases of representations as to quality, correspondence to sample, etc., of goods exhibited in the buyer's presence, the court has ruled that if the buyer had full means of ascertaining the truth for himself he could not set up that he was imposed upon by fraud (*Salem India Rubber Co. v. Adams*, 23 Pick. 256, 265; *Slaughter's Admr. v. Gerson*, 13 Wall. 379, 20 L. ed. 627; *Long v. Warren*, 68 N. Y. 426); and that a verdict has been directed partly on that ground. *Poland v. Brownell*, 131 Mass. 138, 41 Am. Rep. 215. See *Bayly v. Merrel*, Cro. Jac. 386.

But the requirement as it has been worked out does not call for more than reasonable diligence (*Holst v. Stewart*, 161 Mass. 516, 522, 37 N. E. 755, 42 Am. St. Rep. 442; *Brown v. Leach*, 107 Mass. 364, 368; *Nowlan v. Cain*, 3 Allen, 261 264) and distance or other slight circumstances have been held sufficient to warrant leaving the question to the jury. *Holst v. Stewart*, 161 Mass. 516, 522, 523, 37 N. E. 755, 42 Am. St. Rep. 442. See *Burns v. Lane*, 138 Mass. 350, 355, 356; *Whiteside v. Brawley*, 152 Mass. 133, 24 N. E. 1088. The matter may have been confused a little by not distinguishing between seller's talk as to value and the like, where the rule is absolute in ordinary cases that the buyer must look out for himself, and representation of facts concerning which even sellers may be held liable for fraud, and as to which the buyer may be warranted in relying wholly on the seller's word. The notion that the buyer must look out for himself sometimes has been pressed a little too strongly into the latter class of cases."

⁶⁴ *Pratt v. Metzger* (Ark.), 95 S. W. 451; *Kimmell v. Skelly*, 130 Cal. 555, 62 Pac. 1067; *Sanborn v. Sanborn*, 104 Mich. 180, 62 N. W. 371; *Quinby v. Shearer*, 56 Minn. 534, 58 N. W. 155; *Standard Mfg. Co. v. Slot*, 121 Wis. 14, 98 N. W. 923, 105 Am. St. Rep. 1016.

ing the document the privilege of excusing his own misconduct by the stupidity or credulity of the defrauded party.⁶⁵

§ 635. **Fraud on the seller by impersonation.**—A method of fraud upon the seller not infrequently committed is for the fraudulent buyer to obtain goods by inducing the seller to believe that the sale is made to another person having good credit. If the buyer induces the seller to assent to the transfer of title in the goods to him under such a mistaken belief, title will pass although it will be voidable for fraud. Thus where the buyer in person obtains the assent of the ~~buyer~~ to a sale to him of the goods by pretending to be some one else, title passes.⁶⁶ In such a case, though it is true the seller intends to transfer title to the person of good credit whom he supposes to be the person standing before him, his primary intent is to transfer title to the person before him. It frequently happens that a seller intends several things when professing to transfer title, and that all of these intentions cannot be effectuated. This is almost invariably true where the bargain is induced by fraud. Thus if the buyer is the person

⁶⁵ *Angier v. Brewster*, 69 Ga. 362; *Chapman v. Atlanta Guano Co.*, 91 Ga. 821, 18 S. E. 41; *New v. Wambach*, 42 Ind. 456; *Rosenberg v. Doe*, 148 Mass. 560, 20 N. E. 176; *Maxfield v. Schwartz*, 45 Minn. 150, 47 N. W. 448, 10 L. R. A. 606; *Shrimpton & Sons v. Philbrick*, 53 Minn. 366, 55 N. W. 551; *Adolph v. Minneapolis & P. Ry. Co.*, 58 Minn. 178, 59 N. W. 959; *Stamps v. Bracy*, 1 How. (Miss.) 312; *Cole Bros. v. Williams*, 12 Neb. 440, 11 N. W. 875; *Griffin v. Lumber Co.*, 140 N. C. 514, 53 S. E. 307, 6 L. R. A. (N. S.) 463 (annotated); *International & G. N. R. Co. v. Shuford*, 36 Tex. Civ. App. 251, 81 S. W. 1189; *Houston & T. C. R. Co. v. Milam* (Tex. Civ. App.), 58 S. W. 735; *Warder Co. v. Whitish*, 77 Wis. 430, 46 N. W. 540; *Standard Mfg. Co. v. Slot*, 121 Wis. 14, 98 N. W. 923, 105 Am. St. Rep. 1016.

⁶⁶ *Hickey v. McDonald*, 151 Ala. 497, 44 So. 201, 13 L. R. A. (N. S.) 413;

Edmunds v. Merchants' Transportation Co., 135 Mass. 283. But see *Loeffel v. Pohlman*, 47 Mo. App. 574. This principle has been several times applied in the law of negotiable paper where it is held that if a note is made payable in terms to A., but is delivered to B. on supposition that he is A., title to the note is in B. and may be transferred by B.'s indorsement. *Emporia Bank v. Shotwell*, 35 Kans. 360, 11 Pac. 141, 57 Am. Rep. 171; *Robertson v. Coleman*, 141 Mass. 231, 4 N. E. 619, 55 Am. Rep. 471; *Land Trust Co. v. Northwestern Bank*, 196 Pa. St. 230, 46 Atl. 420, 50 L. R. A. 75, 79 Am. St. Rep. 717. Compare *Tolman v. American Bank*, 22 R. I. 462, 48 Atl. 480, 52 L. R. A. 877, 84 Am. St. Rep. 850. In the latter case a contrary conclusion was reached but was based on the Negotiable Instruments Law, the wording of which affords some color for the decision.

that he purports to be, but deceives the seller as to his pecuniary responsibility, the seller here also has a double intent; namely, to transfer title to the goods to the person before him, and also to transfer title to the goods to a person of pecuniary responsibility; but the primary intent is to transfer title to the person before him, and accordingly title will pass. On the other hand, if goods are ordered by mail by a fraudulent person, the name of a responsible buyer being used as a fraudulent means of inducing the seller to send forward the goods, the seller's primary intent is to sell the goods to the person whose name appears to be signed to the letter. The seller also intends to sell the goods to the person who wrote the letter. He believes that these two intentions are harmonious because he believes the persons are one and the same. As they are not the same, both intentions cannot be made effectual. Here the primary intent is to sell to the person whose name appears signed to the letter; that is the essential matter in the seller's mind. The belief that the writer of the letter is that person is rather an inducement to the intent to sell to the person indicated by the signature than itself the governing purpose.⁶⁷ So where a person falsely represents that he is the

⁶⁷ The leading case illustrating this point is *Cundy v. Lindsay*, 3 A. C. 459. In this case it appeared that one Alfred Blenkarn hired a room which had side windows on Wood street. He wrote an order to Messrs. Lindsay as from "37 Wood Street." He signed this letter without any initial representing a Christian name, and wrote it so that it appeared to be "Blenkiron & Co." There was a firm, in good credit, of W. Blenkiron & Son carrying on business at 123 Wood street. The goods were sent addressed to "Messrs. Blenkiron & Co., 37 Wood Street," where they were obtained by Blenkarn. He sold the goods to various innocent purchasers, among others to Messrs. Cundy who resold them in the regular course of business. Messrs. Lindsay brought this action against

Messrs. Cundy for conversion, and were held entitled to maintain that action. Similarly in *Newberry v. Norfolk & Southern Ry. Co.*, 133 N. C. 45, 45 S. E. 356, it appeared that there were two persons named respectively Arthur B. Alexander and Alfred Alexander. The former, who was notoriously insolvent, ordered goods from the plaintiff, signing the order "A. Alexander." The seller shipped the goods, supposing they were ordered by Alfred Alexander, who was a man of means. It was held that no title passed to Alfred Alexander and the plaintiff was entitled to reclaim his goods. Compare *Perkins v. Anderson*, 65 Iowa, 398, 21 N. W. 696; *Samuel v. Cheney*, 135 Mass. 278, 46 Am. Rep. 467. In this case goods were ordered by a fraudulent person under the name of A.

agent of another, and by this false representation obtains possession of goods, the seller agreeing to sell to the alleged principal, no title passes. The alleged principal gets no title because he never agreed to buy, and the agent gets no title because the seller never agreed to transfer title to him.⁶⁸

Swannick. This was the name of a reputable dealer in the same town. The goods were sent directed to A. Swannick. The carrier took them first to the reputable dealer who refused them, and then delivered them to the fraudulent person who had written the order. The carrier was not held liable. In this case, however, the court profess to decide nothing in regard to title, and the numerous cases in regard to the liability of a carrier for misdelivery must be carefully scrutinized before any weight is conceded to them upon the point herein discussed. Although it is well settled that a carrier is generally liable for delivering goods to any other person than the owner or the person to whom they are billed, and though it might, therefore, seem a safe assumption that where a seller has shipped goods in accordance with an order, the carrier's liability would depend on whether the seller in fact shipped the goods to the person to whom delivery was made by the carrier, the case of *Singer v. Merchants' Transportation Co.*, 191 Mass. 449, 77 N. E. 882, 114 Am. St. Rep. 625, shows that every court at least would not assent to the assumption. In that case the plaintiff, a shoe dealer in Boston, named Louis Singer, delivered cases of goods to the defendant for transportation to Springfield, Illinois, marked L. Singer, Springfield, Illinois. There was in Springfield, Illinois, a dealer in goods of the kind shipped, named Lena Singer. She did business under the name of L. Singer, and was so known to the defendant's

representatives, and goods had been received for her over the defendant's line nearly every week addressed to L. Singer. The shipper in fact intended to address the goods to himself; he did not know there was any person by the name of Lena Singer or L. Singer in Springfield, Illinois. It was held that the contract of the defendant was to deliver the goods to L. Singer, Springfield, Illinois, and that the defendant had performed this contract and was not liable to the plaintiff, Louis Singer, for the loss of the goods; nor was it held material that the plaintiff for five years had sent goods six or seven times a year addressed in the same way. It will be observed that in this case the title to the goods was unquestionably in Louis Singer, and that in consigning them to L. Singer he intended to consign them to himself. It is, therefore, evident that a decision that a carrier is not liable as for a misdelivery does not necessarily involve the conclusion that the person to whom the goods were delivered was the owner or the person intended to be the consignee.

⁶⁸ *Hardman v. Booth*, 1 H. & C. 803; *Kingsford v. Merry*, 1 H. & N. 503; *Hollins v. Fowler*, L. R. 7 H. L. 757, 763, 795; *Smith Typewriter Co. v. Stidger*, 18 Colo. App. 261, 71 Pac. 400; *Alexander v. Swackhamer*, 105 Ind. 81, 4 N. E. 433, 5 N. E. 936, 55 Am. Rep. 180; *Rogers v. Dutton*, 182 Mass. 187, 65 N. E. 56; *Decan v. Shipper*, 35 Pa. St. 239, 78 Am. Dec. 334; *Hamet v. Letcher*, 37 Ohio St. 356, 41 Am. Rep. 519; *Edmunds v. Merchants' Transportation Co.*, 135

§ 636. **Representations of solvency.**— A common form of fraud upon the seller is a misrepresentation of the buyer's solvency or ability to pay for the goods, by which the seller is induced to give credit to the buyer. Such representations if going beyond an expression of opinion are obviously fraudulent.⁶⁹ There can be no doubt that any misstatement of fact of this kind made with knowledge of its falsity and operating as an inducement to the sale is ground either for avoiding the sale or for an action of deceit. Statements are sometimes made, however, which are merely matters of opinion, not statements of fact, and, therefore, not within the rule just stated.⁷⁰ This is especially likely to be true of misrepresentations made, not by the buyer himself, but by third persons. Misrepresentations of solvency will render the buyer liable, not only when made by him in person, but when made by his agents, and statements made to commercial agencies and afterward furnished to sellers of goods, who act in reliance on the statements, make the buyer guilty of fraud if his statements were made with knowledge of their falsity. Since the purpose of commercial agencies is to give information as to credits, the buyer must know that his statements may be relied upon by any customer

Mass. 283; Rodliff v. Dallinger, 141

Mass. 1, 4 N. E. 805, 55 Am. Rep. 439; Hentz v. Miller, 94 N. Y. 64. And see Dean v. Yates, 22 Ohio St. 388; Moody v. Blake, 117 Mass. 23, 19 Am. Rep. 394; Barker v. Dinsmore, 72 Pa. St. 427, 13 Am. Rep. 697. *Contra*, Hawkins v. Davis, 8 Baxt. 596. But if A. sells goods to B., erroneously supposing him to be purchasing as agent for C., but without any representation or pretense on the part of B. that he was buying as agent for another, the contract is valid and the title to the goods passes to B. Stoddard v. Ham, 129 Mass. 383, 37 Am. Rep. 369. Compare *Ex parte Barnett*, 3 Ch. D. 123. And see Ellsworth v. Randall, 78 Iowa, 141, 42 N. W. 629, 16 Am. St. Rep. 425; Huffman v. Long, 40 Minn. 473, 42 N. W. 355; Kayton v. Barnett, 116 N. Y. 625, 23 N. E. 24.

⁶⁹ McKenzie v. Weinman, 116 Ala. 194, 22 So. 508; Bugg v. Wertheimer-Schwartz Shoe Co., 64 Ark. 12, 40 S. W. 134; Bell v. Kaufman, 9 Colo. App. 259, 47 Pac. 1035; Judd v. Weber, 55 Conn. 267, 11 Atl. 40; Dinkler v. Potts, 90 Ga. 103, 15 S. E. 690; Cox Shoe Co. v. Adams, 105 Iowa, 402, 75 N. W. 316; Clark v. Munroe Co., 127 Mich. 300, 86 N. W. 816; McKinney v. Bank, 36 Neb. 629, 54 N. W. 963; Boyd v. Shiffer, 156 Pa. St. 100, 27 Atl. 60; Cincinnati Cooperage Co. v. Gaul, 170 Pa. St. 545, 32 Atl. 1093; Fitchard v. Doheny, 93 App. Div. 9, 86 N. Y. Suppl. 964; Wertheimer-Schwartz Shoe Co. v. Faris (Tenn. Ch. App.), 46 S. W. 336. Nor is it the less fraudulent because the buyer intended to pay. Atlas Shoe Co. v. Bechard, 102 Me. 197, 66 Atl. 390, 10 L. R. A. (N. S.) 679.

⁷⁰ See *supra*, § 628.

of the commercial agency to which a statement is made.⁷¹ When, therefore, a commercial agency obtains the facts upon which it bases its rating from outside sources, and not from the buyer or some one authorized by him, the seller cannot treat the sale as induced by fraud.⁷² If in such a case, however, the buyer referred the seller to his commercial rating, he thereby approves it as correct, and is in the same position as if he had originated it.⁷³ But it is insufficient that the buyer knew of the incorrect rating and that it had been furnished to the seller.⁷⁴ For how long a time a statement made to a mercantile agency may furnish reasonable ground of reliance to a seller depends in great measure on the circumstances of the case. If the statement was accurate when made, but after lapse of time has ceased to be so, the situation seems similar to that which exists where the mercantile agency derives its information from independent sources. In each case the buyer knows that the seller is or may be acting under an erroneous impression, and in each case the buyer is not at fault for that impression except that he has failed to remove it. In one case he is not at fault because he did not make the statement,

⁷¹ *Fechheimer v. Baum* (C. C.), 37 Fed. Rep. 167, 2 L. R. A. 153; *In re Epstein* (D. C.), 109 Fed. Rep. 874; *W. W. Johnson Co. v. Triplett*, 66 Ark. 233, 50 S. W. 455; *Soper Lumber Co. v. Halsted & Harmount Co.*, 73 Conn. 547, 48 Atl. 425; *Mashburn & Co. v. Dannenberg Co.*, 117 Ga. 567, 44 S. E. 97; *Tennent Shoe Co. v. Stovall & Brand*, 25 Ky. L. Rep. 1615, 78 S. W. 417; *Furry v. O'Connor*, 1 Ind. App. 573, 28 N. E. 103; *Cox Shoe Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316; *Courtney v. Knabe, etc., Mfg. Co.*, 97 Md. 499, 55 Atl. 614, 99 Am. St. Rep. 456; *Emerson v. Detroit, etc., Spring Co.*, 100 Mich. 127, 59 N. W. 659; *Stevens v. Ludlum*, 46 Minn. 160, 48 N. W. 771, 13 L. R. A. 270, 24 Am. St. Rep. 210; *Kellogg Co. v. Holm*, 82 Minn. 416, 85 N. W. 159; *Farwell Co. v. Boyce*, 17 Mont. 83, 42 Pac. 98; *Eaton v. Avery*, 83 N. Y. 31; *Tindle v. Birkett*, 57 N. Y. App. Div. 450,

67 N. Y. Suppl. 1017; *affd.*, 171 N. Y. 520, 64 N. E. 210, 89 Am. St. Rep. 822; *Arnold v. Richardson*, 74 App. Div. 581, 77 N. Y. Suppl. 763; *Ernst v. Cohn* (Tenn. Ch. App.), 62 S. W. 186; *Gainesville Nat. Bank v. Bamberger*, 77 Tex. 48, 13 S. W. 959, 19 Am. St. Rep. 738.

⁷² *In re Roalswick* (D. C.), 110 Fed. Rep. 639; *Wachsmuth v. Martini*, 154 Ill. 515, 39 N. E. 129; *Cox Shoe Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316; *Hiller v. Ellis*, 72 Miss. 701, 18 So. 95, 41 L. R. A. 707; *Berkson v. Heldman*, 58 Neb. 595, 79 N. W. 162; *Cream City Hat Co. v. Tollinger*, 62 Neb. 98, 86 N. W. 921; *Maccullar v. McKinley*, 99 N. Y. 353, 2 N. E. 9.

⁷³ *Cox Shoe Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316.

⁷⁴ *Cox Shoe Mfg. Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316. See also *Dorman v. Weakley* (Tenn. Ch. App.), 39 S. W. 890.

and in the other case he is not at fault because, although he originally made it, his statement was then neither false nor fraudulent.⁷⁵ Though it would not generally be held fraud for the buyer to remain silent knowing that the seller was relying or might rely on an erroneous rating,⁷⁶ such conduct may be evidence of an intent on the seller's part not to pay for goods,⁷⁷ and slight circumstances may be sufficient to amount to a representation by the buyer that the rating of the agency is correct.⁷⁸ If the statement

⁷⁵ This view is taken and the transaction held not fraudulent in *Burchinell v. Hirsh*, 5 Colo. App. 500, 39 Pac. 352; *Cortland Mfg. Co. v. Platt*, 83 Mich. 419, 47 N. W. 330; *Reid v. Kempe*, 74 Minn. 474, 77 N. W. 413; *Strickland v. Willis* (Tex. Civ. App.), 43 S. W. 602. Of course if the buyer refers to the statement or in any way induces the seller to act upon it, he thereby in effect makes a new representation that the old rating is accurate and is guilty of fraud. *Mooney v. Davis*, 75 Mich. 188, 42 N. W. 802, 13 Am. St. Rep. 425.

⁷⁶ See *supra*, § 631.

⁷⁷ *Taylor v. Mississippi Mills*, 47 Ark. 247, 1 S. W. 283; *Lindauer v. Hay*, 61 Iowa, 663, 17 N. W. 98.

⁷⁸ *Cox Shoe Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316 (here the buyer referred the seller to the rating of the agency); *Frisbee v. Chickering*, 115 Mich. 185 (in this case the defendant, Frank Chickering, who had no means, was a member of the firm of Frank Chickering & Co., the office of which was in Ohio. The defendant, however, lived in Michigan and did business there under the name of Chickering & Co. The firm of Frank Chickering & Co., which did business in Ohio by virtue of its solvent partners, was correctly rated as worth \$50,000 to \$75,000. Two mercantile agencies listed the firm of Frank Chickering & Co. in their lists for Grand Rapids, Michigan, where the defendant lived. It did not appear conclusively that the defendant was

responsible for this, but the evidence pointed that way. The court said (p. 189): "If it be admitted that he was doing business at Grand Rapids for his sole use, under the name of Frank Chickering & Co., he knew that one of the leading mercantile reports of the country was representing that firm as consisting of Mr. Chickering, Mr. Monnette, and Mr. Hull, and that they were worth a large sum of money. He also knew that this report, so far as it related to the business of Frank Chickering & Co., done for his sole benefit, was untrue, and was calculated to mislead, and might result in the consummation of frauds upon the persons who had a right to rely upon these reports, if they acted upon them. He also knew that there was no report in that list of the firm of Frank Chickering & Co., so far as it related to his sole business, and that, when he did business in the name of Frank Chickering & Co. the subscribers to Dun & Co.'s reports would naturally and would have a right to suppose he was doing business not only for himself but for Mr. Monnette and Mr. Hull, and that credit extended to the firm would be in the belief that it was extended to a responsible firm. To do business under such circumstances in the name of a responsible firm, for his own use, when he was hopelessly insolvent, was a fraud upon those with whom he did business, and to allow such a transaction to stand would not be very creditable

was falsely made, a buyer is entitled to rely upon the statement, at least for a reasonable time.⁷⁹ And there seems force in the statement in a New York decision,⁸⁰ that where the statement was made falsely and fraudulently, the fraudulent person "cannot be heard to say that its mischievous force was operative longer than was expected."

§ 637. **Intention not to pay for the goods.**—The law is well settled that where the buyer at the time of the purchase was insolvent and intended not to pay for the goods, it is a fraud which will render the purchaser's title voidable.⁸¹ In Pennsylvania, how-

to the courts. * * * This was not a case of simply remaining silent when one was under no obligation to speak. The defendant knew, as already stated, that the firm of Frank Chickering & Co., listed at Grand Rapids, was represented by a great mercantile agency as responsible and entitled to credit, and that this representation would naturally be relied upon when an order was sent in the name of that firm. Under such circumstances, it was his duty to speak when he came to deal with a person who was a stranger to him and who, by the usual and known methods among business men, would be likely to consult the representation as contained in the mercantile reports." It may be added that the use of the name Frank Chickering & Co. was a misrepresentation. It is submitted that it will always be a misrepresentation for a buyer to use language in a sense, which though literally accurate, he knows will be misinterpreted by the seller).

⁷⁹ Statements made a year before the sale were held not necessarily too remote in *Lowdon v. Fisk* (Tex. Civ. App.), 27 S. W. 180. So in *Cox Shoe Co. v. Adams*, 105 Iowa, 402, 415, 75 N. W. 316, where reports were made "nearly a year" before the purchase. The question was held to be one of fact to the jury whether a statement

made two months before should have been acted upon by the seller without inquiry. *Richardson Dry Goods Co. v. Goodkind*, 22 Mont. 462, 56 Pac. 1079. See also *Treadwell v. State*, 99 Ga. 779, 27 S. E. 785. In *Sharpless v. Gummey*, 166 Pa. St. 199, 30 Atl. 1127, two and a half years was held too great a lapse of time for the seller to be justified in relying on a statement.

⁸⁰ *Bradley v. Seaboard Nat. Bank*, 167 N. Y. 427, 60 N. E. 771. See also *Brown v. Lobdell*, 51 Ill. App. 574.

⁸¹ *Ferguson v. Carrington*, 9 B. & C. 59; *Load v. Green*, 15 M. & W. 216; *Clough v. London, etc., Ry. Co.*, L. R. 7 Ex. 26; *Ex parte Whittaker*, 10 Ch. 446, 449; *Donaldson v. Farwell*, 93 U. S. 631, 23 L. ed. 993; *Parker v. Byrnes*, 1 Low. 539; *Loeb v. Flash*, 65 Ala. 526; *Spira v. Hornthall*, 77 Ala. 137; *Robinson v. Levi*, 81 Ala. 134, 1 So. 554; *Taylor v. Mississippi Mills*, 47 Ark. 247, 1 S. W. 283; *Bugg v. Wertheimer-Schwartz Shoe Co.*, 64 Ark. 12, 40 S. W. 134; *Thompson v. Rose*, 16 Conn. 71, 41 Am. Dec. 121; *Morrison v. Shuster*, 1 Mackey (D. C.) 190; *Johnson v. O'Donnell*, 75 Ga. 453; *Seisel v. Wells*, 99 Ga. 159, 25 S. E. 266; *Farwell v. Hanchett*, 120 Ill. 573, 11 N. E. 875; *Wabash, St. L. & P. R. Co. v. Shryock*, 9 Ill. App. 323;

ever, it is essential that some positive representation be made or some trick, artifice, or conduct which involves a false representation be added. The secret intention not to pay is insufficient.⁸² It may be urged that in such a case there is no representation of an existing fact by the buyer and that, consequently, the court is affording relief to the buyer merely because circumstances exist of which the seller has no knowledge which render the transaction unfair. The answer to this, however, is that the purchase of goods implies a representation that the buyer intends to pay for them. Accordingly, not only is the bargain voidable, but it has been held the seller may maintain an action of deceit.⁸³ This,

Brower v. Goodyer, 88 Ind. 572; *Waterbury v. Miller*, 13 Ind. App. 197, 41 N. E. 383; *Oswego Starch Factory v. Lendrum*, 57 Iowa, 573, 10 N. W. 900, 42 Am. Rep. 53; *Cox Shoe Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316; *Reager v. Kendall*, 19 Ky. L. Rep. 27, 39 S. W. 257; *Burrill v. Stevens*, 73 Me. 395, 40 Am. Rep. 366; *Atlas Shoe Co. v. Bechard*, 102 Me. 197, 66 Atl. 390, 10 L. R. A. (N. S.) 245; *Powell v. Bradlee*, 9 G. & J. 220; *Dow v. Sanborn*, 3 Allen, 181; *Watson v. Silsby*, 166 Mass. 57, 43 N. E. 1117; *Avers v. Farwell*, 196 Mass. 349, 82 N. E. 35; *Shipman v. Seymour*, 40 Mich. 274; *Ross v. Miner*, 67 Mich. 410, 35 N. W. 60; *Frisbee v. Chickering*, 115 Mich. 185, 73 N. W. 112; *Bidault v. Wales*, 19 Mo. 36, 59 Am. Dec. 327; *Fox v. Webster*, 46 Mo. 181; *Stewart v. Emerson*, 52 N. H. 301; *Hall v. Naylor*, 18 N. Y. 588, 75 Am. Dec. 269; *Hennequin v. Naylor*, 24 N. Y. 139; *Whitten v. Fitzwater*, 129 N. Y. 626, 29 N. E. 298; *Ash v. Putnam*, 1 Hill, 302; *Cary v. Hotailing*, 1 Hill, 311, 37 Am. Dec. 233; *Durrell v. Haley*, 1 Paige, 492, 19 Am. Dec. 444; *Des Farges v. Pugh*, 93 N. C. 31, 53 Am. Rep. 446; *Davis v. McWhirter*, 40 U. C. Q. B. 598.

⁸² *Smith v. Smith*, 21 Pa. St. 367, 60 Am. Dec. 51; *Rodman v. Thal-*

heimer, 75 Pa. St. 232; *Bughman v. Bank*, 159 Pa. St. 94, 28 Atl. 209 (in this case Mitchell, C. J., though regarding the Pennsylvania rule as established, and, therefore, following it, said that it "was not in harmony with * * * sound policy or the principles of business honesty").

⁸³ *Edgington v. Fitzmaurice*, 29 Ch. D. 459; *Swift v. Rounds*, 19 R. I. 527, 35 Atl. 45, 33 L. R. A. 561, 61 Am. St. Rep. 791. But see *Dawe v. Morris*, 149 Mass. 188, 192, 21 N. E. 313, 4 L. R. A. 158, 14 Am. St. Rep. 404, where Devens, J., said: "The plaintiff further contends that, as where goods have been obtained under the form of a purchase, with the intent not to pay for them, the seller may, on discovery of this, rescind the contract and repossess himself of the goods as against the purchaser, or any one obtaining the goods from him with notice or without consideration, an action of tort should be maintained on an unfulfilled promise, which at the time of making the promisor intended not to perform, by reason of which nonperformance the plaintiff has suffered injury in having been induced to enter into a contract which depended for its successful and profitable performance upon the performance by the defendant of his promise. Assuming that the

however, is not universally admitted.^{83a} If the reasoning is sound it would follow that it is immaterial whether the buyer is insolvent or not; the intention not to pay would be the only material circumstance. This result seems correct and would doubtless generally be reached, but not perhaps everywhere.⁸⁴ It would also logically follow that in any case where a promise was made with a preconceived intention not to perform it, the promisor would be guilty of a fraudulent misrepresentation of fact. Many courts certainly would not be prepared to go to this length.⁸⁵ If it cannot be said that making a promise with intent not to perform it involves a misrepresentation of fact, the seller's right to rescind must be based on the ground that the circumstances of the case of which the seller was ignorant, and which the buyer, knowing their materiality, failed to disclose, render the transaction fraudulent and make it equitable to avoid it. If this be accepted as the true ground, it would seem to follow that hopeless insolvency on the part of the buyer, not disclosed to the seller, ought of itself to afford ground for rescinding a sale; but it is generally held that mere nondisclosure of insolvency will not suffice to avoid a sale.⁸⁶

plaintiff's declaration enables him to raise this question, which may be doubted * * * there is an obvious difference between the case where a contract is rescinded, and thus ceases to exist, and one in which the injury results from the nonperformance of that which it is the duty of the defendant to perform, and where there is no other wrong than such nonperformance. To term this a 'tort' would be to confound a cause of action in contract with one in tort, and would violate the policy of the Statute of Frauds by relieving a party from the necessity of observing those statutory formalities which are necessary to the validity of certain executory contracts."

^{83a} See Pollock, *Torts* (2d ed.), p. 252, and note m. Also extract from *Dawe v. Morris* in the preceding note, and *Kitson v. Farwell*, 132 Ill. 327, 23 N. E. 1024.

⁸⁴ *La Grand v. Eufaula Nat. Bank*, 81 Ala. 123, 1 So. 160 (but see *Maxwell v. Brown Shoe Co.*, 114 Ala. 304, 21 So. 1009).

⁸⁵ See *supra*, § 630.

⁸⁶ *Ex parte Whittaker*, L. R. 10 Ch. App. 446; *Carnahan v. Bailey*, 28 Fed. Rep. 519 (C. C.); *Gavin v. Armistead*, 57 Ark. 574, 22 S. W. 431; *Bell v. Ellis*, 33 Cal. 620; *Burchinell v. Hirsh*, 5 Colo. App. 500, 39 Pac. 352; *Mears v. Waples*, 3 Houst. 581; *Fulton v. Gibian*, 98 Ga. 224, 25 S. E. 431; *Kitson v. Farwell*, 132 Ill. 327, 23 N. E. 1024; *Reticker v. Katzenstein*, 26 Ill. App. 33; *Hacker v. Munroe*, 56 Ill. App. 532; *Thompson v. Peck*, 115 Ind. 512, 18 N. E. 16, 1 L. R. A. 201; *West v. Graff*, 23 Ind. App. 410, 55 N. E. 506; *Houghtaling v. Hills*, 59 Iowa, 287, 13 N. W. 305; *Reid v. Cowduroy*, 79 Iowa, 169, 44 N. W. 351; *Franklin Sugar Ref. Co. v. Collier*, 89 Iowa,

§ 638. **Fraud on the buyer.**—Fraud upon the buyer will generally consist of some misrepresentation in regard to the character of the goods or in regard to their title, quantity, or value. Misrepresentations as to quantity and value have already been sufficiently discussed.⁸⁷ Representations in regard to the character of the goods have also been considered both in connection with the law of warranty⁸⁸ and in connection with fraudulent representations by the seller.⁸⁹ A representation in regard to goods will frequently be not only a warranty but, if fraudulently made, also ground for an action of deceit. False representations as to title, though to some extent involving a statement of law and sometimes also of opinion, involve also such assertions of fact as to constitute actionable fraud.⁹⁰ And misrepresentations as to mortgages or other liens upon the property are likewise actionable if made with knowledge of their falsity.⁹¹ It seems also that offering goods for sale without disclosing a defect in the title or an incumbrance is itself a representation of good title and freedom from incumbrance. It is, at least, partly on this ground that warranties of title and freedom from incumbrances

69, 56 N. W. 279; *Kelsey v. Harrison*, 29 Kans. 143; *Cross v. Peters*, 1 Greenl. 376, 10 Am. Dec. 78; *Edelhoff v. Horner-Miller Mfg. Co.*, 86 Md. 595, 613, 39 Atl. 314; *Watson v. Silsby*, 166 Mass. 57, 43 N. E. 1117; *Zucker v. Karpeles*, 88 Mich. 413, 50 N. W. 373; *Reeder Bros. Shoe Co. v. Prylinski*, 102 Mich. 468, 60 N. W. 969; *Illinois Leather Co. v. Flynn*, 108 Mich. 91, 65 N. W. 519; *Sprague, Warner & Co. v. Kempe*, 74 Minn. 465, 77 N. W. 412; *Manheimer v. Harrington*, 20 Mo. App. 297; *Stein v. Hill*, 100 Mo. App. 38, 71 S. W. 1107; *Nichols v. Pinner*, 18 N. Y. 295; *Nichols v. Michael*, 23 N. Y. 264, 80 Am. Dec. 259; *Wright v. Brown*, 67 N. Y. 1; *Hotchkin v. Third Nat. Bank*, 127 N. Y. 329, 27 N. E. 1050; *Wheeler & Wilson Mfg. Co. v. Keeler*, 65 Hun, 508; *Rodman v. Thalheimer*, 75 Pa. St. 232; *Dalton v. Thurston*,

15 R. I. 418, 7 Atl. 112, 2 Am. St. Rep. 905; *Hallacher v. Henlein* (Tenn. Ch. App.), 39 S. W. 869; *Redington v. Roberts*, 25 Vt. 686; *Garbutt v. Bank*, 22 Wis. 384; *Consolidated Milling Co. v. Fogo*, 104 Wis. 92, 80 N. W. 103; *Hart v. Moulton*, 104 Wis. 349, 80 N. W. 599.

⁸⁷ *Supra*, § 628.

⁸⁸ *Supra*, § 194 *et seq.*

⁸⁹ *Supra*, § 628.

⁹⁰ *Simpson v. Wiggis*, 3 Woodb. & M. 413; *Hale v. Philbrick*, 42 Iowa, 81; *McGibbons v. Wilder*, 78 Iowa, 531, 535; *Case v. Hall*, 24 Wend. 102, 35 Am. Dec. 605; *Halsell v. Musgrave*, 5 Tex. Civ. App. 476, 24 S. W. 358.

⁹¹ *Stevenson v. Marble*, 84 Fed. Rep. 23; *Merritt v. Robinson*, 35 Ark. 483; *Dinwiddie v. Kelley*, 46 Ind. 392; *Loucks v. Taylor*, 23 Ind. App. 245.

are implied.⁹² And if the seller knew of the defect in his title his offer to sell would amount to a fraudulent misrepresentation.⁹³

§ 639. **Fraud against creditors.**— Fraud against creditors in the law of sales of personal property is generally due to retention of possession by the seller either with actual fraudulent intent or in violation of a positive rule of law. This form of fraud against creditors has already been elaborately considered.⁹⁴ But it is possible in other ways for a sale of personal property to violate the Statute of Elizabeth which makes void sales and transfers made with intent to hinder, delay, or defraud creditors.⁹⁵ It is beyond the scope of this treatise to deal elaborately with the whole subject of fraudulent conveyances. Except so far as concerns the rule governing retention of or transfer of possession, the prin-

⁹² See *supra*, § 216 *et seq.*

⁹³ *Merritt v. Robinson*, 35 Ark. 483; *Abbott v. Marshall*, 48 Me. 44.

⁹⁴ *Supra*, § 351 *et seq.*

⁹⁵ The sections of the Statute 13 Eliz., c. 5, which are generally in force in this country by adoption or re-enactment are: "II. Be it therefore declared, ordained and enacted by the authority of this present parliament.—That all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, or of any lease, rent, common or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, (2) and all and every bond, suit, judgment and execution, at any time had or made since the beginning of the Queen's majesty's reign that now is, or at any time hereafter to be had or made, (3) to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that person, his or their heirs, successors, executors, administrators and assigns, and every of them, whose actions, suits, debts, accounts, dam-

ages, penalties, forfeitures, heriots, mortuaries and reliefs, by such guileful, covinous or fraudulent devices and practices, as is aforesaid, are, shall or might be in any wise disturbed, hindered, delayed or defrauded) to be clearly and utterly void, frustrate and of none effect; any pretence, colour, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding. VI. Provided also, and be it enacted by the authority aforesaid, that this act, or anything therein contained, shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods or chattels, had, made, conveyed or assured, or hereafter to be had, made, conveyed or assured, which estate or interest is or shall be upon good consideration and *bona fide* lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud or collusion as is aforesaid; anything before mentioned to the contrary hereof notwithstanding."

ciples of fraudulent conveyances are similar, whatever the nature of the property. Without extended consideration a brief summary may be made of the general principles which govern the subject. The decision of the questions which arise turns largely upon whether the conveyance or transfer was for value or gratuitous, the pecuniary circumstances and intent of the grantor, the grantee's knowledge of those circumstances or intent, and the standing of the creditor who seeks to set the conveyance aside.

§ 640. **Fraudulent transfers for value.**—If a sale or transfer is made for a fraudulent purpose, it is within the prohibition of the statute even though made for full value. Thus a sale made for the purpose of enabling a debtor to turn his assets into cash and dispose of them in fraud of his creditors would be fraudulent if the purchaser were a party to the scheme.⁹⁶ But a preference of one creditor over another by transferring property in satisfaction of a debt, though an act of bankruptcy if the debtor is insolvent, is not a fraudulent transfer under the Statute of Elizabeth.⁹⁷ Even though the transfer was made for the purpose of defeating other creditors, provided it was not of property worth more than the debt for which it was transferred, there is no legal fraud.⁹⁸ And though the debt which is satisfied was unenforcible because the Statute of Limitations had run,⁹⁹ or because the creditor was the wife of the debtor,¹ the conveyance is good. Nor is it legally

⁹⁶ *Henney Buggy Co. v. Ashenfelter*, 60 Neb. 1, 82 N. W. 118, 83 Am. St. Rep. 503; *Frank v. Zeigler*, 46 W. Va. 614, 33 S. E. 761.

⁹⁷ Many cases are collected in 14 Am. & Eng. Encyc. (2d ed.) 226 *et seq.*

⁹⁸ *Darvill v. Terry*, 6 H. & N. 807; *Murry v. Leiter*, 190 Ill. 414, 60 N. E. 851; *Thomas v. Johnson*, 137 Ind. 244, 36 N. E. 893; *White v. Million*, 102 Mo. App. 437, 76 S. W. 733; *Ziegler v. Handrick*, 106 Pa. St. 87. But see *contra*, *Bigby v. Warnock*, 115 Ga. 385, 41 S. E. 622. If the creditor in receiving the money had a fraudulent purpose of helping the debtor, and was not merely seeking to get payment of his own claim,

the transaction is fraudulent. *Blair State Bank v. Bunn*, 61 Neb. 464, 85 N. W. 527.

⁹⁹ *Wright v. Wright*, 103 Fed. Rep. 580; *French v. Motley*, 63 Me. 326; *Frost v. Steele*, 46 Minn. 1, 48 N. W. 413; *Manchester v. Tibbetts*, 121 N. Y. 219, 24 N. E. 304, 18 Am. St. Rep. 816; *McAfee v. McAfee*, 28 S. C. 188, 5 S. E. 480.

¹ *Van Sickle v. Wells-Fargo Co.*, 105 Fed. Rep. 16; *Vietor v. Swisky*, 87 Ill. App. 583; *Meredith v. Schaap* (Iowa), 85 N. W. 628; *French v. Motley*, 63 Me. 326; *Ullman v. Thomas*, 126 Mich. 61, 85 N. W. 245; *Martin v. Remington*, 100 Wis. 540, 76 N. W. 614, 69 Am. St. Rep. 941.

fraudulent for a debtor to sell property when insolvent, for the purpose of investing the proceeds in property exempt from seizure by creditors.² If the consideration was in good faith agreed upon as the equivalent of the property transferred, it is no objection that the consideration was inadequate, unless the inadequacy is very gross.³ But if the value was understood to be less than the value of the property transferred and the purpose of the transaction was in part to make a gift, so far as the excess is concerned, the transaction will be treated as a gift.⁴ A promise to give the seller a consideration which will inure purely to the seller's personal benefit and which cannot be made use of to satisfy the seller's debts is not such consideration as to make the transfer regarded as one for value. Thus a promise to support the grantor will not enable the grantee to hold property conveyed by an insolvent in consideration of such a promise.⁵ But if the promise has been partly performed by the grantee acting in good faith, the transfer

² *First Nat. Bank v. Glass*, 79 Fed. Rep. 706, 49 U. S. App. 228, 25 C. C. A. 151; *Re Wilson*, 123 Fed. Rep. 20, 59 C. C. A. 100; *Re Wood*, 147 Fed. Rep. 877; *Reeves v. Peterman*, 109 Ala. 366, 19 So. 512; *Kelley v. Connell*, 110 Ala. 453, 18 So. 9; *Flask v. Tindall*, 39 Ark. 571; *Goudy v. Werbe*, 117 Ind. 154, 163, 19 N. E. 764; *Meigs v. Dibble*, 73 Mich. 101, 40 N. W. 935; *Finn v. Krut*, 13 Tex. Civ. App. 36, 34 S. W. 1013; *Bell v. Beazley*, 18 Tex. Civ. App. 639, 45 S. W. 401; *Bradley v. Gotzian*, 12 Wash. 71, 40 Pac. 623. See also *Bates v. Callender*, 3 Dak. 256, 16 N. W. 506; *Kapernick v. Louk*, 90 Wis. 232, 62 N. W. 1057. In *Comstock v. Bechtel*, 63 Wis. 656, 24 N. W. 465, the court, though regarding such a transaction as fraudulent, held that the exempt property could not be touched, the creditor's only remedy being to attack the transfer of property which was not exempt. And in *Riddell v. Shirley*, 5 Cal. 488, the court held a creditor entitled to levy on nonexempt property conveyed

to free a mortgage on a homestead, the transferee having knowledge of the circumstances. See also *Bishop v. Hubbard*, 23 Cal. 514, 83 Am. Dec. 132. The creditor or trustee in bankruptcy under former bankruptcy laws was said to have a right against the homestead or exempt property in *Pratt v. Burr*, 5 Biss. 36; *Re Boothroyd*, 14 Nat. B. R. 223; *Re Parker*, 18 Nat. B. R. 43. See also *Re Wright*, 8 Nat. B. R. 430; *Re Sauthoff*, 16 Nat. B. R. 181; *Re Melvin*, 17 Nat. B. R. 543; *Brackett v. Watkins*, 21 Wend. 68. And the same result was reached under the present law in *Re Boston*, 98 Fed. Rep. 587.

³ *Repauno Chemical Co. v. Victor Hardware Co.*, 101 Fed. Rep. 948, 42 C. C. A. 106; *Jaeger v. Kelley*, 52 N. Y. 274. Many other cases to the same effect are collected in *Williston's Cases Bankruptcy*, 182, note.

⁴ *Benson v. Benson*, 70 Md. 253.

⁵ Numerous authorities are quoted in 14 Am. & Eng. Encyc. of Law (2d ed.), 246.

will be upheld to the extent of the value of the performance actually given.⁶ It is true that exempt property, though it cannot be reached by creditors, constitutes sufficient value for a transfer, but this is an exception to the general rule and is based on the statutes allowing exemptions.

§ 641. **Voluntary conveyances.**—The early English rule as to voluntary conveyances, which was adopted in an elaborate decision of Chancellor Kent,⁷ made any gift void at the suit of a creditor whose claim existed at the time of the gift, irrespective of the means of the debtor at the time he made the gift. This severe rule seems to be still in force in a few States.⁸ But the modern rule in England,⁹ New York,¹⁰ and in most States of this country, is that the existence of indebtedness unless beyond what can reasonably be discharged by the donor's remaining property is no evidence of fraud.¹¹

⁶ *Kelsey v. Kelley*, 63 Vt. 41, 50, 22 Atl. 597.

⁷ *Reade v. Livingston*, 3 Johns. Ch. 481, 8 Am. Dec. 520.

⁸ *Guyton v. Terrell*, 132 Ala. 66, 31 So. 83; *Robinson v. Woolstein* (Ky.), 58 S. W. 706; *Fellows v. Smith*, 40 Mich. 689; *Gardner v. Kleinke*, 46 N. J. Eq. 90, 18 Atl. 457; *Jackson v. Lewis*, 34 S. C. 1, 12 S. E. 560; *Flynn v. Jackson*, 93 Va. 341, 25 S. E. 1; *Rogers v. Verlander*, 30 W. Va. 619, 5 S. E. 847.

⁹ *Freeman v. Pope*, L. R. 5 Ch. 538.

¹⁰ *Babcock v. Eckler*, 24 N. Y. 623; *Kain v. Larkin*, 131 N. Y. 300, 30 N. E. 105, 141 N. Y. 144, 36 N. E. 9.

¹¹ *Warren v. Moody*, 122 U. S. 132, 7 S. Ct. 1063, 30 L. ed. 1108; *Adams v. Collier*, 122 U. S. 382, 7 S. Ct. 1208, 30 L. ed. 1207; *Chambers v. Sallie*, 29 Ark. 407; *Windhaus v. Bootz*, 92 Cal. 617, 28 Pac. 557; *Woolridge v. Boardman*, 115 Cal. 74, 46 Pac. 868; *Salmon v. Bennett*, 1 Conn. 525, 7 Am. Dec. 237; *Trumbull v. Hewitt*, 62 Conn. 448, 451, 26 Atl. 350, 29 Am. St. Rep. 341; Ga. Code,

§ 2695; *Cohen v. Parish*, 105 Ga. 339, 31 S. E. 205; *Harting v. Jockers*, 136 Ill. 627, 27 N. E. 188; *Dillman v. Nadelhoffer*, 162 Ill. 625, 45 N. E. 680; *Emerson v. Opp*, 139 Ind. 27, 38 N. E. 330; *Gwyer v. Figgins*, 37 Iowa, 517; *Tyler v. Budd*, 96 Iowa, 29, 64 N. W. 679; *Weeks v. Hill*, 88 Me. 111, 33 Atl. 778; *Gardiner Savings Inst. v. Emerson*, 91 Me. 535, 40 Atl. 551; *Warner v. Dove*, 33 Md. 579; *Winchester v. Charter*, 102 Mass. 272; *Clark v. McMahon*, 170 Mass. 91, 48 N. E. 939; *Blake v. Boisjoli*, 51 Minn. 296, 53 N. W. 637; *Wilson v. Kohlheim*, 46 Miss. 346; *Hoffman v. Nolte*, 127 Mo. 120, 29 S. W. 1006; *Glacier v. Walker*, 69 Mo. App. 288; *Pomeroy v. Bailey*, 43 N. H. 118; N. C. Code, § 1547; *Clement v. Cozart*, 112 N. C. 412, 17 S. E. 486; *Hamburger v. Grant*, 8 Or. 181; *Crumbaugh v. Kugler*, 2 Ohio St. 373; *Dukes v. Spangler*, 35 Ohio St. 119; *Wilson v. Howser*, 12 Pa. St. 109; *Clark v. Depew*, 25 Pa. St. 509, 64 Am. Dec. 717; *Burkey v. Self*, 4 Sneed, 121; *Nelson v. Kinney*, 93 Tenn. 428, 24 S. W. 100; Pan-

§ 642. **Creditors who may object.**—A person having an unliquidated claim whether for breach of contract or for tort is protected by the rule forbidding conveyances in fraud of creditors,¹² unless the assertion of the claim was so remote or contingent at the time of the conveyance as to make disregard of it reasonable.¹³ The law draws, however, a sharp distinction between the rights of creditors whose claims existed at the time when the transfer was made, and creditors whose claims arise subsequently. The rights of the former class to attack any conveyance made with actual intent to defraud, or made without such intent but without consideration and when the donor's financial circumstances were not such as to warrant the gift, have been considered in the two preceding sections. The rights of subsequent creditors are not the same in all jurisdictions. It is everywhere admitted that if the grantor intended to defraud subsequent creditors they may attack the conveyance. And in many States this is the only right the subsequent creditor has. "He can avail himself only of that fraud which is practiced against himself."¹⁴ But in England it became established first that if an existing creditor set aside a fraudulent conveyance, subsequent creditors could share in the benefit, and later, that if no existing creditor attacked a fraudulent conveyance, subsequent creditors might take the initiative provided some creditor whose claim existed at the time of the conveyance still remained unpaid,¹⁵ and many States in this country have gone

handle *Nat. Bank v. Foster*, 74 Tex. 514, 12 S. W. 223; *Carkeek v. Boston Nat. Bank*, 16 Wash. 399, 47 Pac. 884; *Second Nat. Bank v. Merrill*, 81 Wis. 142, 50 N. W. 503, 29 Am. St. Rep. 870.

¹² Numerous cases are cited in *Williston's Cases Bankruptcy*, p. 237.

¹³ *Ex parte Mercer*, 17 Q. B. D. 290; *Sanders v. Logue*, 88 Tenn. 355, 12 S. W. 722.

¹⁴ *Harlan v. Maglaughlin*, 90 Pa. St. 203. To the same effect are *Horbach v. Hill*, 112 U. S. 144, 5 S. Ct. 81, 28 L. ed. 670; *Schreyer v. Scott*, 134 U. S. 405, 411, 10 S. Ct. 579, 33 L. ed. 955; *Walter v. Lane*, 1 MacArthur

(D. C.), 275; *Springer v. Bigford*, 160 Ill. 495, 43 N. E. 751; *Hutchinson v. First Nat. Bank*, 133 Ind. 271, 30 N. E. 952, 36 Am. St. Rep. 537; *Voorhis v. Michaelis*, 45 Kans. 255, 25 Pac. 592; *Todd v. Hartley*, 2 Metc. (Ky.) 206; *First Nat. Bank v. Brass*, 71 Minn. 211, 215, 73 N. W. 729; *Simmons v. Ingram*, 60 Miss. 886; *Bauer Grocery Co. v. Smith*, 74 Mo. App. 419; *Minzesheimer v. Doolittle*, 56 N. J. Eq. 206, 230, 39 Atl. 386; *Crawford v. Beard*, 12 Or. 447, 8 Pac. 537; *Ditman v. Raule*, 124 Pa. St. 225, 16 Atl. 819.

¹⁵ *Jenkyn v. Vaughan*, 3 Eq. 300; *Freeman v. Pope*, L. R. 5 Ch. 538.

somewhat farther and held that if a conveyance is actually fraudulent, not merely constructively so, as against existing creditors, subsequent creditors may without reference to nonpayment of existing creditors avoid the transfer.¹⁶ But if not actually fraudulent against existing creditors, subsequent creditors must prove an intent to defraud themselves. It has been held that in order to make out such an intent on the part of the grantor to defraud subsequent creditors, "It must appear that at the time of the conveyance he had an actual intent to contract debts and a purpose to avoid the payment of them by the conveyance."¹⁷ But it seems that an expectation by the grantor that he probably would have debts, and an intent that in that case the granted property should not be used for the payment of them, should be sufficient. On this account if a conveyance by a grantor is made immediately before embarking in a hazardous business, it is strong evidence of fraud.¹⁸

§ 643. **Sales in bulk.**— A number of States have recently passed statutes having for their object the limitation of the practice by

¹⁶ *Burdick v. Gill*, 7 Fed. Rep. 668; *Lilienthal v. Drucklieb*, 92 Fed. Rep. 753, 34 C. C. A. 657; *Prestwood v. Troy Fertilizer Co.*, 115 Ala. 668, 22 So. 77; *May v. State Nat. Bank*, 59 Ark. 614, 28 S. W. 431; *Banning v. Marleau*, 133 Cal. 485, 65 Pac. 964; *Mulock v. Wilson*, 19 Colo. 296, 35 Pac. 532; *Dart v. Stewart*, 17 Ind. 221; *Jones v. Light*, 86 Me. 437, 30 Atl. 71; *Day v. Cooley*, 118 Mass. 524, 527; *Smyth v. Carlisle*, 16 N. H. 464, 17 N. H. 417; *Dewey v. Moyer*, 72 N. Y. 70, 76; *Flynn v. Williams*, 7 Ired. L. 32; *Trezevant v. Terrell*, 96 Tenn. 528, 33 S. W. 109; *McLane v. Johnson*, 43 Vt. 48; *Pratt v. Cox*, 22 Gratt. 330; *Johnson v. Wagner*, 76 Va. 587, 591; *Silverman v. Greaser*, 27 W. Va. 550. In a few cases the statement of the law is qualified as in England by the requirement that some antecedent debt must still be unpaid. *Toney v. McGehee*, 38 Ark. 419 (compare *May v. State Nat.*

Bank, 59 Ark. 614, 28 S. W. 431); *Barbour v. Connecticut Mut. L. I. Co.*, 61 Conn. 240, 251, 23 Atl. 154; *Clafin v. Mess*, 30 N. J. Eq. 211 (compare *Allaire v. Day*, 30 N. J. Eq. 231); *Gardner v. Kleinke*, 46 N. J. Eq. 90, 18 Atl. 457.

¹⁷ *Stratton v. Edwards*, 174 Mass. 374, 54 N. E. 886; *O'Neal v. Clymer* (Tex. Civ. App.), 61 S. W. 545.

¹⁸ *Re Foss*, 147 Fed. Rep. 790; *Hagerman v. Buchanan*, 45 N. J. Eq. 292, 17 Atl. 946, 14 Am. St. Rep. 732; *Minzesheimer v. Doolittle*, 56 N. J. Eq. 206, 230, 39 Atl. 386; *Todd v. Nelson*, 109 N. Y. 316, 16 N. E. 360; *Williams v. Davis*, 69 Pa. St. 21; *Harlan v. Maglaughlin*, 90 Pa. St. 293, 297; *Sommermeier v. Schwartz*, 89 Wis. 66, 61 N. W. 311. See also *Schreyer v. Scott*, 134 U. S. 405, 10 S. Ct. 579, 33 L. ed. 955; *Gable v. Columbus Cigar Co.*, 140 Ind. 563, 38 N. E. 474; *Neuberger v. Keim*, 134 N. Y. 35, 31 N. E. 268.

dealers of selling all their merchandise at once, since frauds upon creditors have frequently been committed by a dealer making such a sale and departing with the consideration received without paying his creditors. The details of these statutes vary, but their general purport is that a sale by a dealer of his merchandise in bulk is presumed to be fraudulent unless certain formalities either of record or notice to creditors, or both, be observed. Such statutes have been passed in the following States: California,¹⁹ Colorado,²⁰ Connecticut,²¹ Delaware,²² District of Columbia,²³ Florida,²⁴ Georgia,²⁵ Idaho,²⁶ Illinois,²⁷ Indiana,²⁸ Kansas,²⁹ Kentucky,³⁰ Louisiana,³¹ Maine,³² Maryland,³³ Massachusetts,³⁴ Michigan,³⁵ Minnesota,³⁶ Mississippi,³⁷ Montana,³⁸ Nebraska,³⁹ Nevada,⁴⁰

¹⁹ Act of March 10, 1903, amending § 3440 of the Civil Code.

²⁰ Laws of 1903, c. 110.

²¹ Gen. St., §§ 4867, 4869, construed in *Walp v. Mooar*, 76 Conn. 515, 57 Atl. 277; *Cohen v. Schneider*, 70 Conn. 505, 40 Atl. 455; *Spencer v. Broughton*, 77 Conn. 38, 58 Atl. 236. In the last two cases it was held that the statute had not changed the general rule as to the effect of the retention of possession by the vendor.

²² Laws of 1903, c. 387.

²³ U. S. St. at L., 58th Cong., c. 1809.

²⁴ Act of May 27, 1907.

²⁵ Acts of 1903, § 457, construed in *Carstarphen Co. v. Fried*, 124 Ga. 544, 52 S. E. 598; *Parham v. Potts-Thompson*, 127 Ga. 303, 56 S. E. 460; *Sampson v. Brandon Co.*, 127 Ga. 454, 56 S. E. 488.

²⁶ Acts of 1903, pp. 11 and 12.

²⁷ Acts of 1905, p. 284 (declared unconstitutional).

²⁸ Burns' Annot. St., Vol. 4, § 6637a; *McKinster v. Sager*, 163 Ind. 671, 72 N. E. 854, 68 L. R. A. 273, 106 Am. St. Rep. 268, holds the act unconstitutional. See also *Sellers v. Hayes*, 163 Ind. 422, 72 N. E. 119.

²⁹ Acts of 1904, p. 72.

³⁰ Acts of 1904, c. 22. Held constitutional in a Circuit Court decision. No. 41, 668, *Callahan v. Hardin*.

³¹ Acts of 1896, No. 94.

³² Acts of 1905, p. 119.

³³ Acts of 1906, c. 421, amends the Act of 1900, c. 579, which in the case of *Hart v. Roney*, 93 Md. 432, 49 Atl. 661, was held to make retention of possession in case of failure to comply with formalities of the statute only *prima facie* evidence of fraud. Acts of 1908, c. 704, in turn repeals and re-enacts with amendments the law of 1906.

³⁴ Acts of 1903, c. 415. In *Squire v. Tellier*, 185 Mass. 18, 69 N. E. 312, 102 Am. St. Rep. 322, the statute was held constitutional. In *Wasserman v. McDonnell*, 190 Mass. 326, 76 N. E. 959, the statute was held not to apply where chattel mortgages had been given in good faith for a valuable consideration and duly recorded. The statute was applied in *Hart v. Brierly*, 189 Mass. 598, 76 N. E. 286.

³⁵ Acts of 1905, No. 223. Held constitutional in *Spurr v. Travis*, 145 Mich. 721, 108 N. W. 1090.

³⁶ Rev. Laws, § 3503, construed in *Thorpe v. Pennock Mercantile Co.*, 99 Minn. 22, 108 N. W. 940, held the

New Jersey,⁴¹ New York,⁴² North Carolina,⁴³ North Dakota,⁴⁴ Ohio,⁴⁵ Oklahoma,⁴⁶ Oregon,⁴⁷ Pennsylvania,⁴⁸ South Carolina,⁴⁹ Tennessee,⁵⁰ Utah,⁵¹ Vermont, Virginia,⁵² Washington,⁵³ and Wisconsin.⁵⁴ The constitutionality of these statutes has been attacked, and in Indiana, Minnesota, New York, and Ohio, successfully.⁵⁵ In New York and Ohio new statutes were then passed with a view of avoiding the constitutional difficulty.⁵⁶ But in most instances the validity of the statutes has been upheld.⁵⁷

statute unconstitutional, and also that it makes a sale of merchandise only *prima facie* fraudulent. The court refers to the provisions on this last point in every statute on this subject then in force.

³⁷ Act of March 6, 1908.

³⁸ Act of March 7, 1907.

³⁹ Act of March 4, 1907.

⁴⁰ Act of March 20, 1907.

⁴¹ Acts of 1907, c. 237.

⁴² Acts of 1907, c. 722. An earlier statute had been held unconstitutional. *Wright v. Hart*, 182 N. Y. 330, 75 N. E. 404, 2 L. R. A. (N. S.) 338.

⁴³ Act of March 5, 1907.

⁴⁴ Act of March 8, 1907.

⁴⁵ Act of April 30, 1908, amending §§ 6343, 6344 of the Revised Statutes of Ohio. A former statute had been held unconstitutional in *Miller v. Crawford*, 70 Ohio St. 207, 71 N. E. 631; *Wright v. Crawford*, 13 Ohio Dec. 607.

⁴⁶ Act of May 26, 1908, repealing Acts of 1903, c. 30, which had been held constitutional in *Williams v. Fourth Nat. Bank*, 15 Okla. 477, 82 Pac. 496. The statutory presumption of fraud may be rebutted.

⁴⁷ Annotated Codes and Statutes (1902), §§ 4623-4626.

⁴⁸ Acts of 1905, No. 44, p. 62.

⁴⁹ Acts of 1906, p. 1.

⁵⁰ Acts of 1901, c. 133, held constitutional in *Neas v. Borches*, 109 Tenn. 398, 71 S. W. 50.

⁵¹ Comp. Laws (1907), title 71, §§ 2063x-2063x4.

⁵² Code (1904), § 2460a.

⁵³ Acts of 1901, p. 222. The constitutionality of the statute was upheld in *McDaniels v. J. J. Connelly Shoe Co.*, 30 Wash. 549, 71 Pac. 37, 60 L. R. A. 947, 94 Am. St. Rep. 889, and it was further construed in *Fitz Henry v. Munter*, 33 Wash. 629, 74 Pac. 1003; *Seattle Brewing Co. v. Donofrio*, 34 Wash. 18, 74 Pac. 283; *Olwell v. Gordon & Co.*, 40 Wash. 185, 82 Pac. 180; *First Nat. Bank v. Coles*, 40 Wash. 528, 82 Pac. 892; *Everett Produce Co. v. Smith Bros.*, 40 Wash. 566, 82 Pac. 905, 2 L. R. A. (N. S.) 331, 111 Am. St. Rep. 979; *Peterson v. Doak*, 43 Wash. 251, 86 Pac. 663; *Hardwick v. Gettier*, 43 Wash. 644, 86 Pac. 943; *Whitehouse v. Nelson*, 43 Wash. 174, 86 Pac. 174.

⁵⁴ Laws of 1901, c. 463, construed in *Fisher v. Herrman*, 118 Wis. 424, 95 N. W. 392.

⁵⁵ *McKinster v. Sager*, 163 Ind. 671, 72 N. E. 854, 68 L. R. A. 273, 106 Am. St. Rep. 268; *Thorpe v. Pennock Mercantile Co.*, 99 Minn. 22, 108 N. W. 940; *Wright v. Hart*, 182 N. Y. 330, 75 N. E. 404, 2 L. R. A. (N. S.) 338; *Miller v. Crawford*, 70 Ohio St. 207, 71 N. E. 631.

⁵⁶ New York Acts of 1907, c. 722; Ohio Act of April 30, 1908.

⁵⁷ *Walp v. Mooar*, 76 Conn. 515, 57 Atl. 277; *Squire v. Tellier*, 185 Mass. 18, 69 N. E. 312, 102 Am. St. Rep.

§ 644. **Fraud against subsequent purchasers.**—Cases where the seller directly defrauds a buyer of goods have already been considered.⁵⁸ And from one point of view the cases classed under the head of fraud against subsequent purchasers are merely illustrations of the wider heading of fraud upon a buyer. In cases where a subsequent purchaser is defrauded, it is assumed that title to the goods has passed to a prior purchaser but the seller subsequently fraudulently disposes of the goods as if they were his own. The circumstance which generally enables him to commit such a fraud is his retention of possession. The effect of such retention has already been elaborately considered.⁵⁹ A somewhat analogous case arises where the owner of goods gives such apparent title to a third person by transfer of possession in connection with other circumstances that the latter is enabled to deceive a purchaser who buys on the assumption that the apparent owner can convey a good title. This subject also has been dealt with in connection with transfer of title by estoppel.⁶⁰ The mere fact that a transfer with delivery is in fraud of creditors, whether a voluntary gift or for value, will not enable a subsequent purchaser from the grantor to obtain the goods. The transfer though fraudulent as to creditors is binding upon the grantor,⁶¹ and the second purchaser from the grantor gets no greater rights.⁶²

§ 645. **Remedies of defrauded buyer or seller.**—Although relief may be obtained by a defrauded buyer or seller in a variety of ways, such relief is always based on one of three general remedies which are open to the defrauded party: (1) A right to damages for being led into the transaction. Under this form of relief the injured party does not seek to undo the fraudulent transaction but claims sufficient compensation to make his position as

322; *Spurr v. Travis*, 145 Mich. 721, 108 N. W. 1090; *Williams v. Fourth Nat. Bank*, 15 Okla. 477, 82 Pac. 496; *Neas v. Borches*, 109 Tenn. 398, 71 S. W. 50, 97 Am. St. Rep. 851; *McDaniels v. J. J. Connelly Shoe Co.*, 30 Wash. 549, 71 Pac. 37, 60 L. R. A. 947, 94 Am. St. Rep. 889. See also *Hart v. Roney*, 93 Md. 432, 49 Atl. 661; *Fisher v. Herrmann*, 118 Wis. 424, 95 N. W. 392.

⁵⁸ *Supra*, § 638.

⁵⁹ See section 25 of the Sales Act, and *supra*, § 349 *et seq.*

⁶⁰ See *supra*, § 311 *et seq.*

⁶¹ *Infra*, § 651.

⁶² See *Bynum v. Miller*, 86 N. C. 559, 41 Am. Rep. 467; *Moore v. Moore*, 1 Russ. & G. (Nova Scotia), 525.

good as it would have been had he not entered into the transaction at all. (2) Rescission of the fraudulent transaction and restoration of the situation which the parties occupied before the fraudulent transaction was entered into. (3) Frequently a seller's fraudulent representation with regard to the goods will amount to a warranty. In such a case a third kind of relief is open to him based on a contractual right to have damages sufficient to put him not simply in as good a position as he offered before the fraudulent transaction, but in as good a position as he would have occupied had the fraudulent statements been true. This last form of redress, however, is not based on fraud, and has been sufficiently considered in connection with warranty. But as has been seen in an earlier section⁶³ in many States the measure of damages in an action of deceit has been assimilated to the measure of damages appropriate for breach of warranty.

§ 646. **Action of damages for deceit.**—The right of one who has suffered damage by fraudulent representations to bring an action for deceit needs no citation of authorities. In order to maintain such an action where benefit has been received by the plaintiff, it is not necessary that such benefit be returned. The defrauded party may retain this benefit and sue for the damages he has suffered.⁶⁴ Nor need demand be made before suit.⁶⁵ The measure of damages in such an action has already been considered.⁶⁶ It is of course essential to the right of action that some damage shall have been suffered, and it has been urged that where a contract induced by fraud is still wholly executory on both sides at the time the fraud is discovered, no damage is suffered by the defrauded party since the fraud furnishes a complete defense to the enforcement of the contract. According to this view, there-

⁶³ *Supra*, § 613.

⁶⁴ *Binghampton Trust Co. v. Auten*, 68 Ark. 294, 299, 57 S. W. 936, 82 Am. St. Rep. 295; *Herfort v. Cramer*, 7 Colo. 483; *Nysewander v. Lowman*, 124 Ind. 584, 24 N. E. 355; *Andrews v. Jackson*, 168 Mass. 266, 47 N. E. 412, 37 L. R. A. 402, 60 Am. St. Rep. 390; *Elliott v. Brady*, 192 N. Y. 221, 85 N. E. 69. See also cases cited in the following note.

⁶⁵ *Morrow Shoe Mfg. Co. v. New England Shoe Co.*, 57 Fed. Rep. 685, 692, 18 U. S. App. 256, 616, 24 L. R. A. 417, 6 C. C. A. 508; *Farwell v. Hanchett*, 120 Ill. 573, 577, 11 N. E. 875; *Parker v. Simpson*, 180 Mass. 334, 62 N. E. 401.

⁶⁶ *Supra*, § 613.

fore, performance of the contract by the defrauded party under these circumstances is an unnecessary act, and no damages can be recovered.⁶⁷ If this doctrine is logically carried out, however, it would be necessary also to hold that if the contract though not wholly executory is capable of rescission, and if thereby the parties can be restored to their former situation, no recovery can be had in deceit, because no damage has been suffered. It seems more accurate, however, to hold that damage is caused by the original transaction. Even if this is merely an executory contract, the contract is not void, and the result of the fraud is the existence of a contract to which the defrauded person is a party. Moreover, as has been seen,⁶⁸ in most jurisdictions recovery is allowed on false representations on the basis of warranty; that is, the plaintiff recovers, not the damages caused by being induced to enter into the transaction, but the damages he suffers by the failure to make good the representations. Accordingly it is generally held that one who has been defrauded may, though the contract is executory, affirm the contract and perform it without forfeiting his right to recover damages for deceit. Especially where the contract is partially executed this result is clearly sound.⁶⁹ The right to damage may be asserted by the defrauded person not only as plaintiff but as defendant. By recoupment, or counterclaim, he is allowed to deduct his damages when sued for failure to perform his obligations under the bargain.⁷⁰ It is commonly said that the

⁶⁷ *St. John v. Hendrickson*, 81 Ind. 350; *Thompson v. Libby*, 36 Minn. 287, 31 N. W. 52.

⁶⁸ *Supra*, § 113.

⁶⁹ *Matlock v. Reppy*, 47 Ark. 148, 14 S. W. 546; *Williams v. McFadden*, 23 Fla. 143, 1 So. 618, 11 Am. St. Rep. 345; *Dowagiac Mfg. Co. v. Gibson*, 73 Iowa, 525, 35 N. W. 603, 5 Am. St. Rep. 697; *Haven v. Neal*, 43 Minn. 315, 45 N. W. 612; *Nauman v. Oberle*, 90 Mo. 666, 3 S. W. 380; *Whitney v. Allaire*, 4 Denio, 554, 1 N. Y. 305; *Allaire v. Whitney*, 1 Hill, 484; *Grabenheimer v. Blum*, 63 Tex. 369; *Mallory v. Leach*, 35 Vt. 156, 82 Am. Dec. 625. In *Cain v.*

Dickenson, 60 N. H. 371, the defrauded person when performing expressly reserved his right to sue for the fraud.

⁷⁰ *Wilson v. New United States Cattle Ranch Co.*, 73 Fed. Rep. 994, 36 U. S. App. 634, 20 C. C. A. 244; *Lilley v. Randall*, 3 Colo. 298; *Sharp v. Ponce*, 76 Me. 350; *Gent v. Ensor*, 41 Md. 24; *Perley v. Balch*, 23 Pick. 283, 34 Am. Dec. 56; *Sanborn v. Osgood*, 16 N. H. 112; *Lukens v. Aiken*, 174 Pa. St. 152, 34 Atl. 575. See also in regard to similar procedure for breach of warranty, *supra*, §§ 605, 507.

right to recover damages may be waived. Doubtless election to rescind the transaction operates as a bar to the right to recover damages.⁷¹ And a right of action for deceit may be settled in the same way as any other right of action — by a release under seal, or by a compromise or accord and satisfaction accompanied by sufficient consideration. In most if not all the cases relied on as showing the possibility of waiving a right to sue for fraud, the elements of accord and satisfaction will be found. That an assent or agreement without rescission or consideration or formal release will discharge a right of action for deceit already accrued cannot be admitted.

§ 647. **Rescission and restitution.**—The alternative remedy of rescission and restitution is in its origin equitable; and where the property is of a sort requiring formal transfer of title, as land or shares of stock, it will generally be necessary for a defrauded party to get the aid of a court having equity powers in order to bring about a restoration of the former status. But, as previously shown,⁷² in the case of chattel property a defrauded seller may regain title by trover or replevin or without the aid of a court; and a defrauded buyer may sue at law for the price which he paid.⁷³

§ 648. **Election of remedies.**—It is generally said that a defrauded party must elect whether he will affirm the fraudulent transaction or rescind it. But a transaction though induced by fraud is not on that account void, it is only voidable; consequently if nothing is done the transaction is not avoided, and the rights of the parties will be fixed by the agreement which they made without any manifestation of election. The right to sue for deceit which is based on the assumption that the fraudulent transaction is to stand does not, therefore, require prompt action by the injured party.⁷⁴ The Statute of Limitations alone prevents excessive delay, though it is obvious that delay in asserting a right

⁷¹ In *Cphoon v. Fisher*, 146 Ind. 583, it was held that an action to rescind a contract might be amended into an action to recover damages for the fraud alleged to have been committed, but this seems unsound, as the assertion of the right to rescind without even beginning a suit

seems a conclusive election. See *infra*, § 648.

⁷² *Supra*, § 567.

⁷³ See *supra*, § 570.

⁷⁴ *Cottrill v. Krum*, 100 Mo. 397, 13 S. W. 753, 18 Am. St. Rep. 549; *Huber Mfg. Co. v. Hunter*, 99 Mo. App. 46.

of action for fraud will tend to show both that no fraud was perpetrated and, in connection with other circumstances, that if there was, any right of action that may have existed has been discharged. But the right to set a fraudulent bargain aside is an alternative right given on equitable principles to the injured party and, therefore, if this remedy is desired it must be sought promptly after the fraud has been discovered.⁷⁵ Not only may the defrauded party lose his right of rescission by failing to act promptly, but also by any act done after discovery of the fraud which indicates a willingness to allow the transaction to stand. Thus the acceptance or demand of any benefit under the transaction.⁷⁶ It seems entirely possible for a defrauded person to take the position that if payment or security is at once made he will let the transaction stand, but otherwise will claim the right to rescind. But if security is actually obtained with knowledge of the fraud this will amount to affirmance,⁷⁷ as will retention of the goods as security for an unpaid balance of the price.⁷⁸ Delay or action assuming the validity of the transaction will not prevent rescission if the fraud had not been discovered at the time.⁷⁹ Though the cases

⁷⁵ *Clough v. London, etc., Ry. Co.*, 163, 22 U. S. App. 12, 9 C. C. A. 415; *L. R. 7 Ex. 26*; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203; *Pence v. Langdon*, 99 U. S. 578, 25 L. ed. 420; *Mudsill Mining Co. v. Watrous*, 61 Fed. Rep. 163, 22 U. S. App. 12, 9 C. C. A. 415; *Bowden v. Spellman*, 59 Ark. 251, 259, 27 S. W. 602; *Cedar Rapids Ins. Co. v. Butler*, 83 Iowa, 124, 129, 48 N. W. 1026; *Byrd v. Rautman*, 85 Md. 414, 36 Atl. 1099; *Boles v. Merrill*, 173 Mass. 491, 53 N. E. 894, 73 Am. St. Rep. 308; *Barnard v. Campbell*, 58 N. Y. 73, 17 Am. Rep. 208; *Baker v. Lever*, 67 N. Y. 304, 309, 23 Am. Rep. 117. Compare *Pitcher v. Webber*, 103 Me. 101, 68 Atl. 593.

⁷⁶ *Clough v. London, etc., Ry. Co.*, L. R. 7 Ex. 26, 34; *Bulkley v. Morgan*, 46 Conn. 393; *O'Donald v. Constant*, 82 Ind. 212; *Stokes v. Burns*, 132 Mo. 214, 33 S. W. 460; *Fowler*

v. Bowery Bank, 113 N. Y. 450, 21 N. E. 172, 4 L. R. A. 145, 10 Am. St. Rep. 479; *Bach v. Tuch*, 126 N. Y. 53, 26 N. E. 1019; *Genet v. Delaware Canal Co.*, 170 N. Y. 278, 296, 63 N. E. 350; *O'Bryan v. Glenn*, 91 Tenn. 106, 17 S. W. 1030, 30 Am. St. Rep. 862. But see *Flower v. Brumbach*, 131 Ill. 646, 23 N. E. 335. A demand of security does not necessarily indicate affirmance of the contract. *Boyd v. Shiffer*, 156 Pa. St. 100, 27 Atl. 60; *Cortland Mfg. Co. v. Platt*, 83 Mich. 419, 47 N. W. 330.

⁷⁷ *Bridgeford v. Adams*, 45 Ark. 136; *Joslin v. Cowee*, 52 N. Y. 90.

⁷⁸ *James Music Co. v. Bridge*, Wis. , 114 N. W. 1108.

⁷⁹ *Woonsocket Rubber Co. v. Loewenberg*, 17 Wash. 29, 48 Pac. 785. And see decisions cited in previous notes.

are in some conflict, it seems clear on principle that it is an election to affirm the contract to bring an action for deceit. Such an action can only be based on the assumption that the plaintiff has been induced to enter into a transaction to his damage. This is inconsistent with an assertion of the nullity of the transaction.⁸⁰ It has been suggested that where a defrauded seller reclaims what goods he can reach, he should be allowed to recover damages for the remainder in an action of deceit. But the only theory upon which part of the goods can be reclaimed is that the whole contract is rescinded. If the whole contract is rescinded the seller's remedy for the goods which he cannot reach is not deceit but conversion, or, on principles of *quasi*-contract, an action for the value of the goods.⁸¹ The election to rescind must be communicated either by bringing legal proceedings, asserting ownership of property fraudulently conveyed, or otherwise.⁸² And such election when once made is conclusive, and precludes remedies based on a con-

⁸⁰ The following cases seem rather to support the view that it is not necessarily a conclusive affirmance of the contract to bring an action for deceit: *Emma Silver Mining Co. v. Emma Silver Mining Co. of New York*, 7 Fed. Rep. 401; *Cohoon v. Fisher*, 146 Ind. 583; *Gutheil v. Goodrich*, 160 Ind. 92, 94; *Kimball v. Cunningham*, 4 Mass. 502, 505, 3 Am. Dec. 230; *Percy v. Benedict*, 15 Hun, 282. But the statement of Sanborn, J., in *Stuart v. Hayden*, 72 Fed. Rep. 402, 411, 36 U. S. App. 462, 18 C. C. A. 618; *affd.* in 169 U. S. 1, 42 L. ed. 639, 18 S. Ct. 274, is unanswerable: "One who is induced to make a sale or trade by the deceit of his vendee has a choice of two remedies upon his discovery of the fraud. He may affirm the contract, and sue for his damages; or he may rescind it, and sue for the property he has sold. The former remedy counts upon and affirms the validity of the transaction; the latter repudiates the transaction, and counts

upon its invalidity. The two remedies are utterly inconsistent, and the choice of one rejects the other, because a sale cannot be valid and void at the same time." In *Cohoon v. Fisher*, 146 Ind. 583, a distinction was attempted between an action begun for rescission and one begun for deceit. It was suggested that in the latter case there was perhaps a conclusive election to affirm the contract, whereas in the former case there was no conclusive election to set it aside. The distinction seems untenable.

⁸¹ *Farwell v. Myers*, 64 Mich. 234, 31 N. W. 128; *Sleeper v. Davis*, 64 N. H. 59, 6 Atl. 201, 10 Am. St. Rep. 377; *Powers v. Benedict*, 88 N. Y. 605. See also *Re Hirschman*, 104 Fed. Rep. 69; *Singer v. Schilling*, 74 Wis. 369, 43 N. W. 101.

⁸² *Reese River Silver Min. Co. v. Smith*, L. R. 4 H. L. 64, 73; *Clough v. London, etc., Ry. Co.*, L. R. 7 Ex. 26; *Hammond v. Pennock*, 61 N. Y. 145, 155; *Potter v. Taggart*, 54 Wis. 395, 11 N. W. 678.

tinued existence of the transaction.⁸³ The transaction if rescinded must be rescinded as a whole.⁸⁴ Therefore, a seller who has sold goods on credit cannot, because the sale was induced by fraud, sue for the price before the period of credit has expired.⁸⁵ Though it seems impossible to support the maintenance of an action on the contract for the price before the period of credit has expired, there seems good ground for allowing the plaintiff at once to rescind the contract and instead of suing in trover to waive the tort and sue in *assumpsit*, not for the price of the goods, but for their value.^{85a}

§ 649. **Restoration of consideration.**—In a suit in equity for rescission a plaintiff who has received consideration commonly offers in his bill to restore the consideration, and whether such an offer is made or not the decree in such a suit will provide, not simply for the return by the defendant of what he has wrongfully acquired, but for the restoration of the consideration by the plaintiff.⁸⁶ The same principles apply where rescission is exercised without the aid of equity. The injured party must make an offer to restore what he has received on condition of receiving in return what he was defrauded into parting with.⁸⁷ Accordingly if the de-

⁸³ *Wright v. Zeigler*, 70 Ga. 501; *Kearney Milling Co. v. Union Pacific Ry. Co.*, 97 Iowa, 719, 66 N. W. 1059, 59 Am. St. Rep. 434; *Farwell v. Myers*, 59 Mich. 179, 26 N. W. 328; *Powers v. Benedict*, 88 N. Y. 605.

⁸⁴ *Pike's Peak Paint Co. v. Masury*, 19 Colo. App. 286. And see cases in the following note.

⁸⁵ *Ferguson v. Carrington*, 9 B. & C. 59; *Kellogg v. Turpie*, 93 Ill. 265. 34 Am. Rep. 163; *Dellone v. Hull*, 47 Md. 112; *Allen v. Ford*, 19 Pick. 217; *Jones v. Brown*, 167 Pa. St. 395, 31 Atl. 647. And see *Whitlock v. Heard*, 3 Rich. L. 88. *Contra*, *Blalock v. Phillips*, 38 Ga. 216; *Wigand v. Sichel*, 3 Keyes, 120; *Crossman v. Universal Rubber Co.*, 127 N. Y. 34, 27 N. E. 400, 13 L. R. A. 91; *Heilbronn v. Herzog*, 165 N. Y. 98, 58 N. E. 759; *Jaffray v. Wolf*, 4 Okla. 303, 47 Pac. 496.

^{85a} *Barrett v. Koella*, 5 Biss. 40; *Dietz's Assignee v. Sutcliffe*, 80 Ky. 650; *Crown Cycle Co. v. Brown*, 39 Or. 285, 64 Pac. 451. See further, 44 Cent. L. J. 380.

⁸⁶ See *Thomas v. Beals*, 154 Mass. 51, 27 N. E. 1004; *Parker v. Simpson*, 180 Mass. 334, 343, 62 N. E. 401.

⁸⁷ *Clarke v. Dickson*, E. B. & E. 148; *Grymes v. Sanders*, 93 U. S. 55, 23 L. ed. 798; *Samples v. Guyer*, 120 Ala. 611, 24 So. 942; *Herman v. Haffenegger*, 54 Cal. 161; *Adam, Meldrum Co. v. Stewart*, 157 Ind. 678, 61 N. E. 1002, 87 Am. St. Rep. 240; *Tisdale v. Buckmore*, 33 Me. 461; *Thomas v. Beals*, 154 Mass. 51, 54, 27 N. E. 1004; *Rumsey v. Shaw*, 212 Pa. St. 576, 578; *Friend Bros. Co. v. Hulbert*, 98 Wis. 183, 73 N. W. 784.

frauded party is unable to restore what he has received, rescission is impossible.⁸⁸ This rule, however, is subject to the exception that if the consideration was worthless it need not be returned.⁸⁹ In other cases where on the particular facts it seems equitable to allow rescission without complete or perfect restoration of the consideration, the modern tendency seems to favor the relief, and to be opposed to the strict construction upheld in earlier decisions.⁹⁰ Thus diminution in value of the consideration by reasonable use before the discovery of the fraud,⁹¹ or the application of the consideration for the defendant's benefit,⁹² or the use of part of the consideration in testing,⁹³ will not prevent rescission, nor will

⁸⁸ See cases cited in preceding note.

⁸⁹ *Babcock v. Case*, 61 Pa. St. 427, 100 Am. Dec. 654. On this principle a fraudulent buyer's note which has not been negotiated by the seller need not be returned. It is enough if produced for surrender at the trial. *Wilcox v. San José Fruit Packing Co.*, 113 Ala. 519, 28 So. 376, 59 Am. St. Rep. 135; *Coghill v. Boring*, 15 Cal. 213; *Morse v. Woodworth*, 155 Mass. 233, 249, 27 N. E. 1010, 29 N. E. 525; *Skinner v. Michigan Hoop Co.*, 119 Mich. 467, 78 N. W. 547, 75 Am. St. Rep. 413; *Wood v. Garland*, 58 N. H. 154; *Berry v. American Central Ins. Co.*, 132 N. Y. 49, 55, 30 N. E. 254, 28 Am. St. Rep. 548; *Crossen v. Murphy*, 31 Or. 114, 49 Pac. 858; *Sloane v. Shiffer*, 156 Pa. St. 59, 27 Atl. 67. But see *contra*, *Farwell v. Hanchett*, 120 Ill. 573, 11 N. E. 875. It is otherwise in case of a note of a third person (*Northampton Nat. Bank v. Smith*, 169 Mass. 281, 61 Am. St. Rep. 283; *Cook v. Gilman*, 34 N. H. 556; *Spencer v. St. Clair*, 57 N. H. 9; *Baker v. Robbins*, 2 Denio, 136; *Whitcomb v. Denio*, 52 Vt. 382), unless the note is worthless (*Mahone v. Reeves*, 11 Ala. 345; *Estabrook v. Swett*, 116 Mass. 303; *Duval v. Mowry*, 6 R. I. 479). Compare *Cook v. Gilman*, 34 N. H. 556; *Spencer v.*

St. Clair, 57 N. H. 9; *Crossen v. Murphy*, 31 Or. 114, 49 Pac. 858. Other illustrations of worthless property may be found in *Dill v. O'Ferrell*, 45 Ind. 268; *Haase v. Mitchell*, 58 Ind. 213; *Kent v. Bornstein*, 12 Allen, 342.

⁹⁰ In *Bassett v. Brown*, 105 Mass. 551, the court said: "This rule is held with great strictness in actions at law, as in the case of the casks that contained worthless lime (*Conner v. Henderson*, 15 Mass. 319, 8 Am. Dec. 103) and the sack that covered the rejected bale of cotton. *Morse v. Brackett*, 98 Mass. 205, and 104 Mass. 494." Compare with these decisions the cases in the following notes.

⁹¹ *Gatling v. Newell*, 9 Ind. 572. Even where rescission is sought merely for breach of contract, valuable use of the property has been held not to preclude rescission. *Ankeny v. Clark*, 148 U. S. 345, 37 L. ed. 475. And see *Wald's Pollock, Contracts* (3d ed.), 343.

⁹² *Brown v. Norman*, 65 Miss. 369, 4 So. 293, 7 Am. St. Rep. 663.

⁹³ *Eastern Granite Roofing Co. v. Chapman*, 140 Ala. 440, 443, 37 So. 199. So if the deterioration is due to the defect to which the fraud related. *Pitcher v. Webber*, 103 Me. 101, 68 Atl. 593.

inability to return the consideration, when the inability is due to the wrongful conduct of the fraudulent party.⁹⁴ The matter has been thus summarized: "That a party seeking rescission of a contract must return, or offer to return, what he has received under it, and thus put the other party as nearly as is possible in his situation before the contract, is the law. But this rule is wholly an equitable one; impossible or unreasonable things, which do not tend to accomplish equity in the particular transaction, are not required."⁹⁵ So where the wrongdoer has injured goods fraudulently obtained by him to a greater extent than the consideration he gave, it has been held that the defrauded person need not return the latter as a condition of rescission.⁹⁶ And where the remedy sought permits, some courts have allowed as a substitute for restoration of the consideration a deduction of the amount of it from the recovery against the wrongdoer.⁹⁷ This is the most satisfactory disposition of many cases. If property fraudulently obtained has got into the hands of a third person who is not a purchaser for value, he is not allowed to object to a claim of the defrauded party for the return of the property that the consideration has not been restored to the fraudulent person.⁹⁸ Frequently a fraudulent seller will refuse to receive the goods when offered in rescission of the bargain, and as to the rights of the buyer then, it has been said: "A purchaser who is defrauded by the seller, and who in the lawful exercise of his right to rescind tenders the property to the seller, who refuses to receive it, is

⁹⁴ *Hammond v. Pennock*, 61 N. Y. 145; *Gates v. Raymond*, 106 Wis. 657, 82 N. W. 530. In the latter case the defendant fraudulently caused the plaintiff to become intoxicated and sell his horse and then lose at poker to the defendant and his associates the consideration.

⁹⁵ *Sloane v. Shiffer*, 156 Pa. St. 59, 64, 27 Atl. 67. But the fact that a defrauded buyer has disposed of the goods before discovery of the fraud will not excuse restoration. *Smith v. Brittenham*, 98 Ill. 188.

⁹⁶ *Phenix Iron Works v. McEvony*,

47 Neb. 228, 66 N. W. 290, 53 Am. St. Rep. 527.

⁹⁷ See *Ladd v. Moore*, 3 Sandf. 589; *Crossen v. Murphy*, 31 Or. 114, 49 Pac. 858; *Warner v. Vallily*, 13 R. I. 483; *Sisson v. Hill*, 18 R. I. 212, 26 Atl. 196, 21 L. R. A. 206. See also *Wilson v. Burks*, 71 Ga. 862; *Todd v. Leach*, 100 Ga. 227, 28 S. E. 43; *Todd v. McLaughlin*, 125 Mich. 268, 84 N. W. 146; *Brewster v. Wooster*, 131 N. Y. 473, 30 N. E. 489; *Mason v. Lawing*, 10 Lea, 264.

⁹⁸ *Stevens v. Austin*, 1 Met. 557; *Schoonmaker v. Kelly*, 42 Hun, 299; *Frost v. Lowry*, 15 Ohio, 200.

under no other obligation to him than to retain the property as his agent and bailee, and, after notice of his intention, may in good faith dispose of the same for account of the owner. If he sells the property otherwise than in good faith, the extent of his liability would be the fair market value of the same."⁹⁹ Doubtless such a right of resale is allowable, but in view of the chance for subsequent dispute as to the propriety of the buyer's conduct, if it does not involve expense or any great degree of care, it would seem safer for a defrauded buyer who wishes to rescind the transaction to retain the goods on behalf of the fraudulent seller if the latter refuses to assent to rescission.

§ 650. **Rescission allowed only against fraudulent person.**—As has already been seen,¹ fraud may sometimes be of such a character as to preclude assent to a bargain by the defrauded person. If goods are obtained in this way no property passes to the fraudulent person, and the defrauded person's title may be asserted even against purchasers for value.² But in the ordinary case of fraud, the defrauded person is induced to give his assent to the bargain. If the bargain is a non-negotiable executory contract the defrauded person may, in spite of any assignment, refuse to be bound by the transaction,³ since even a purchaser for value of a non-negotiable chose in action can stand in no better position than his assignor. If, however, title to a negotiable contract or goods be secured by fraud, a purchaser from the fraudulent person acquires this title, and if he had no notice of the fraud and was not a volunteer, no equity exists against him. As commonly expressed, a purchaser for value of the voidable title of the fraudulent person acquires an indefeasible title.⁴ Not only may the contract be avoided as

⁹⁹ *Hambrick v. Wilkins*, 65 Miss. 18, 3 So. 67, 7 Am. St. Rep. 631. See also *Barnett v. Speir*, 93 Ga. 762, 21 S. E. 168.

¹ *Supra*, § 625.

² See cases cited *supra*, §§ 625, 635.

³ Even though by statute the assignee of such a contract may sue in his own name, his rights are limited to those of his assignor. *Chrysler v. Renois*, 43 N. Y. 209.

⁴ *White v. Garden*, 10 C. B. 919; *Leask v. Scott*, 2 Q. B. D. 376; *Ste-*

verson v. Newnham, 13 C. B. 285, 303; *Lightman v. Boyd*, 132 Ala. 618, 32 So. 714; *Williamson v. Russell*, 39 Conn. 406; *Walp v. Moor*, 76 Conn. 515, 517, 57 Atl. 277; *Mears v. Waples*, 3 Houst. 581, 4 Houst. 62; *Kern v. Thurber*, 57 Ga. 172; *Ohio & Mississippi R. R. v. Kerr*, 49 Ill. 458; *Titecomb v. Wood*, 38 Me. 561; *Hall v. Hinks*, 21 Md. 406; *National Bank of Bristol v. Baltimore & Ohio R. R.*, 99 Md. 661, 59 Atl. 134, 105 Am. St. Rep. 321; *Goodwin v. Mass.*

against purchasers with notice,⁵ but also against persons whose right was gratuitously acquired.⁶ But unless it is unconscientious for the holder of the legal title to retain it, he will not be deprived of it, and, therefore, fraud of a third party "inducing the purchase of goods will not give the purchaser a right to rescind the contract—if the seller is not a party to the fraud, the contract must stand."⁷

§ 651. **Remedies for transfers in fraud of creditors.**— It is well settled that a transfer in fraud of creditors cannot be avoided by the parties thereto.⁸ A more difficult question arises when the transaction is at least in part executory and one of the parties to it seeks to enforce the provisions of the bargain; as where the seller sues for the price, or the buyer sues for the goods. It can hardly be questioned that an agreement to transfer property in fraud of creditors is not only void as to creditors, but contrary to public policy. Certainly where there is an actual, not merely, constructive intent to defraud, the contract, though not criminal, should be held illegal. Therefore, if the fraudulent grantor sues for the price he should not be allowed to recover. It is so held in some States.⁹ But in many States such an action is allowed if

Loan & Trust Co., 152 Mass. 189, 198, 25 N. E. 100; *White v. Dodge*, 187 Mass. 449, 450, 73 N. E. 549; *Lee v. Portwood*, 41 Miss. 109; *Porell v. Cavanaugh*, 69 N. H. 364, 41 Atl. 860; *Root v. French*, 13 Wend. 570, 28 Am. Dec. 482; *Padon v. Taylor*, 44 N. Y. 371; *Sinclair v. Healy*, 40 Pa. St. 417, 80 Am. Dec. 589; *Dettra v. Kestner*, 147 Pa. St. 566, 23 Atl. 889; *Singer Mfg. Co. v. Sammons*, 49 Wis. 316, 5 N. W. 788; *Arnett v. Cloudas*, 4 Dana, 299.

⁵ *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. ed. 892.

⁶ *Mendenhall v. Treadway*, 44 Ind. 131; *Hogan v. Wixted*, 138 Mass. 270; *Gordon v. McCarty*, 3 Whart. 407; *Longenecker v. Church*, 200 Pa. St. 567, 575.

⁷ *Nash v. Minnesota Title Ins. Co.*, 163 Mass. 574, 581, 40 N. E. 1039

(citing *Pulsford v. Richards*, 17 Beas. 87, 95); *Masters v. Ibberson*, 8 C. B. 100.

⁸ *Robinson v. M'Donnell*, 2 B. & Ald. 134; *Kirby v. Raynes*, 138 Ala. 194, 100 Am. St. Rep. 39; *Bowden v. Spellman*, 59 Ark. 251, 258, 27 S. W. 602; *Francis v. Wilkinson*, 147 Ill. 370; *Harvey v. Varney*, 98 Mass. 118; *Lufkin v. Jakeman*, 188 Mass. 528, 532; *Doughty v. Miller*, 50 N. J. Eq. 529, 25 Atl. 153; *Ahl's Appeal*, 129 Pa. St. 49, 18 Atl. 475. Many other decisions might be cited for this point, but it is undisputed.

⁹ *Norris v. Norris*, 9 Dana, 317, 35 Am. Dec. 138; *Demeritt v. Miles*, 22 N. H. 523; *Church v. Muir*, 33 N. J. L. 318; *Somers v. Johnson*, 70 N. J. L. 695; *Nellis v. Clark*, 4 Hill, 424, 20 Wend. 24; *Briggs v. Merrill*, 58 Barb. 389; *Powell v. Inman*, 7 Jones L. 28; *Bradford v.*

the contract is on its face unobjectionable, and the plaintiff's case can be made out without exposing the fraud.¹⁰ Where the buyer or grantee under a fraudulent bargain seeks to recover the property, the situation is somewhat different, for while the grantor is necessarily a participant of the fraud in a fraudulent conveyance, the grantee or buyer is not. If the buyer was ignorant of the fraud there is no reason why he should not enforce his rights to the same extent as any other buyer. Whether mere knowledge of a wrongful intent on the part of the seller would deprive him of a right to enforce the bargain involves a question much in dispute in regard to illegal contracts generally; namely, whether mere knowledge by one party to the contract of an illegal purpose of the other in entering into the transaction so taints the former party with the illegality as to preclude recovery by him, or whether to produce this result it is necessary that he should have actually promoted the illegal purpose, not merely known that the designs of the other party were illegal. The buyer's right to enforce an executory contract where the seller intended to defraud his creditors should be governed by the principles applied to other cases of contracts where the plaintiff has guilty knowledge.¹¹ But the courts which allow recovery of the price by a fraudulent seller would doubtless generally allow an action against the seller by the buyer or grantee whatever the extent of his participation in the fraud.¹² If, however, the title to the property has passed to the buyer and possession only has been retained by the seller, the buyer even though a party to the fraud to the fullest extent may recover the property. He is in such a case not suing on the illegal contract but enforcing a property right.¹³ The creditors who can attack a fraudulent

Beyer, 17 Ohio St. 388; Harvin v. Weeks, 11 Rich. L. 601. See also Hollis v. Morris, 2 Harr. 128.

¹⁰ Giddens v. Bolling, 93 Ala. 92, 9 So. 427 (but see Glover v. Walker, 107 Ala. 540, 18 So. 251); Landwirth v. Shaphran, 47 La. Ann. 336, 16 So. 839; Butler v. Moore, 73 Me. 151, 40 Am. Rep. 348; Maxfield v. Jones, 76 Me. 135, 137; Dyer v. Homer, 22 Pick. 253; Harvey v. Varney, 98 Mass. 118; Stillings v. Turner, 153

Mass. 534, 27 N. E. 671; Gary v. Jacobson, 55 Miss. 204, 30 Am. Rep. 514; Telford v. Adams, 6 Watts, 429; Carpenter v. McClure, 39 Vt. 9, 91 Am. Dec. 370. See also Sauter v. Leveridge, 103 Mo. 615, 15 S. W. 981.

¹¹ See *infra*, § 675.

¹² See Harvey v. Varney, 98 Mass. 118.

¹³ Bush v. Rogan, 65 Ga. 320, 38 Am. Rep. 785; Bibb v. Baker's Admr., 17 B. Mon. 292; Peterson v. Brown,

conveyance have already been considered.¹⁴ As to creditors whose claims are such that they have a right to attack a fraudulent conveyance,¹⁵ the conveyance in the words of the Statute of Elizabeth is void. This means that they may disregard the conveyance and levy upon the property in the same way as if the legal title to the property were still in their debtor.¹⁶ Sometimes, however, the legal title to the property never was in the debtor, as where the debtor fraudulently pays the price for a conveyance by another of property to the debtor's wife or friend. In such a case it is generally held that the property cannot be reached by execution at law against the debtor.¹⁷ Wherever the remedy at law is inadequate, equity will aid the creditor by declaring a fraudulent conveyance void, or ordering a reconveyance, and in regard to land at least, or property which like land is transferred formally (for example, certificates of stock), there is no doubt that the creditor may take his choice of remedies. The fact that a possible remedy at law is

17 Nev. 172, 45 Am. Rep. 437; Jackson v. Garnsey, 16 Johns. 189; York v. Merritt, 80 N. C. 285; Boyle v. Rankin, 22 Pa. St. 168; Croft v. Jennings, 173 Pa. St. 216, 220, 33 Atl. 1026; Broughton v. Broughton, 4 Rich. L. 491; Hooser v. Kraeka, 29 Tex. 450; Starke's Ex. v. Littlepage, 4 Rand. 368. See also Moore v. Cline, 115 Ga. 405, 408, 41 S. E. 614; Russell v. Cole, 167 Mass. 6, 9, 44 N. E. 1057, 57 Am. St. Rep. 432. *Contra*, Kirkpatrick v. Clark, 132 Ill. 342, 24 N. E. 71, 8 L. R. A. 511. 22 Am. St. Rep. 531.

¹⁴ *Supra*, § 642.

¹⁵ See *supra*, § 642.

¹⁶ So held in the following cases in regard to land: Staples v. Bradley, 23 Conn. 167, 60 Am. Dec. 630; Barber v. Terrell, 54 Ga. 146; Wil-
lard v. Masterson, 160 Ill. 443, 43 N. E. 771; Hall v. Sands, 52 Me. 355; Woodard v. Mastin, 106 Mo. 324, 17 S. W. 308; Russell v. Dyer, 33 N. H. 186; Jacoby's Appeal, 67 Pa. St. 434. And the rule is the same in regard to personal property. Eckman v.

Munnerlyn, 32 Fla. 367, 13 So. 922, 37 Am. St. Rep. 109; Sherman v. Davis, 137 Mass. 132; Jaeger v. Kelley, 52 N. Y. 274.

¹⁷ So held in the following cases in regard to land: Robinson v. Springfield Co., 21 Fla. 203; Griffin v. Nitcher, 57 Me. 270; Hamilton v. Cone, 99 Mass. 478; Trask v. Green, 9 Mich. 358; Carlisle v. Tindall, 49 Miss. 229; Haggerty v. Nixon, 26 N. J. Eq. 42; Underwood v. Sutcliffe, 77 N. Y. 58; Everett v. Raby, 104 N. C. 479, 10 S. E. 526, 17 Am. St. Rep. 685; Garrett v. Rhame, 9 Rich. L. 407; Gettelmann v. Gitz, 78 Wis. 439, 47 N. W. 660. But in some States a sale under a legal execution is allowed. Hershey v. Latham, 42 Ark. 305; O'Connell v. Taney, 16 Colo. 353, 27 Pac. 888, 25 Am. St. Rep. 275; Hanna v. Aebker, 84 Ind. 411; Cecil Bank v. Snively, 23 Md. 253; Bobb v. Woodward, 50 Mo. 95; Kimmel v. M'Right, 2 Pa. St. 38. It may be assumed that the law is the same in regard to personal property.

open to him does not preclude equitable relief.¹⁸ The same rule probably applies to chattel property. In most jurisdictions, aside from statute, a judgment against the debtor is a prerequisite to maintaining such a bill.¹⁹ But in some States,²⁰ by statute, a creditor may set aside a fraudulent conveyance without first getting judgment at law.²¹

§ 652. Remedies for fraud against subsequent purchasers.—If a subsequent purchaser who has been defrauded by a fraudulent conveyance to another nevertheless has acquired possession of the goods and by estoppel or otherwise former owners cannot successfully assert title to them, he needs no redress. The estoppel of those who endeavored to defraud him is sufficient protection. If the subsequent purchaser has not possession of the property, he will be unable to obtain it if the prior purchaser's title is good; and if the latter was not a party to the fraud against him. In such a case, therefore, the defrauded subsequent purchaser must seek redress against his seller either in an action of deceit or in an action based on the warranty of title or obligation to deliver, which form part of a seller's obligation.

¹⁸ *Ladd v. Smith*, 107 Ala. 506, 18 So. 195 (stock); *Logan v. Logan*, 22 Fla. 561, 1 Am. St. Rep. 212; *First Bank v. Gibson*, 60 Neb. 767, 84 N. W. 259; *Rozek v. Redzinski*, 87 Wis. 525, 58 N. W. 262.

¹⁹ See numerous authorities cited in 14 Am. & Eng. Encyc. of Law (2d ed.), 315.

²⁰ Alabama, Arkansas, Indiana, Maryland, Massachusetts, Mississippi, North Carolina, Ohio, South Carolina, Tennessee, Virginia, West Virginia.

²¹ 14 Am. & Eng. Encyc. of Law (2d ed.), 319.

CHAPTER XXI.

MISTAKE, DURESS, IMPOSSIBILITY, BANKRUPTCY.

Section 653. Mistake.

- 654. Mistake rendering agreement void.
- 655. Mistake in the expression of agreement.
- 656. Rescission of contract for mistake.
- 657. Mistake having no legal consequences.
- 658. Effect of duress.
- 659. Legal and equitable duress.
- 660. Impossibility — How distinguished from mistake.
- 661. When impossibility excuses.
- 662. Bankruptcy.

§ 653. **Mistake.**— The effect of mistake upon a bargain may be various: 1. A mistake may be “such as to prevent any real agreement from being formed, in which case the agreement is void.” 2. “Or, mistake may occur in the expression of a real agreement, in which case, subject to rules of evidence, the mistake can be rectified.”¹ 3. There may be a real agreement and, therefore, a contract or sale at law, but a mutual mistake may make it equitable to rescind this contract or sale. 4. The mistake may be wholly without legal consequences. These four classes of bargains made under a mistake will now be separately considered.

§ 654. **Mistake rendering agreement void.**— Mistake does not prevent the formation of a contract or sale unless, in consequence of the mistake, there is no mutual assent in the sense in which those words are used in the law; namely, an expression of assent or what the other party to the bargain is justified in considering such.² Both in written contracts and in oral agreements, mistake may be of this fundamental character. Ordinarily a man's signature to a writing imports his assent to the writing; but if he signed the writing under the assumption that it contained something other than what actually was there, no such inference is permissible. This principle has already been considered in connection with the subject of fraud.³ But the principle is appli-

¹ Wald's *Pollock, Contracts* (3d ed.), p. 563, quoted with approval in *Curtis v. Albee*, 167 N. Y. 360, 365, 60 N. E. 660.

² See *supra*, § 5.

³ See *supra*, § 625.

cable whether there is fraud or not.⁴ Where the signer of the writing was imposed upon or made an innocent mistake without carelessness, he is thus allowed to show that the act of signing the writing did not indicate assent. But if a man acts negligently, and in such a way as to justify others in supposing that the writing is assented to by him, he will be liable; accordingly, even if an illiterate executes a deed under a mistake as to its contents, he is bound if he did not require it to be read to him or its object explained.⁵ And much more, if the signer is not illiterate, "it will not do for him to enter into a contract and when called upon to abide by its conditions, say that he did not read it when he signed it, or did not know what it contained."⁶ A court of

⁴ *Thoroughgood's Case*, 2 Coke, 9a (considered in *L. R. 4 C. P. 711*); *Davis v. Snider*, 70 Ala. 315; *Bank v. Webb*, 108 Ala. 132, 19 So. 14; *Yoch v. Insurance Co.*, 111 Cal. 503, 44 Pac. 189, 34 L. R. A. 857; *Meyer v. Haas*, 126 Cal. 560, 58 Pac. 1042; *Green v. Maloney*, 7 Houst. 22; *Brooks v. Matthews*, 78 Ga. 739, 3 S. E. 627; *Rockford, etc., R. R. Co. v. Shunick*, 65 Ill. 223; *O'Donnell v. Clinton*, 145 Mass. 461, 14 N. E. 747; *Adolph v. Minneapolis, etc., P. Ry. Co.*, 58 Minn. 178, 59 N. W. 959; *Wright v. McPike*, 70 Mo. 175; *Alexander v. Brogley*, 62 N. J. L. 584, 41 Atl. 691, 63 N. J. L. 307, 43 Atl. 888; *Jackson v. Hayner*, 12 Johns. 469; *Green v. North Buffalo Township*, 56 Pa. St. 110; *Schuykill County v. Copley*, 67 Pa. St. 386, 5 Am. Rep. 441; *Wanner v. Landis*, 137 Pa. St. 61, 20 Atl. 950; *Coates v. Early*, 46 S. C. 220, 24 S. E. 305; *Cameron v. Estabrooks*, 73 Vt. 73, 50 Atl. 638; *Gross v. Drager*, 66 Wis. 150, 28 N. W. 141; *Warder Co. v. Whitish*, 77 Wis. 430, 46 N. W. 540. A few decisions seem inconsistent with the foregoing. *Hawkins v. Hawkins*, 50 Cal. 558 (compare *Meyer v. Haas*, 126 Cal. 560, 58 Pac. 1042); *Chicago, etc., Ry. Co. v. Belliwith*,

83 Fed. Rep. 437 (compare *Great Northern Ry. Co. v. Kasischke*, 104 Fed. Rep. 440, 449); *Binford v. Bruso*, 22 Ind. App. 512, 54 N. E. 146. See further a full note in 32 Am. L. Reg. (N. S.) 946.

⁵ *Robinson v. Glass*, 94 Ind. 211; *Roach v. Karr*, 18 Kans. 529, 26 Am. Rep. 788; *Leddy v. Barney*, 139 Mass. 394, 2 N. E. 107; *Hallenbeck v. Dewitt*, 2 Johns. 404; *Bauer v. Roth*, 4 Rawle, 83, 94; *Weller's Appeal*, 103 Pa. St. 594.

⁶ *Upton v. Tribilcock*, 91 U. S. 45, 50, 23 L. ed. 203; *Hazard v. Griswold*, 21 Fed. Rep. 178; *Stutz v. Handley*, 41 Fed. Rep. 531, 534; *Travelers' Ins. Co. v. Henderson*, 69 Fed. Rep. 762, 768, 32 U. S. App. 536, 16 C. C. A. 390; *Lumley v. Railway Co.*, 71 Fed. Rep. 21; *rev'd.*, 76 Fed. Rep. 66, 43 U. S. App. 476, 22 C. C. A. 60; *Royston v. Miller*, 76 Fed. Rep. 50; *Chicago, etc., Ry. Co. v. Belliwith*, 83 Fed. Rep. 437; *New York, etc., Ins. Co. v. McMaster*, 87 Fed. Rep. 63, 67, 57 U. S. App. 638, 30 C. C. A. 532; *Wagner v. National Ins. Co.*, 90 Fed. Rep. 395, 407, 61 U. S. App. 691, 33 C. C. A. 121; *Chicago, etc., Ry. Co. v. Green*, 114 Fed. Rep. 676; *Goetter v. Pickett*, 61 Ala. 387; *Dawson v. Burrus & Wil-*

equity, however, may in its discretion refuse to enforce such a contract.⁷ And if the promisee was guilty of fraud, the fraud will be a defense to an action by him, though the promisor was negligent in failing to read the contract.⁸ In oral agreements or in informal contracts by letter or memoranda, if language is ambiguous or obscure without fault of the speaker, and is misunderstood also without fault by the other party, the same principles are applied. Each party may insist on his own understanding as the real meaning of the words and, therefore, there will be no contract.⁹ But, if without the knowledge of the other party, the speaker understands "the transaction to be different from that which his words plainly expressed, it is immaterial, as his obligations must be measured by his overt acts."¹⁰

§ 655. **Mistake in the expression of agreement.**—As mutual assent means the expression of mutual assent, not necessarily mental assent,¹¹ it follows that parties by expressing assent under a mistake may make a contract of a kind which they do not intend.

Hiams, 73 Ala. 111; *Martin v. Smith*, 116 Ala. 639, 22 So. 917; *Brooks v. Matthews*, 78 Ga. 739, 3 S. E. 627; *Jossey v. Railroad Co.*, 109 Ga. 439, 34 S. E. 664; *Georgia Medicine Co. v. Hyman*, 117 Ga. 851, 45 S. E. 238; *Black v. Railway Co.*, 111 Ill. 351, 53 Am. Rep. 628; *Rogers v. Place*, 29 Ind. 577; *American Ins. Co. v. McWhorter*, 78 Ind. 136; *McCormack v. Molburg*, 43 Iowa, 561; *Wallace v. Chicago, etc., Ry. Co.*, 67 Iowa, 547, 25 N. W. 772; *Bonnot Co. v. Newman*, 108 Iowa, 158, 78 N. W. 817; *Insurance Co. v. Hodgkins*, 66 Me. 109; *Eldridge v. Dexter, etc., Co.*, 88 Me. 191, 33 Atl. 974; *Jackson v. Olney*, 140 Mass. 195, 4 N. E. 225; *Liska v. Lodge*, 112 Mich. 635, 71 N. W. 171; *Dellinger v. Gillespie*, 118 N. C. 737, 24 S. E. 538; *Greenfield's Estate*, 14 Pa. St. 489, 496; *Pennsylvania R. Co. v. Shay*, 82 Pa. St. 198; *Johnson v. Patterson*, 114 Pa. St. 398, 6 Atl. 746; *Bishop v. Allen*, 55 Vt. 423; *Sanger v. Dun*, 47 Wis. 615, 620, 3 N. W. 388, 32 Am. Rep. 789.

In *Williams v. Leisen*, 72 N. J. L. 410, 60 Atl. 1096, the defendant testified when sued on a written contract for the purchase of books that the plaintiff's agent told him that he wanted to get some influential citizens to indorse the work and the defendant signed the slip supposing that it was merely an indorsement of the work. This was held insufficient to excuse the defendant.

⁷ *McElroy v. Maxwell*, 101 Mo. 294, 14 S. W. 1.

⁸ *Warden v. Reser*, 38 Kans. 86, 16 Pac. 60; *Alexander v. Brogley*, 62 N. J. L. 584, 41 Atl. 691, 63 N. J. L. 307, 43 Atl. 888; *Smith v. Smith*, 134 N. Y. 62, 31 N. E. 258, 30 Am. St. Rep. 617. But see *Reid v. Bradley*, 105 Iowa, 220, 74 N. W. 896; *Dowagiac Mfg. Co. v. Schroeder*, 108 Wis. 109, 84 N. W. 14. See *supra*, § 634.

⁹ See *supra*, § 5.

¹⁰ *Mansfield v. Hodgdon*, 147 Mass. 304, 17 N. E. 544. And see *supra*, § 5.

¹¹ See *supra*, § 5.

In such a case it may be supposed either that the parties both intended the same thing, or it may be supposed that they intended different things. Under the first supposition the contract should be reformed in order to express what the parties intended. This is a recognized department of equity jurisprudence, and proceeds upon the assumption that a legal contract has been made which is different in its terms from that which equitably should govern the relations of the parties. The power of equity to reform contracts has been to some extent usurped by courts of law, in fact, though not in name; for the result attained by a court of equity may frequently be reached by a court of law by simply admitting evidence of the actual intention of the parties and enforcing the bargain which the parties intended to make. The jurisdiction of equity is confined to written instruments, but as to such instruments its jurisdiction is clear.¹² The same principle, it is believed, would be applied by a court of law to an oral contract. For instance, in case of a sale by sample, if the sample is subject to a secret defect unknown to the parties, the obligation of the seller is to furnish, not goods like the sample, but goods of the kind to which the sample seems to belong.¹³ In terms, such a contract obviously binds the seller to furnish defective goods only. But the mutual mistake as to a material fact can be rectified and the parties "put in the same position as if their erroneous assumption had been correct, and, therefore, their contract, instead of being avoided, is upheld, according to their true intention."¹⁴ It is essential to relief that the intent of the parties

¹² *Walker v. Armstrong*, 8 De G. M. & G. 531; *Hunt v. Rousmaniere's Admr.*, 1 Pet. 1, 13, 7 L. ed. 27; *Walden v. Skinner*, 101 U. S. 577, 583, 25 L. ed. 963; *Andrews v. Essex Ins. Co.*, 3 Mason, 6, 10; *Stone v. Hale*, 17 Ala. 557, 52 Am. Dec. 185; *Cake v. Peet*, 49 Conn. 501; *West v. Suda*, 69 Conn. 60, 36 Atl. 1015; *Miller v. Davis*, 10 Kans. 541; *Inskoe v. Proctor*, 6 T. B. Mon. 311; *Gaylord v. Pelland*, 169 Mass. 356, 47 N. E. 1019; *Smith v. Jordan*, 13 Minn. 264, 97 Am. Dec. 232; *Wall v. Meilke*, 89 Minn. 232, 94 N. W.

688; *Tesson v. Insurance Co.*, 40 Mo. 33, 93 Am. Dec. 293; *Story v. Gammell*, 68 Neb. 709, 94 N. W. 982; *Loss v. Obry*, 22 N. J. Eq. 52; *McKay v. Simpson*, 6 Ir. Eq. 452; *Gower v. Sterner*, 2 Whart. 75; *Gammage v. Moore*, 42 Tex. 170.

¹³ *Heilbutt v. Hickson*, L. R. 7 C. P. 438; *Drummond v. Van Ingen*, 12 A. C. 284; *Coates v. Cook*, 101 Ga. 586, 28 S. E. 982. Compare *Dickinson v. Gay*, 7 Allen, 29, 83 Am. Dec. 656.

¹⁴ *Wald's Pollock, Contracts* (3d ed.), p. 620.

should have been identical; not even a court of equity can make a new agreement for the parties which the parties never intended to make for themselves.¹⁵

§ 656. **Rescission of contract for mistake.**—If parties enter into a bargain on the assumption that certain things are true, it is inequitable to enforce the bargain or to allow it to stand if the mistake relates to a matter so fundamental that it must be assumed that the parties would not have entered into the transaction had they known the truth. Here the mistake lies not in failing to express an intended agreement (which might be rectified), but in entering into any bargain at all, in view of the circumstances. To rescind the transaction is, therefore, the only available remedy. An illustration of this kind of mistake is where an agreement was made for the sale of a bar of metal, understood to contain a certain proportion of silver. Through some mistake in the assay on the strength of which the bargain was made, the understanding of the parties was erroneous; there was less silver than supposed. It was held that on tendering back the bar, the buyer was entitled to recover the money he had paid.¹⁶ It will be noticed that there was here an actual sale of the bar in question. There was a clear expression of assent to the sale of that particular bar. The case, therefore, is one of rescission of a sale on equitable grounds. As in most such cases where chattels are involved, the remedy is at law.¹⁷ Similarly, where a watch was sold on the assumption that it was gold, when in fact it was base metal, rescission is permitted.¹⁸ Another application

¹⁵ *Mackenzie v. Coulson*, L. R. 8 Eq. 368, 375; *Hunt v. Rousmaniere's Admr.*, 1 Pet. 1, 14, 7 L. ed. 27. See also *Wald's Pollock*, Contracts (3d ed.), p. 639.

¹⁶ *Cox v. Prentice*, 3 M. & S. 344. If the bar had contained more silver than supposed, the seller, on the same principle, would have been entitled to rescind the transaction.

¹⁷ See *supra*, § 566 *et seq.*

¹⁸ *Sparling v. Marks*, 86 Ill. 125. Neither in England or in Illinois is rescission allowed merely for breach of warranty [see *supra*, § 608, note

89]; therefore, the decisions referred to in this and the preceding note must be rested on the ground suggested in the text. If A. buys from B., and pays for a mass of oats at a fixed sum per bushel, the quantity being estimated by the quantity of a portion of the mass which has been measured, which both suppose to contain 500 bushels, though in fact it contains but 500 half-bushels, A. can recover from B. for the excess of the estimated over the real quantity. *Wheaton v. Olds*, 20 Wend. 174. And see *Devine v. Edwards*, 87 Ill. 177.

of the same principle is found where parties enter into a contract to sell on the assumption of the existence or good condition of the goods to which the bargain relates. This matter is covered by special provisions in the Sales Act.¹⁹ The whole doctrine of recovery of money paid under mistake is based upon the same doctrine.²⁰ It is insufficient to entitle a party to redress that he himself was under a mistake. The mistake must have been mutual.²¹ How far knowledge by one party that the other is under a mistake will have any legal effect has already been considered in connection with the subject of fraud.²² Whether the mistake relates to the subject-matter of the contract, the parties, the price, or to collateral circumstances, is not material in itself. The vital point is whether the mistake was in regard to so fundamental a matter as to go to the root of the contract and so make it inequitable to allow it to stand. A very material mistake as to collateral circumstances may be of more importance than a slight mistake as to the character or quality of the subject-matter.²³

§ 657. **Mistake having no legal consequences.**—The discussion in the previous sections has sufficiently indicated that in some cases mistake is immaterial; namely, where there is clear expression of mutual assent to a bargain, and one party is under a mistake as to the meaning or effect of it,²⁴ or even both parties are under

If copartners make a settlement based on their understanding of what the firm books showed to be the state of their accounts, relief may be had if by reason of a mutual mistake in such understanding one party paid to the other more or less than was his due. *Moors v. Bigelow*, 158 Mass. 60, 32 N. E. 900; *Locke v. Locke*, 166 Mass. 435, 44 N. E. 346; *McGunn v. Hanlin*, 29 Mich. 476; *Cobb v. Cole*, 44 Minn. 278, 46 N. W. 364.

¹⁹ Sections 7, 8. See *supra*, §§ 160–165.

²⁰ See Keener, *Quasi-Contracts*, 26 *et seq.*

²¹ See *supra*, § 5, and cases there cited, showing that an innocent party may hold to his bargain one who has by mistake expressed assent to it.

²² *Supra*, § 631.

²³ See Wald's *Pollock, Contracts* (3d ed.), p. 582, passages from which are approved in *Nordyke v. Kehlor*, 155 Mo. 643, 654, 56 S. W. 287, 78 Am. St. Rep. 600; *Irwin v. Wilson*, 45 Ohio St. 426, 437, 15 N. E. 209.

²⁴ See *supra*, § 5. See also *Steinmeyer v. Schroeppel*, 226 Ill. 9, 80 N. E. 564. It was held in this case that the mistake of a dealer in adding up the various items of the selling price of materials upon which he was asked to furnish an estimate did not justify a court of equity in canceling a contract to furnish such materials formed by the buyer's acceptance of an offer based on such erroneous estimate.

a mistake, but not the same mistake, as to its meaning or effect.²⁵ Again, even a mutual mistake may be in regard to so trivial a matter that it will not be the basis of relief. Finally, even a mutual mistake of law will not generally furnish a basis for relief.²⁶ This principle is especially applied in actions to recover money paid under a mistake.²⁷

§ 658. **Effect of duress.**—Duress, like fraud and mistake, may completely prevent the mutual assent necessary for the formation of a contract or sale, or it may be merely a ground for setting aside a bargain because the mutual assent thereto was improperly obtained. If a man by force compels another to go through certain indications of assent, as by taking his hand and forcibly guiding it, there is no mutual assent. But in the ordinary case where duress is exercised, as generally when fraud is exercised, there is an actual expression of assent, but in view of the way in which the assent was obtained it is inequitable to permit the enforcement of the bargain.²⁸

§ 659. **Legal and equitable duress.**—Duress, unlike fraud and mistake, was recognized by the common law as a ground for the avoidance of contracts; but the scope of the defense was somewhat technically confined. "It must be a threatening, beating, or imprisonment of the party himself, that doth make the deed, or his wife."²⁹ Courts of equity long since refused to be controlled by this narrow limitation, and established the rule that, "Any influence brought to bear upon a person entering into an agreement, or consenting to a disposal of property, which, having regard to the age and capacity of the party, the nature of the transaction, and all the circumstances of the case, appears to have been such as to preclude the exercise of free and deliberate judgment, is considered by courts of equity to be undue influence, and is a ground for setting aside the act procured by its employment."³⁰ At the present day there seems no reason why courts of law should not disregard the early common-law limitations as to what consti-

²⁵ *Preston v. Luck*, 27 Ch. D. 497; *Sawyer v. Hovey*, 3 Allen, 331, 333, 81 Am. Dec. 659.

²⁶ *Wald's Pollock, Contracts* (3d ed.), p. 616.

²⁷ See *Wald's Pollock, Contracts* (3d ed.), p. 579.

²⁸ See *Fairbanks v. Snow*, 145 Mass. 153, 154, 13 N. E. 596, 1 Am. St. Rep. 446.

²⁹ *Sheppard's Touchstone*, 61.

³⁰ *Wald's Pollock, Contracts* (3d ed.), 732.

tutes duress, and follow the same course that they have in regard to fraud and mistake; namely, adopt and enforce the equitable doctrine.³¹

§ 660. **Impossibility — How distinguished from mistake.**— The mere fact that performance of a contract is impossible does not prevent liability upon it. A man may guarantee performance of anything whatever, if he chooses to do so.³² Where impossibility is a defense to a contract, it is because in the absence of positive statements to the contrary in the contract the court will assume that the parties contracted on the assumption that the performance would remain possible. The nature of the defense of impossibility is very similar to that of mistake. Indeed many cases that are ordinarily classed as cases of impossibility should rather be classed under the heading of mistake. Impossibility of performance may be due either to a circumstance existing at the time the bargain was made, or to supervening circumstances which render performance in the future impossible though not impossible when the bargain was made. Impossibility of the former sort generally involves mistake. A typical illustration of this is where without the knowledge of the parties the goods to which the bargain relates have been destroyed or injured. The case has already been considered.³³ It should be observed, however, that the defense

³¹ See further Wald's *Pollock, Contracts* (3d ed.), 728 *et seq.*

³² *Clifford v. Watts*, L. R. 5 C. P. 577, per Willes, J.; *Bennett v. Morse*, 6 Colo. App. 122; *Reid v. Alaska Packing Assn.*, 43 Or. 429, 73 Pac. 337; *Stratford Gas Co. v. Stratford*, 26 Ont. App. 109.

³³ See *supra*, §§ 160, 656. A somewhat similar sort of case is that of *Clifford v. Watts*, L. R. 5 C. P. 577. There was here a lease of certain clay pits, with a covenant that the lessee should dig not less than 1,000 tons, nor more than 2,000 tons of potter's clay in each year, paying therefor a royalty of 2s 6d per ton. It turned out that there was insufficient clay to enable the lessee to perform his contract; and it was held that he

was not liable. It is to be observed that the contract might very easily have been written so as to amount to a covenant on the part of the lessee to pay a royalty at all events on a minimum number of tons. Mining leases in the latter form are often made. *Lehigh Zinc & Iron Co. v. Bamford*, 150 U. S. 665, 14 S. Ct. 219, 37 L. ed. 1215; *McDowell v. Hendrix*, 67 Ind. 513; *Valley City Mining Co. v. Prange*, 123 Mich. 211, 81 N. W. 1074; *Wharton v. Stoutenburgh*, 46 N. J. L. 151; *Timlin v. Brown*, 158 Pa. St. 606, 28 Atl. 236. Compare *Monnett v. Potts*, 10 Ind. App. 191, 37 N. E. 729. But leases having the same effect as that in *Clifford v. Watts* are also common. *Ridgely v. Conewago Iron Co.*, 53

of impossibility also exists in such a case. If one party to the transaction knew the true situation, there would be no mutual mistake, and if this party merely kept silence his conduct would not generally be held fraudulent, yet there can be no doubt that the ignorant promisor would be excused from performing his promise.

§ 661. **When impossibility excuses.**— It is not every case of impossibility which will excuse the promisor from liability even though he does not expressly undertake the risk of impossibility. There are, however, three cases where it is well settled that the promisor will be excused unless in the contract he expressly agreed to assume the risk of performance, whether possible or not; and a fourth case where the defense is sometimes allowed: 1. Impossibility due to a change in the law.³⁴ But impossibility owing to foreign law does not excuse.³⁵ Where, however, a foreign law making performance impossible existed at the time of the contract, if the parties were ignorant of it, both are excused; not on the ground of impossibility, but because it is a

Fed. Rep. 988; *Gribben v. Atkinson*, 64 Mich. 651, 31 N. W. 570; *Blake v. Lobb's Estate*, 110 Mich. 608, 68 N. W. 427; *Buchanan v. Layne*, 95 Mo. App. 148, 68 S. W. 952; *Cook v. Andrews*, 36 Ohio St. 174; *Brick Co. v. Pond*, 38 Ohio St. 65; *Muhlenberg v. Henning*, 116 Pa. St. 138, 9 Atl. 144; *Boyer v. Fulmer*, 176 Pa. St. 282, 35 Atl. 235. See also *Nordyke & Marmon Co. v. Kehlror*, 155 Mo. 643, 56 S. W. 287.

³⁴ *Baily v. De Crespigny*, L. R. 4 Q. B. 180, is a leading case. A covenant that land should not be built upon was held excused by the seizure of the land by eminent domain by a railroad company, under authority of an act of Parliament, for the purpose of building a railroad station. Impossibility created by law was also held an excuse for nonperformance in *Avery v. Bowden*, 5 E. & B. 714; *Reid v. Hoskins*, 5 E. & B. 729; *Board of Commissioners v. Young*, 59 Fed. Rep. 96, 108; *Dunham v. New*

Britain, 55 Conn. 378, 11 Atl. 354; *Scovill v. McMahon*, 62 Conn. 378, 26 Atl. 479, 21 L. R. A. 58, 36 Am. St. Rep. 350; *Kuhn v. Freeman*, 15 Kans. 423; *Gammon v. Blaisdell*, 45 Kans. 221, 25 Pac. 580; *Theobald v. Burtleigh*, 66 N. H. 574, 23 Atl. 367; *Brick Presb. Church v. City of New York*, 5 Cow. 538; *Kaiser v. Richardson*, 5 Daly, 301; *Jones v. Judd*, 4 N. Y. 412; *Burkhardt v. Georgia School Township*, 9 S. Dak. 315, 69 N. W. 16. Compare *Klauber v. Street Ry. Co.*, 95 Cal. 353, 30 Pac. 555; *Newport News Co. v. McDonald Brick Co.'s Assignee*, 109 Ky. 408, 59 S. W. 332; *Baker v. Johnson*, 42 N. Y. 126.

³⁵ *Barker v. Hodgson*, 3 M. & S. 267; *Spence v. Chodwick*, 10 Q. B. 517; *Kirk v. Gibbs*, 1 H. & N. 810; *Clifford v. Watts*, L. R. 5 C. P. 577, 586; *Cunningham v. Dunn*, 3 C. P. D. 443; *Jacobs v. Credit Lyonnais*, 12 Q. B. D. 589; *Ashmore v. Cox*, [1899] 1 Q. B. 436; *Tweedie Trading Co. v.*

mutual mistake of fact justifying relief.³⁶ When the law interposes to prevent the performance of a contract, but such prohibition is for a limited time, the obligation to perform the contract will be suspended while the law is in force, but the parties will not be discharged from performance.³⁷ 2. Impossibility due to the death or illness of one who by the terms of the contract is to do an act which requires his personal performance. Generally it is the promisor himself who is to render the personal performance, but the principle is also applicable to a case where the promisor agrees that a third person shall render such performance.^{37a} Most of the cases illustrating this kind of case are contracts for personal service, but the principle is applicable to a contract to make and sell goods, which by its terms of the bargain or nature, contract requires the seller's personal work, as a contract to paint a portrait.³⁸ 3. Impossibility due to the destruction or change in character of the goods to which the contract related. This kind of impossibility is specifically covered by section 8 of the Sales Act.³⁹ This principle has been extended to cases where the subject-matter of the sale was not in existence at the time of the bargain, and indeed never came into existence. For instance, an agreement to sell a future crop of specified land is excused if there is no crop.⁴⁰ But an agreement to sell a specified quantity of produce is not excused by the fact that the seller expected to

James P. McDonald Co., 114 Fed. Rep. 985; *Beebe v. Johnson*, 19 Wend. 500, 32 Am. Dec. 518.

³⁶ *Rosenbaum v. United States Credit System Co.*, 64 N. J. L. 34, 44 Atl. 966.

³⁷ *School District v. Howard*, (Neb.) 93 N. W. 666.

^{37a} *Spalding v. Rosa*, 71 N. Y. 40, 27 Am. Rep. 7.

³⁸ The following cases related to contracts of service, but sufficiently illustrate the general principle. *Boast v. Firth*, L. R. 4 C. P. 1; *Spalding v. Rosa*, 71 N. Y. 40, 27 Am. Rep. 7; *Blakely v. Sousa*, 197 Pa. St. 305, 47 Atl. 286, 80 Am. St. Rep. 821.

³⁹ *Supra*, § 163. See *supra*, § 164.

⁴⁰ *Howell v. Coupland*, 1 Q. B. D. 258. The defendant in this case agreed to sell 200 tons of potatoes "grown on land belonging to the said Robert Coupland in Whaplode." This was construed as meaning land belonging to the said Robert Coupland at the time the bargain was made. There were sixty-eight acres of such land which would, in an ordinary season, produce a much larger quantity than 200 tons. Without any fault on the part of the defendant a disease attacked the crop so that the whole marketable produce of the land was but a fraction of 200 tons. It was held that the defendant was ex-

fulfill the contract with the crop of particular land, and that crop without fault on his part is a failure.⁴¹ 4. Another kind of impossibility is due to the failure of the contemplated means of performance. It is cases of this sort that give rise to the greatest difficulty. It has indeed been said that "There are many cases holding that the continued existence of the means of performance, or of the subject-matter to which the contract relates, is an implied condition, and the rule seems to rest on the presumption that the parties necessarily intended an exception."⁴² And some cases bear out the general doctrine that the destruction of the contemplated means of performance is an excuse.⁴³ It is hard, however, to distinguish such cases from cases where it has been held that prevention by foreign law is not an excuse,⁴⁴ for in such cases also it is true that the contemplated means of performance have become impossible. So it has been held that prevention of the performance of a contract of shipment by the blockade of a port does not excuse the promisor.⁴⁵ Yet here, too, the contemplated means

cused. To somewhat the same effect, see *Browne v. United States*, 30 Ct. Cl. 124; *Ontario Fruit Assn. v. Cutting Packing Co.*, 134 Cal. 21, 66 Pac. 28, 53 L. R. A. 681, 86 Am. St. Rep. 231; *Losecco v. Gregory*, 108 La. 648, 32 So. 985.

⁴¹ *Anderson v. May*, 50 Minn. 280, 52 N. W. 530, 17 L. R. A. 555, 36 Am. St. Rep. 642. This was a contract to sell beans, and from the facts the court found that it fairly appeared that the beans were to be grown by the plaintiff, but that it could not be gathered that he was to grow the beans on any particular land. See also *Newell v. New Holstein Canning Co.*, 119 Wis. 635, 97 N. W. 487. Compare *Rice v. Weber*, 48 Ill. App. 573.

⁴² *Dolan v. Rodgers*, 149 N. Y. 489, 493, 44 N. E. 167.

⁴³ *Nickoll v. Ashton*, [1900] 2 Q. B. 289. In this case the seller had contracted to ship a cargo by the steamship "Orlando." At the time when performance should have been rendered, this steamship had been stranded without fault of the seller.

It was held that the latter was excused from the obligation of his contract. *Clarksville Land Co. v. Hariman*, 68 N. H. 374, 44 Atl. 527. In this case there was a contract to drive logs down a stream tributary to the Connecticut river. Owing to a fall in the water in the stream, performance became impossible. It was held that there could be no recovery. In *Stewart v. Stone*, 127 N. Y. 500, 28 N. E. 595, where the parties to a contract for the manufacture of goods assumed that they were to be made in a specific factory of the seller though the contract did not expressly so provide. It was held that destruction of the factory excused the seller. Such a case must be distinguished from one where the contract may be satisfied by goods manufactured in any factory. *Summers v. Hibbard*, 153 Ill. 102, 38 N. E. 899, 46 Am. St. Rep. 872; *Booth v. Rolling Mill Co.*, 60 N. Y. 487.

⁴⁴ See *supra*, note 35.

⁴⁵ *Ashmore v. Cox*, [1899] 1 Q. B. 436.

of performance have become impossible. It is probable that the tendency of the law is toward an enlargement of the defense of impossibility, and in any case where it may fairly be said that both parties assumed that the performance of the contract would involve the continued existence of a certain state of affairs, impossibility of performance due to a change in this condition of affairs will be an excuse. But the mere fact that the promisor is himself unable to perform a thing in itself possible is never an excuse;⁴⁶ and impossibility due to the fault of the promisor is also no defense.⁴⁷ On this principle if a corporation voluntarily winds up business it is liable for failing to fulfill its contracts.⁴⁸ And where a corporation is wound up by act of the State — if the action of the State was due to the fault of the corporation, it is liable.⁴⁹ It sometimes happens that because of excusable impossibility or other legal defense a contractor is unable to fulfill all of a number of similar obligations and yet could fulfill any one of these obligations if he totally disregarded the others. In such a case the contractor may apportion the possible performance *pro rata* among the several contracts, and be excused from further liability.⁵⁰

§ 662. **Bankruptcy.**—Bankruptcy may affect contracts to sell or sales of goods by destroying the title of the seller and thereby preventing performance. Such prevention, of course, does not discharge the contract, but the only relief which the solvent party can obtain is proof in bankruptcy of the damages he has suffered.

⁴⁶ *Jones v. United States*, 96 U. S. 24, 24 L. ed. 644; *Summers v. Hibbard*, 153 Ill. 102, 38 N. E. 899, 46 Am. St. Rep. 872.

⁴⁷ *Booth v. Rolling Mill Co.*, 60 N. Y. 487.

⁴⁸ *Yelland's Case*, L. R. 4 Eq. 350; *Re London, etc., Co.*, L. R. 7 Eq. 550; *Re Dale*, 43 Ch. D. 255; *Lovell v. St. Louis Ins. Co.*, 111 U. S. 264, 28 L. ed. 423; *Kalkhoff v. Nelson*, 60 Minn. 284, 62 N. W. 332; *Tiffin Glass Co. v. Stoehr*, 54 Ohio St. 157; *Seipel v. Insurance Co.*, 84 Pa. St. 47; *Potts v. Rose Valley Mills*, 167 Pa. St. 310, 31 Atl. 655. See also *Ex parte Machure*, L. R. 5 Ch. 737;

Ritter v. Mutual Life Ins. Co., 169 U. S. 139, 18 S. Ct. 300, 42 L. ed. 693.

⁴⁹ *Spader v. Mural Decoration Co.*, 47 N. J. Eq. 18, 20 Atl. 378; *Bolles v. Crescent Drug & Chemical Co.*, 53 N. J. Eq. 614, 32 Atl. 1061; *Rosenbaum v. United States Credit Co.*, 61 N. J. L. 543, 40 Atl. 591. But see *Malcomson v. Wappoo Mills*, 88 Fed. Rep. 680; *People of New York v. Globe Ins. Co.*, 91 N. Y. 174; *Lenoir v. Linville Improvement Co.*, 126 N. C. 922, 36 S. E. 185, 51 L. R. A. 146.

⁵⁰ *Oakman v. Boyce*, 100 Mass. 477.

All bankruptcy laws fix a day of cleavage between the title of the bankrupt and the title of the trustee in bankruptcy, or similar official, who succeeds to the bankrupt's title, in order to settle his estate. In the nature of things, it is impossible for a trustee in bankruptcy to take title until he is appointed.⁵¹ But when title vests in him it does so by relation to a previous time. That is, the title is treated as having existed from the earlier day. Accordingly, a transfer by the bankrupt during the intermediate period is invalidated. The date to which the title relates has varied in different systems of bankruptcy. Under the English law it has always been to the act of bankruptcy by virtue of which the debtor was adjudicated a bankrupt. Under the United States law of 1867, the relation was to the time of filing the petition. Under the present Bankruptcy Law it has not yet been authoritatively determined whether the rule is the same as under the law of 1867 or whether the time of adjudication is the date. The language of the statute is ambiguous,⁵² and the de-

⁵¹ *Schoenthaler v. Roskam*, 107 Ill. App. 427; *Fuller v. N. Y. Fire Ins. Co.*, 184 Mass. 12, 67 N. E. 879; *Rand v. Iowa Central Ry. Co.*, 186 N. Y. 58, 78 N. E. 574, 116 Am. St. Rep. 530.

⁵² Section 70 of the Bankruptcy Act provides that the trustee shall be "vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." It will be observed that the trustee gets at the time of adjudication all property

which "prior to the filing of the petition the bankrupt could have transferred." This seems clearly to state a relation back to the filing of the petition. It has been said that the first part of the extract quoted from the statute relates to when the property passes, and the later part relates to what property passes (*Re Pease*, 4 Am. B. Rep. 578; *Gray v. Chase*, 184 Mass. 444, 68 N. E. 676); but when the property which passes is defined only by the time when the bankrupt owned it, such a distinction becomes meaningless. It may, however, be urged in support of the view that the date of adjudication is the day of cleavage, that this is certainly true, under the words of the statute, in regard to documents, interests in patents, copyrights and trade-marks, powers, and property transferred in fraud of creditors.—the first four kinds of property enumerated in the passage quoted from the act, and it would certainly be unprecedented for the trustee to take title to different

cisions of the courts are not harmonious.⁵³ Under the previous bankruptcy statutes, English and American, the transfer of title to the bankrupt's property, as of the day of cleavage, has been effective absolutely against all the world, including *bona fide* purchasers without notice of the bankruptcy.⁵⁴ There is nothing in

kinds of property as of different days. On the other hand, it seems generally admitted that a claim is not provable unless it existed when the petition was filed (*Remington, Bankruptcy*), and though there is no absolute necessity that the day of cleavage for the transfer of property should be the same as that for the proof of claims, yet it is desirable that it should be. In England the day has always been different, but in England after-acquired property of an undischarged bankrupt passes to his assignees in bankruptcy. The truth is the drafting of the act is faulty. There is a contradiction in section 70, which may be settled as matter of positive law by a decision of the Supreme Court of the United States, but which, as matter of English, is not to be reconciled.

⁵³ The following decisions tend to show that the trustee's title relates to the filing of the petition. *Re Breslauer*, 121 Fed. Rep. 910; *Re Goldberg*, 121 Fed. Rep. 578; *Re Antigo Screen Door Co.*, 123 Fed. Rep. 249, 59 C. C. A. 248; *Re Briskman*, 132 Fed. Rep. 201; *Re Mertens*, 131 Fed. Rep. 507, 134 Fed. Rep. 101, 105; *Kinmouth v. Braeutigam* (N. J.), 52 Atl. 226. These decisions are in a large measure founded upon this *dictum* in *Mueller v. Nugent*, 184 U. S. 1, 14, 46 L. ed. 405, 22 S. Ct. 269. "It is as true of the present law as it was of that of 1867, that the filing of a patent in bankruptcy is a *caveat* to all the world, and in effect an attachment and injunction."

But the force of this *dictum* has been taken away by the statement in *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. ed. 782, that the *dictum* was made in regard to particular facts in the case "and did not involve any inquiry into the title of a trustee in bankruptcy as between himself and the bankrupt." Other authorities take the view that the property vests in the trustee as of the date of adjudication. See *Re Parish*, 122 Fed. Rep. 553; *Re Barton's Estate*, 144 Fed. Rep. 540, 542; *Re Mertens*, 144 Fed. Rep. 818, 823, 77 C. C. A. 473; *Re Cramond*, 145 Fed. Rep. 966; *Re Youngstron*, 153 Fed. Rep. 98, 82 C. C. A. 232; *Gray v. Chase*, 184 Mass. 444, 68 N. E. 676; *Kennedy v. Pierce's Loan Co.*, 100 Mo. App. 269, 73 S. W. 357.

⁵⁴ *Willis v. Freeman*, 12 East, 656; *Cole v. Coles*, 6 Hare, 517; *Re Calcott*, [1898] 2 Ch. 460; *Conner v. Long*, 104 U. S. 228, 232, 26 L. ed. 723; *Re Gregg*, 1 Hask. 173; *Re Lake*, 3 Biss. 204; *Howard v. Crompton*, 14 Blatchf. 328; *Sicard v. Buffalo, etc., Ry. Co.*, 15 Blatchf. 525; *Stevens v. Mechanics' Bank*, 101 Mass. 109, 3 Am. Rep. 325; *Palmer v. Jordan*, 163 Mass. 350, 40 N. E. 110; *Duffield v. Horton*, 73 N. Y. 218. It has been held that even an officer acting under the order of a court is liable for dealing in good faith with property of a bankrupt after the day to which the trustee's title has relation. *Cooper v. Chitty*, 1 Burr. 20; *Balme v. Hutton*, 1 Crompt. & M. 262; *Garland v. Car-*

the language of the present act which seems to warrant a different rule.⁵⁵ In a referee's decision,⁵⁶ however, the view was taken that between the time of the filing of the petition and the time of the adjudication purchasers and others dealing with the debtor are protected in titles they take from him;⁵⁷ and this view has found some support in other cases.⁵⁸ When, therefore, a sale to a bankrupt buyer is involved, it is essential to determine the day dividing his title from that of his trustee in bankruptcy. If the property and possession have passed to the buyer before that day, his trustee in bankruptcy takes the goods, and the seller has only a provable claim for the price. On the other hand, if the property in the goods vests in the bankrupt subsequently to the day of cleavage, he retains them as after-acquired property, and the seller has a right of action for the price against the bankrupt personally, but no provable claim against his estate. An unpaid seller who has sold goods to a bankrupt often desires to reclaim the goods instead of accepting a dividend on the price for them. If the seller still has a lien upon the goods, or by stoppage *in transitu* can regain a lien, he has the rights of any seller with a lien.⁵⁹ And if the sale was induced by fraud, as where the buyer intended when he bought the goods not to pay for them,⁶⁰ the seller may regain his title, for the title of the trustee in bankruptcy is subject to all equities and estoppels to which the bank-

lisle, 4 Cl. & Fin. 693. But the United States Supreme Court refused to follow these precedents. *Conner v. Long*, 104 U. S. 228, 26 L. ed. 723. See also *Johnson v. Bishop*, 1 Woolw. 324; *Bradley v. Frost*, 3 Dill. 457.

⁵⁵ If it be granted that the words of the statute: "Property which prior to the filing of the petition he could by any means have transferred," etc., define the class of property which passes, rather than the time when it passes; the language, nevertheless, would seem to include all property that the debtor had at the time of filing the petition and, therefore, any property which he may have subse-

quently transferred whether to a *bona fide* purchaser or not.

⁵⁶ *Re Pease*, 4 Am. B. Rep. 578.

⁵⁷ This in effect construes the words of the act quoted in the preceding note as meaning such of the property which, prior to the filing of the petition, he could by any means have transferred, etc., as he has left in his hands at the time of adjudication.

⁵⁸ Especially it was adopted by the Circuit Court of Appeals in New York in the case of *Re Mertens*, 144 Red. Rep. 818, 77 C. C. A. 473.

⁵⁹ See *supra*, § 501 *et seq.*

⁶⁰ As to this common form of fraud, see *supra*, § 637.

rupt himself was subject,⁶¹ excepting only cases of transfers in fraud of creditors. Such transfers, though valid against the grantor himself,⁶² are, by the express words of the Bankruptcy Statute, invalid against the trustee.⁶³ In case of a sale where the bankrupt is the seller, the question is similarly governed by the day of cleavage. Any transfer for value before that day is effectual. If title has passed to the buyer, even though possession has not, unless the retention of possession was fraudulent under the local law, the trustee in bankruptcy, standing as he does in the shoes of the bankrupt, must surrender the property. In case a contract to sell is executory at the time of the bankruptcy, the bankrupt has no legal excuse for his failure to perform his contract. Impossibility due to pecuniary disability never excuses. Accordingly the solvent contractor may prove in bankruptcy for the damages which he has suffered, whether the bankrupt is the seller⁶⁴ or buyer.⁶⁵ If the bankrupt is granted a discharge, he is thereby freed from personal liability upon the contract. The obligation of the solvent contractor is not discharged by the bankruptcy, unless the obligation on the part of the bankrupt was of such a personal character that performance could be rendered by him only. Except in this case the trustee in bankruptcy has a right to assume the performance of the bankrupt's duties under the contract himself and require performance from the solvent party.⁶⁶ But the latter is freed from any obligation to give credit which the contract may have imposed upon him.⁶⁷ The

⁶¹ *Yeatman v. Savings Institution*, 95 U. S. 764, 24 L. ed. 589; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. ed. 577; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. ed. 782. In the latter case, quoting from *Thompson v. Fairbanks*, the court said: "Under the present Bankruptcy Act, the trustee takes the property of the bankrupt in cases unaffected by fraud in the same plight and condition that the bankrupt himself held it, and subject to the equities impressed upon it in the hands of the bankrupt."

⁶² See *supra*, § 651.

⁶³ See quotation from *York Mfg. Co. v. Cassell*, in note 61 *supra*.

⁶⁴ *Re Stern*, 116 Fed. Rep. 604, 54 C. C. A. 60. A claim for breach of warranty is also provable against a bankrupt seller. *Re Grant Shoe Co.*, 130 Fed. Rep. 881, 66 C. C. A. 78.

⁶⁵ *Re Pettingill*, 137 Fed. Rep. 143.

⁶⁶ *Gibson v. Carruthers*, 8 M. & W. 321.

⁶⁷ *Bloxam v. Sanders*, 4 B. & C. 941; *Miles v. Gorton*, 2 C. & M. 504; *Grice v. Richardson*, 3 A. C. 319; *Ex parte Chalmers*, L. R. 8 Ch. 289; *Bloomer v. Bernstein*, L. R. 9 C. P. 588; *Morgan v. Bain*, L. R. 10 C. P.

only question of difficulty is concerning the duty of the solvent party to tender performance on the chance that the trustee in bankruptcy may wish to assume the contract. It has been held that bankruptcy does not discharge the solvent party from making such a tender.⁶⁸ It seems, however, that this rule is a harsh one. In most cases contracts made by bankrupts are not carried out; and it seems a justifiable assumption for the solvent party in a particular case that the contract is not going to be carried out in the absence of an assertion by the trustee in bankruptcy of his intention to adopt the contract.⁶⁹

15; *Re Phoenix Bessemer Steel Co.*, 4 Ch. D. 108; *Ex parte Stapleton*, 10 Ch. D. 586; *Ex parte Tondeur*, L. R. 5 Eq. 160; *Ex parte Agra Bank*, L. R. 9 Eq. 725; *Re Wheeler*, 2 Low. 252; *Rapplee v. Racine Seeder Co.*, 79 Iowa, 220, 228, 44 N. W. 363, 7 L. R. A. 139; *Brassel v. Troxel*, 68 Ill. App. 131; *Hobbs v. Columbia Brick Co.*, 157 Mass. 109, 31 N. E. 756; *Lennox v. Murphy*, 171 Mass. 370, 373, 50 N. E. 644; *New England Iron Co. v. Gilbert R. R. Co.*, 91 N. Y. 153; *Pardee v. Kanady*, 100 N. Y. 121, 2 N. E. 885; *Vandegrift v. Cowles Engineering Co.*, 161 N. Y. 435, 55 N. E. 941, 48 L. R. A. 685; *Diem v. Koblitz*, 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531.

⁶⁸ *Gibson v. Carruthers*, 8 M. & W. 321. In this case assignees in bankruptcy sued one who had contracted to sell goods to the bankrupt to be shipped at Odessa to London. The defendants pleaded that the assignees

did not, within a reasonable time after bankruptcy and after the arrival of the vessel at Odessa, give notice to the defendant of their intention to adopt the contract. On demurrer the plea was held bad, the court, Abinger dissenting, holding that the duty was upon the seller to tender the goods, not upon the assignees in bankruptcy to announce before tender their adoption of the contract.

⁶⁹ See further as to the duty of a solvent contractor to tender performance to an insolvent contractor or his assignee, *Ex parte Tondeur*, L. R. 5 Eq. 160; *Ex parte Agra Bank*, L. R. 9 Eq. 725; *New England Iron Co. v. Gilbert R. R. Co.*, 91 N. Y. 153; *Pardee v. Kanady*, 100 N. Y. 121, 2 N. E. 885; *Vandegrift v. Cowles Engineering Co.*, 161 N. Y. 435, 55 N. E. 941, 48 L. R. A. 685; *Diem v. Koblitz*, 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531.

CHAPTER XXII.

ILLEGALITY.

Section 663. Illegality.

- 664. Gaming contracts.
- 665. Sales on Sunday.
- 666. Effect of sales on Sunday.
- 667. Ratification and adoption of Sunday contracts.
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- 676. Time of illegality, when important.
- 677. Executory and executed illegal contracts.
- 678. Rescission of illegal contracts.
- 679. Rescission allowed when illegal agreement unexecuted.
- 680. Parties not *in pari delicto*.
- 681. Enforcement of legal portion of illegal contract.

§ 663. **Illegality.**—It is commonly said that illegal contracts are void. This statement, however, is clearly inaccurate. It is true that a court could only under very exceptional circumstances enforce specifically an illegal contract,¹ but the rule of public policy that forbids an action of damages for breach of an illegal contract is not based on the impropriety of compelling the defendant to pay the damages; in itself that would generally be a desirable thing. When relief is denied it is because the plaintiff is a wrongdoer, and to such a person the law denies relief. In a statement of Lord Mansfield frequently quoted in this connection, the matter is correctly put: "The principle of public policy is

¹ In *Seattle Electric Co. v. Snoqualmie Falls Power Co.*, 40 Wash. 380, 82 Pac. 713, 1 L. R. A. (N. S.) 1032, the court for a brief period specifically enforced a contract which was held illegal since designed to create a monopoly. A refusal to enforce the contract would have involved the sudden cutting off of the

supply of electricity upon which the transportation and lighting systems of the city of Seattle were dependent. The court held that the public interest required that the contract be performed until such time as an adequate supply of electricity could be otherwise procured.

this: *Ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causa* or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*."² It will be observed that Lord Mansfield rests the denial of recovery in an illegal contract upon the turpitude of the plaintiff, not the nature of the transaction.³ That this is the principle upon which relief is denied is proved by the fact that if the plaintiff is wholly innocent recovery is allowed though the contract is illegal. Such a case arises where the illegality is due to a circumstance of which the plaintiff is justifiably ignorant.⁴ In some

² *Holman v. Johnson*, Cowp. 341, 343.

³ See also *e. g.*, *Levinson v. Boas*, 150 Cal. 185; *s. c.*, *sub nom.*, *Levinson v. Boas*, 88 Pac. 825, 12 L. R. A. (N. S.) 575.

⁴ The commonest illustration is that of a contract to marry made by one already married. It is well settled that an action for breach of promise will lie in favor of a plaintiff who was ignorant of the defendant's previous marriage. *Millwood v. Littlewood*, 5 Ex. 775; *Wild v. Harris*, 7 C. B. 999; *Daniel v. Bowles*, 2 C. & P. 553; *Paddock v. Robinson*, 63 Ill. 99, 100, 14 Am. Rep. 112; *Davis v. Pryor*, 3 Ind. Terr. 396; *Kelley v. Riley*, 106 Mass. 339, 8 Am. Rep. 336; *Stevenson v. Pettis*, 12 Phila. 468; *Coover v. Davenport*, 1 Heisk. 368. In *Blattmacher v. Saal*, 29 Barb. 22, and *Pollock v. Sullivan*, 53 Vt. 507, 38 Am. Rep. 702, it was held that an action of tort for deceit

would lie, but not an action for breach of contract. But the decisions allowing such an action seem correctly decided. The same principle may arise in a case of sales. *Waugh v. Morris*, L. R. 8 Q. B. 202. In this case there was a contract to ship a cargo of hay, and a term of the bargain was that "all cargoes should be brought and taken from the ship alongside." By an order in council this was illegal at the time. The contract was made in France under the assumption that it could be legally performed. It was held that the illegality did not prevent the enforcement of the contract. And generally where the illegality of a contract results from facts of which the plaintiff is excusably ignorant, he is allowed relief. *Hotchkis v. Dickson*, 2 Bligh, 305, 348; *Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. ed. 347; *Pullman Palace Car Co. v. Central Transportation Co.*, 65 Fed. Rep.

cases also where a refusal to enforce a contract would produce the very effect which the law seeks to guard against, a corporation is allowed to enforce it, although it was particularly prohibited and made illegal. Thus, for the security of depositors and others, banks are prohibited from entering into certain kinds of loans or purchases. When a contract of this sort has been entered into, however, should the corporation be refused a right of recovery the result would be the impairment of the assets of the bank which the law seeks to prevent, and, therefore, the bank is allowed to recover.⁵ Doubtless a statute may make a contract or sale absolutely void, and instances of such statutes may be found, but such a construction will not be adopted unless plainly required by express language or public necessity. Generally the same result is reached when it is said that a guilty party to an illegal bargain cannot enforce it as when it is said that the illegal contract itself is void, but it is believed that the true reason for the decisions is that which has just been suggested, and that this reason cannot safely be disregarded. The kinds of illegal contracts which most affect the law of sales may now be considered.

158; *Mobile, etc., R. R. Co. v. Dis-
mukes*, 94 Ala. 131, 10 So. 289, 17
L. R. A. 113 (but see *Gulf, etc., Ry.
Co. v. Hefley*, 158 U. S. 98, 39 L. ed.
910; *Southern Ry. Co. v. Harrison*,
119 Ala. 539, 24 So. 552, 72 Am. St.
Rep. 936; *Gerber v. Wabash R. R.
Co.*, 63 Mo. App. 145; *Wyrick v.
Missouri, etc., Ry. Co.*, 74 Mo. App.
406); *Musson v. Fales*, 16 Mass. 332;
Emery v. Kempton, 2 Gray, 257;
Beram v. Kruscal, 18 N. Y. Misc.
Rep. 479; *Burkholder v. Beetem's
Adm.*, 65 Pa. St. 496. See also *Harse
v. Pearl Life Assur. Co.*, [1903] 2
K. B. 92; *Cranson v. Goss*, 107 Mass.
439, 9 Am. Rep. 45; *Miller v. Hirsch-
berg*, 27 Or. 522, 40 Pac. 506. Com-
pare *Webster v. Sanborn*, 47 Me. 471.

⁵ Such contracts were enforced under various bank laws in *Gold-Mining
Co. v. National Bank*, 96 U. S. 640,
24 L. ed. 648; *National Bank v.
Matthews*, 98 U. S. 621, 25 L. ed.

188; *National Bank v. Whitney*, 103
U. S. 99, 26 L. ed. 443; *Reynolds v.
Crawfordsville Nat. Bank*, 112 U. S.
405, 5 S. Ct. 213, 28 L. ed. 733;
*Hanover Bank v. First Nat. Bank of
Burlingame*, 109 Fed. Rep. 421, 48
C. C. A. 482, 487; *Holden v. Upton*,
134 Mass. 177. And see *Savings
Bank v. Burns*, 104 Cal. 473; *Union
Mining Co. v. Rocky Mountain Nat.
Bank*, 1 Colo. 531; *Voltz v. National
Bank*, 158 Ill. 532; *Benton County
Bank v. Boddicker*, 105 Iowa, 548, 75
N. W. 632, 45 L. R. A. 321, 67 Am.
St. Rep. 310; *Lester v. Howard Bank*,
33 Md. 558, 3 Am. Rep. 211; *Allen
v. First Nat. Bank*, 23 Ohio St. 97;
First Nat. Bank v. Smith, 8 S. Dak.
7, 65 N. W. 437; *Wroten's Assignee
v. Armat*, 31 Gratt. 228. A similar
decision under Insurance Laws is
*Bowditch v. New England Mutual
Ins. Co.*, 141 Mass. 292, 4 N. E. 798.
See also *infra*, § 672.

§ 664. **Gaming contracts.**— Sales and contracts to sell are not in their nature wagers, but the machinery of stock exchanges and produce exchanges has been used for the purpose of speculation in making bargains which have been held to amount to wagers. Statutes in some jurisdictions have increased the severity of the rules of the common law. Aside from such statutes, the mere fact that transactions are entered upon a margin does not make them gaming contracts,⁶ though they are made such by statute in California.⁷ Nor is a contract giving one party or the other an option to carry out the transaction or not, at pleasure, a wager. It is legal unless forbidden by statute.⁸ In Illinois and perhaps other States, however, such statutes have been passed.⁹ A contract to sell goods in the future, which the seller does not own at the time, is, aside from statute, not only legal but common. In some juris-

⁶ *Universal Stock Exchange v. Stevens*, 66 L. T. (N. S.) 612; *Forget v. Ostigny*, [1895] A. C. 318; *Union Nat. Bank v. Carr*, 15 Fed. Rep. 438; *Clews v. Jamieson*, 182 U. S. 461, 21 S. Ct. 845, 44 L. ed. 1183; *Hatch v. Douglas*, 48 Conn. 116, 40 Am. Rep. 154; *Skiff v. Stoddard*, 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L. R. A. 102; *Corbett v. Underwood*, 83 Ill. 324, 25 Am. Rep. 392; *Oldershaw v. Knowles*, 101 Ill. 117; *Perin v. Parker*, 126 Ill. 201, 18 N. E. 747, 2 L. R. A. 336, 9 Am. St. Rep. 571; *Fisher v. Fisher*, 113 Ind. 474, 15 N. E. 832; *Sondheim v. Gilbert*, 117 Ind. 71, 18 N. E. 687, 5 L. R. A. 432, 10 Am. St. Rep. 23; *Ball v. Campbell*, 30 Kans. 177, 2 Pac. 165; *Sawyer v. Taggart*, 14 Bush, 727; *Durant v. Burt*, 98 Mass. 161; *Bullard v. Smith*, 139 Mass. 492, 2 N. E. 86; *Bingham v. Scott*, 177 Mass. 208, 58 N. E. 687; *Clay v. Allen*, 63 Miss. 426; *Stenton v. Jerome*, 54 N. Y. 480; *Gruman v. Smith*, 81 N. Y. 25; *Minor v. Beveridge*, 141 N. Y. 399, 36 N. E. 404, 38 Am. St. Rep. 804; *Taylor's Estate*, 192 Pa. St. 304, 309, 313, 43 Atl. 973, 975, 73 Am. St. Rep. 812;

Smyth v. Glendinning, 194 Pa. St. 550, 45 Atl. 364; *Winward v. Lincoln*, 23 R. I. 476, 51 Atl. 106, 64 L. R. A. 160.

⁷ *Cashman v. Root*, 89 Cal. 373, 26 Pac. 883, 12 L. R. A. 511, 23 Am. St. Rep. 432; *Wetmore v. Barrett*, 103 Cal. 246, 37 Pac. 140; *Sheey v. Shinn*, 103 Cal. 325, 37 Pac. 393; *Rued v. Cooper*, 119 Cal. 463, 51 Pac. 704; *Parker v. Otis*, 130 Cal. 322, 62 Pac. 571, 927, 92 Am. St. Rep. 56.

⁸ *Union Nat. Bank v. Carr*, 15 Fed. Rep. 438; *Hanna v. Ingram*, 93 Ala. 482, 9 So. 621; *Godman v. Meixsel*, 65 Ind. 32; *Mason v. Payne*, 47 Mo. 517; *Pieronnet v. Lull*, 10 Neb. 457, 6 N. W. 759; *Bigelow v. Benedict*, 70 N. Y. 262, 26 Am. Rep. 573; *Harris v. Tumbridge*, 83 N. Y. 92, 38 Am. Rep. 398; *Lester v. Buel*, 49 Ohio St. 240, 252, 30 N. E. 821, 34 Am. St. Rep. 556; *Kirkpatrick v. Bonsall*, 72 Pa. St. 155.

⁹ See as to construction of the Illinois statutes, *Ubben v. Binnian*, 182 Ill. 508, 85 N. E. 552; *Loeb v. Stern*, 198 Ill. 371, 64 N. E. 1043, and cases cited.

dictions, however, such contracts also are made illegal.¹⁰ The test adopted in the absence of statute distinguishes between contracts to buy and sell in which an actual delivery of the property is contemplated, and similar contracts in which it is contemplated merely that a settlement shall be made between the parties based on fluctuations in the market price. A contract of the former kind is legal; one of the latter kind is a wagering contract, and illegal.¹¹ The importance of the distinction suggested in the preceding section is shown in wagering contracts of this sort; for if either of the parties contracts in good faith, intending that the goods shall be actually delivered, he is entitled to the benefit of his contract, no matter what may have been the secret purpose or intention of the other party.¹² It is not a wagering contract to contract to pay a price for property which shall vary according to some external

¹⁰ *Fortenbury v. State*, 47 Ark. 188, 1 S. W. 58; *Johnson v. Miller*, 67 Ark. 172, 53 S. W. 1052; *Branch v. Palmer*, 65 Ga. 210; *Moss v. Exchange Bank*, 102 Ga. 808, 30 S. E. 267; *Singleton v. Bank of Monticello*, 113 Ga. 527, 38 S. E. 947; *Lemonius v. Mayer*, 71 Miss. 514, 14 So. 33; *Dillard v. Brenner*, 73 Miss. 130, 18 So. 933; *Violett v. Mangold* (Miss.), 27 So. 875; *Connor v. Black*, 119 Mo. 126, 24 S. W. 184, 132 Mo. 150, 33 S. W. 783; *Edwards Brokerage Co. v. Stevenson*, 160 Mo. 516, 61 S. W. 617; *Staples v. Gould*, 9 N. Y. 520; *Gist v. Western Union Tel. Co.*, 45 S. C. 344, 23 S. E. 143; *Riordan v. Doty*, 50 S. C. 537, 27 S. E. 939; *Saunders v. Phelps Co.*, 53 S. C. 173, 31 S. E. 54.

¹¹ *Harvey v. Merrill*, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159, and authorities cited.

¹² *Clarke v. Foss*, 7 Biss. 540; *Bartlett v. Smith*, 13 Fed. Rep. 263; *Kirkpatrick v. Adams*, 20 Fed. Rep. 287; *Hentz v. Jewell*, 20 Fed. Rep. 592; *Bennett v. Covington*, 22 Fed. Rep. 816; *Bangs v. Hornick*, 30 Fed. Rep. 97; *Lehman v. Feld*, 37 Fed. Rep.

852; *Hill v. Levy*, 98 Fed. Rep. 94; *Logan v. Musick*, 81 Ill. 415; *Scanlon v. Warren*, 169 Ill. 142, 48 N. E. 410; *Vigel v. Gattton*, 61 Ill. App. 98; *Whitesides v. Hunt*, 97 Ind. 191, 49 Am. Rep. 441; *Sondheim v. Gilbert*, 117 Ind. 71, 18 N. E. 687, 5 L. R. A. 432, 10 Am. St. Rep. 23; *Murray v. Ocheltree*, 59 Iowa, 435, 13 N. W. 411; *Sawyer v. Taggart*, 14 Bush, 727; *Rumsey v. Berry*, 65 Me. 570, 573; *Dillaway v. Alden*, 88 Me. 230, 33 Atl. 981; *Barnes v. Smith*, 159 Mass. 344, 34 N. E. 403; *Davy v. Bangs*, 174 Mass. 238, 54 N. E. 536; *Gregory v. Wendell*, 40 Mich. 432; *Donovan v. Daiber*, 124 Mich. 49, 82 N. W. 848; *Clay v. Allen*, 63 Miss. 426; *Cockrell v. Thompson*, 85 Mo. 510; *Crawford v. Spencer*, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745; *Edwards Brokerage Co. v. Stevenson*, 160 Mo. 516, 61 S. W. 617; *Deierling v. Sloop*, 67 Mo. App. 446; *Rogers v. Mariott*, 59 Neb. 759, 82 N. W. 21; *Amsden v. Jacobs*, 75 Hun, 311; *affd.*, without opinion, 148 N. Y. 762, 43 N. E. 985; *Dows v. Glaspel*, 4 N. Dak. 251, 60 N. W. 60.

circumstance if that external circumstance is something which affects the value of the property.¹³

§ 665. **Sales on Sunday.**—The prohibition of certain employments or undertakings on Sunday is purely statutory. Aside from such statutes, sales or contracts to sell, as well as other contracts legal in themselves, are valid.¹⁴ Statutes have, however, been passed prohibiting certain transactions on Sunday. The terms of these statutes vary and, though generally sufficiently wide to include sales, they are not universally so. A statute forbidding in effect secular labor and business makes all sales and contracts to sell, as well as other bargains, illegal.¹⁵ But if only business within a person's "ordinary calling" is forbidden, a sale or contract to sell which is outside such calling is not forbidden.¹⁶ So in some States only public sales and publicly offering to sell are forbidden.¹⁷ And still other statutes are directed merely against labor.¹⁸

¹³ See *supra*, § 169.

¹⁴ *Drury v. Defontaine*, 1 Taunt. 131; *Richardson v. Goddard*, 23 How. (U. S.) 28, 42, 16 L. ed. 412; *Richmond v. Moore*, 107 Ill. 429, 47 Am. Rep. 445; *Ward v. Ward*, 75 Minn. 269, 77 N. W. 965; *McKee v. Jones*, 67 Miss. 405, 7 So. 348; *Rodman v. Robinson*, 134 N. C. 503, 47 S. E. 19, 65 L. R. A. 682, 101 Am. St. Rep. 877; *Bloom v. Richards*, 2 Ohio St. 387; *State v. Thomas*, 61 Ohio St. 444, 465, 56 N. E. 276 48 L. R. A. 459; *Brown v. Browning*, 15 R. I. 422, 7 Atl. 403, 2 Am. St. Rep. 908; *Adams v. Gay*, 19 Vt. 358.

¹⁵ *Towle v. Larrabee*, 26 Me. 464; *Pattee v. Greely*, 13 Metc. 284; *Cranso v. Goss*, 107 Mass. 439, 441, 9 Am. Rep. 45; *Durant v. Rhener*, 26 Minn. 362, 4 N. W. 610; *Varney v. French*, 19 N. H. 233; *Jameson v. Carpenter*, 68 N. H. 62, 36 Atl. 554; *Nibert v. Baghurst*, 47 N. J. Eq. 201, 20 Atl. 252; *Northrup v. Foot*, 14 Wend. 248; *Troewert v. Decker*, 51 Wis. 46, 8 N. W. 26, 37 Am. Rep. 808.

¹⁶ *Drury v. Defontaine*, 1 Taunt. 131; *Bloxsome v. Williams*, 3 B. & C. 232; *Smith v. Sparrow*, 4 Bing. 84; *Scarfe v. Morgan*, 4 M. & W. 270; *Swann v. Swann* (C. C.), 21 Fed. Rep. 299; *Sanders v. Johnson*, 29 Ga. 526; *Hazard v. Day*, 14 Allen, 487, 92 Am. Dec. 790; *Allen v. Gardiner*, 7 R. I. 22; *Hellams v. Abercrombie*, 15 S. C. 110, 40 Am. Rep. 684; *Mills v. Williams*, 16 S. C. 592; *Amis v. Kyle*, 2 Yerg. 31, 24 Am. Dec. 463. "Labor or work of their callings" were the words of the earliest statute. 29 Charles II, c. 27.

¹⁷ *Moore v. Murdock*, 26 Cal. 514; *Ward v. Ward*, 75 Minn. 269, 77 N. W. 965; *Holden v. O'Brien*, 86 Minn. 297, 90 N. W. 531; *Boynton v. Page*, 13 Wend. 425; *Batsford v. Every*, 44 Barb. 618. Such a law was held constitutional in *State v. Weiss*, 97 Minn. 125, 105 N. W. 1127.

¹⁸ In *Reynolds v. Stevenson*, 4 Ind. 619, this was held broad enough to include sales. See also *Shaw v. Williams*, 87 Ind. 158, 44 Am. Rep. 756. But though in a broad sense of the words "labor or work," a sale or con-

§ 666. **Effect of sales on Sunday.**— If it be assumed that a given sale or contract to sell is forbidden by the local law, it then becomes important to determine what is the effect, if any, of the transaction. A contract thus forbidden, which is wholly executory on both sides, clearly can be enforced by neither party.¹⁹ But it may be supposed that the bargain has been executed on one side or the other, at least in part. By far the most common case is where goods have been sold and the property in them passed, so far as it is possible for the parties to bring about that result on Sunday. If the effect of the transaction is completely nullified by its illegality, no property can pass and, consequently, the seller, even though the goods have been delivered, may later sue in trover or replevin to recover them. This result has been reached in some States.²⁰ But the criticisms which have been previously made upon the theory that illegal contracts are wholly void²¹ apply here with peculiar force. If it were true that such a sale was absolutely void, a *bona fide* purchaser from one who bought on Sunday would get no title—a result much to be deprecated. In fact the law seems to recognize that except as between the parties themselves the transaction is effectual,²² and is followed by the same conse-

tract to sell may be included, it seems that a statute making illegal what was not illegal at common law should be strictly construed. Accordingly sales and contracts to sell generally have been held not within such a statute. *Richmond v. Moore*, 107 Ill. 429, 47 Am. Rep. 445; *Eden v. People*, 161 Ill. 296, 300, 43 N. E. 1108, 32 L. R. A. 659, 52 Am. St. Rep. 365; *Birks v. French*, 21 Kans. 238; *Roberts v. Barnes*, 127 Mo. 405, 30 S. W. 113, 48 Am. St. Rep. 640; *Horacek v. Keebler*, 5 Neb. 355; *Bloom v. Richards*, 2 Ohio St. 387.

¹⁹ *Chestnut v. Harbaugh*, 78 Pa. St. 473, and cases in this section *passim*.

²⁰ *Dodson v. Harris*, 10 Ala. 569; *Ladd v. Rogers*, 11 Allen, 209 (practically overruled on this point by *Myers v. Meinrath*, 101 Mass. 366, 3 Am. Rep. 368); *Tucker v. Mowrey*,

12 Mich. 378; *Winfield v. Dodge*, 45 Mich. 355, 7 N. W. 906, 40 Am. Rep. 476; *Adams v. Gay*, 19 Vt. 358. In most of these decisions the court seems not so much to hold the transaction void as voidable on return of the consideration.

²¹ See *supra*, § 663.

²² Thus one who claims ownership of goods bought on Sunday by the defendant must establish a title superior to that of him of whom the defendant bought. *Moore v. Kendall*, 2 Pinn. 99, 52 Am. Dec. 145. Thus an action may be maintained on a negotiable note made on Sunday, but dated on a secular day by one who purchased it in good faith. *Begbie v. Levi*, 1 Cr. & Jerv. 180; *Saltmarsh v. Tuthill*, 13 Ala. 390, 406; *Bank of Cumberland v. Mayberry*, 48 Me. 198; *Cranson v. Goss*, 107

quences as if entered into upon a secular day except that all remedy is denied to either of the wrongdoers.²³ Accordingly the buyer becomes the owner of the goods and may retain them, though the consequence of so holding is to permit him to obtain the benefit of the transaction without obligation to surrender the goods,²⁴ or to pay either the price,²⁵ or the

Mass. 439, 9 Am. Rep. 45; *Vinton v. Peck*, 14 Mich. 287. Other applications of the same principle may be found. In *Tennent-Stribling Shoe Co. v. Roper*, 94 Fed. Rep. 739, 36 C. C. A. 455, it was held that a debtor when sued by an assignee of his creditor could not set up that the assignment was made on Sunday. In *Richardson v. Kimball*, 28 Me. 463, the defendant when sued in trover was not allowed the defense that the plaintiff's title was obtained on Sunday. So creditors of one who has sold and delivered property on Sunday cannot seize it as his either in the hands of the buyer. *Blass v. Anderson*, 57 Ark. 483, 22 S. W. 94; *Greene v. Godfrey*, 44 Me. 25; *Foster v. Wooten*, 67 Miss. 540, 7 So. 501; *Chestnut v. Harbaugh*, 78 Pa. St. 473. Or of a purchaser from the buyer. *Horton v. Bufinton*, 105 Mass. 399.

²³ This was well explained in *Smith v. Bean*, 15 N. H. 577, 578, *Parker, C. J.*, saying: "It is generally said of such an illegal contract that it is void. *Drury v. Defontaine*, 1 Taunt. 131; *Allen v. Deming*, 14 N. H. 133, 137, 138, 40 Am. Dec. 179, and cases there cited; *Lewis v. Welch*, 14 N. H. 294, 298. If this were so, and the contract, in the broad sense of the term, were void, no property would pass by it; the vendor might reclaim the property at will, and being his property it would be subject to attachment and levy by his creditors in the same manner as if the attempt to sell had

never been made. But this is not what is intended by such phraseology. The transaction being illegal, the law leaves the parties to suffer the consequences of their illegal acts. The contract is void, so far as it is attempted to be made the foundation of legal proceedings. The law will not interfere to assist the vendor to recover the price. The contract is void for any such purpose. It will not sustain an action by the vendee upon any warranty or fraud in the sale. It is void in that respect. The principle shows that the law will not aid the vendor to recover the possession of the property if he have parted with it. The vendee has the possession, as of his own property, by the assent of the vendor; and the law leaves the parties where it finds them. If the vendor should attempt to retake the property without process, the law, finding that the vendee had a possession which could not be controverted, would give a remedy for the violation of that possession. When then it is said that the contract is void, the language is used with reference to the question whether there is any legal remedy upon it. See *Fennell v. Ridler*, 5 B. & C. 406, opinion of *Bayley, J.*"

²⁴ *Kinney v. McDermot*, 55 Iowa, 674, 39 Am. Rep. 191; *Kelley v. Cosgrove*, 83 Iowa, 229; *Myers v. Meinrath*, 101 Mass. 366, 3 Am. Rep. 368; *Smith v. Bean*, 15 N. H. 577; *Foster v. Wooten*, 67 Miss. 540, 7 So. 501; *Troewert v. Decker*, 51 Wis. 46, 8 N. W. 26, 37 Am. Rep. 808.

value of the goods.²⁶ If the property in the goods has passed but possession has not been delivered, it seems that the buyer would be unable to enforce any right to the property, for in order to show the seller's obligation to deliver the buyer would be obliged to rely upon the illegal contract. If, however, the seller delivered the property on Sunday and afterward retook it, the buyer could sue for the wrong, for he would then be relying on a violation of a right to the continuance of his possession.²⁷ Where a seller has partially performed the bargain, as by delivering part of the goods, the same principle seems applicable. The property in the goods delivered and the possession are in the buyer, but he is under no obligation to pay for what he has received, nor can he enforce any obligation of the seller to deliver the remainder.²⁸

In Maine this rule was altered by statute in 1880, which enacted that one who receives a valuable consideration for a contract made on Sunday shall not defend against it on that ground until he restores the consideration. See *Bridges v. Bridges*, 93 Me. 557, 45 Atl. 827. Such a statute sets up a different rule from that applicable to illegal bargains generally. Under it executory contracts cannot be enforced, but partially executed ones become enforceable unless rescinded by the restoration of the consideration received. Such a rule may be appropriate in a community where a sale on Sunday is not regarded as so wrongful in its nature as to justify the application of the ordinary rule that parties to illegal bargains are left by the law without remedy, whatever their position may be. A result somewhat similar to that reached in Maine by statute seems to have been reached in some other States without the aid of a statute like the Maine act of 1880. *Dodson v. Harris*, 10 Ala. 566; *Tucker v. Mowrey*, 12 Mich. 378; *Adams v. Gay*, 19 Vt. 358.

²⁶ *Wadsworth v. Dunham*, 117 Ala.

661, 23 So. 699; *Pike v. King*, 16 Iowa, 49; *Thompson v. Williams*, 58 N. H. 248; *Foreman v. Ahl*, 55 Pa. St. 325.

²⁷ *Ladd v. Rogers*, 11 Allen, 209; *Troewert v. Decker*, 51 Wis. 46, 8 N. W. 26, 37 Am. Rep. 808. The Maine statute referred to in note 24 changes this result, and the decisions which are cited in the same note as reaching a result like that produced by the statute are also opposed.

²⁸ *Kinney v. McDermot*, 55 Iowa, 674, 8 N. W. 656, 39 Am. Rep. 191. In this case the defendant had in the absence of the plaintiff, on a week day, returned to the plaintiff's stable a horse which he had received on a Sunday in exchange for a horse of his own. This latter horse the defendant took from the plaintiff's stable when he returned the horse he had received. The plaintiff was allowed to maintain replevin for the horse taken. He was thus left in possession of both horses. See also *Thompson v. Williams*, 58 N. H. 248.

²⁹ See *Wadsworth v. Dunham*, 117 Ala. 661, 23 So. 699; *Stewart v. Thayer*, 168 Mass. 519, 47 N. E. 420, 60 Am. St. Rep. 407; *Foreman v. Ahl*, 55 Pa. St. 325.

If the price were paid in whole or in part, but the property not delivered, the same principles would have to be applied as control a case where the seller has performed and the buyer has not.²⁹ If it is illegal to make a bargain on Sunday, no redress can be granted for fraud in inducing a party to such a bargain to enter into it.³⁰

§ 667. **Ratification and adoption of Sunday contracts.**— Frequently a bargain made on Sunday is subsequently recognized, adopted, or ratified by the parties either expressly or by carrying out on a secular day some portion of the contract made on the previous Sunday. The effect of such ratification or adoption must depend on the legal effect of the original transaction. If goods have been sold and delivered on Sunday in a jurisdiction which holds that the property thereby passes to the buyer and also holds that his obligation to pay the price cannot be enforced, there seems no consideration to support an express promise or other subsequent recognition of the contract by the buyer.³¹ If the goods have not been delivered on Sunday, the situation is simpler. Although the property may have passed to the buyer,

²⁹ See *Tucker v. West*, 29 Ark. 386.

³⁰ *Grant v. McGrath*, 56 Conn. 333, 15 Atl. 370; *Gunderson v. Richardson*, 56 Iowa, 56, 8 N. W. 683, 41 Am. Rep. 81; *Robeson v. French*, 12 Metc. 24, 45 Am. Dec. 236. The contrary decision of *Adams v. Gay*, 19 Vt. 358, must be defended, if at all, on the ground that bargains made on Sunday, though unenforceable, are not so far in violation of public policy as to require the application of the ordinary rules governing illegal contracts. Certainly a burglar could not be allowed to sue a companion for fraud in inducing him to enter into a house-breaking enterprise by his fraudulent misrepresentations of the spoil that could be obtained. See further *infra*, § 680.

³¹ Parke, B., therefore, in *Simpson v. Nicholls*, 3 M. & W. 240, 244, criticized the case of *Williams v. Paul*, 6 Bing. 653, in which it had

been held that a subsequent promise of the buyer to pay for the goods was enforceable. Parke argued that the property in the goods had passed by the original transaction and that, therefore, the subsequent promise was without consideration. See also *Shippey v. Eastwood*, 9 Ala. 198; *Grant v. McGrath*, 56 Conn. 333, 15 Atl. 370; *Pope v. Linn*, 50 Me. 83; *Tillock v. Webb*, 56 Me. 100; *Day v. McAllister*, 15 Gray, 433; *Stewart v. Thayer*, 168 Mass. 519, 520, 47 N. E. 420, 60 Am. St. Rep. 407; *Acme Electrical Illustrating, etc., Co. v. Van Derbeck*, 127 Mich. 341, 86 N. W. 786; *Boutelle v. Melendy*, 19 N. H. 196, 49 Am. Dec. 152; *Riddle v. Keller*, 61 N. J. Eq. 513, 48 Atl. 818; *Vinz v. Beatty*, 61 Wis. 645, 21 N. W. 787. But see *Melchoir v. McCarty*, 31 Wis. 252, 256, 11 Am. Rep. 605; *Williams v. Lane*, 87 Wis. 152, 158, 58 N. W. 77.

he cannot successfully assert his right to the goods because the bargain is unenforceable. Therefore, subsequent delivery of the goods by the seller is sufficient consideration for a promise at the time by the buyer, and in the absence of an express promise of payment one is implied. As the later performance is entirely legal it is no objection to the creation of a new obligation then that there was formerly an illegal contract relating to the same matter.³² In jurisdictions where a sale on Sunday is held to be so completely void that the seller may recover in trover or replevin from the buyer, there seems sufficient consideration for a subsequent promise to pay on the part of the buyer even though the property has been delivered. The buyer's promise is supported by the surrender on the part of the seller of his right to reclaim the property. Whether on this ground or not, some courts allow a recovery where a contract made on Sunday is ratified.³³ On the ground of moral consideration, arising from the moral duty to pay for the property of which the defendant has had the benefit, a subsequent promise by him has been enforced in a few jurisdictions.³⁴ But this ground of recovery would not find general acceptance. Unless actual consideration at the time of the subsequent promise can be found, on principle, this promise is unenforceable.

§ 668. **Contracts and sales prohibited by statute.**— For the protection of the public or for purposes of taxation, or for both reasons, many statutes are enacted forbidding sales of certain kinds of goods either altogether or unless certain statutory regulations are complied with. There can be no doubt that if a statute directly prohibits a contract or sale it cannot be enforced by the

³² *Butler v. Lee*, 11 Ala. 885, 46 Am. Dec. 230; *Bradley v. Rea*, 14 Allen, 20; 103 Mass. 188, 4 Am. Rep. 524; *Aspell v. Hosbein*, 98 Mich. 117, 57 N. W. 27; *Pillen v. Erickson*, 125 Mich. 68, 83 N. W. 1023; *Bollin v. Hooper*, 127 Mich. 287, 86 N. W. 795; *Foreman v. Ahl*, 55 Pa. St. 625; *Hopkins v. Stefan*, 77 Wis. 45, 45 N. W. 676. See also *Stebbins v. Peck*, 8 Gray, 553; *Flynn v. Columbus Club*, 21 R. I. 534, 45 Atl. 551;

Ainsworth v. Williams, 111 Wis. 17, 86 N. W. 551.

³³ *Tucker v. West*, 29 Ark. 386; *Banks v. Werts*, 13 Ind. 203; *Gwinn v. Simes*, 61 Mo. 335; *Smith v. Case*, 2 Or. 190; *Sayles v. Wellman*, 10 R. I. 465; *Adams v. Gay*, 19 Vt. 358; *Flinn v. St. John*, 51 Vt. 334, 345.

³⁴ *Campbell v. Young*, 9 Bush, 240; *Cook v. Forker*, 193 Pa. St. 461, 44 Atl. 560, 74 Am. St. Rep. 699.

parties to it, and the imposition of a penalty is at least *prima facie* an implied prohibition of the transaction to which the penalty attaches.³⁵ No distinction is now made between things which are merely *mala prohibita* and things which are *mala in se*. Courts cannot go behind the reason for the legislative prohibition when the prohibition itself is clear.³⁶ But in determining what validity, if any, a forbidden contract has, it is often important to consider how far and for what reason the prohibited transaction is wrongful, since the courts will endeavor so to deal with the transaction as to give effect to the fundamental purpose of the Legislature and to a wise public policy.³⁷

³⁵ *Clark v. Protection Ins. Co.*, 1 Story, 109, 122; *Swann v. Swann*, 21 Fed. Rep. 299; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671; *Harrison v. Jones*, 80 Ala. 412; *Campbell v. Segars*, 81 Ala. 259, 1 So. 714; *Youngblood v. Birmingham Trust Co.*, 95 Ala. 521, 12 So. 579, 20 L. R. A. 58, 36 Am. St. Rep. 245; *Berka v. Woodward*, 125 Cal. 119, 57 Pac. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31; *Funk v. Gallivan*, 49 Conn. 124, 44 Am. Rep. 210; *Dillon v. Allen*, 46 Iowa, 299, 26 Am. Rep. 145; *Durgin v. Dyer*, 68 Me. 143; *Roby v. West*, 4 N. H. 285, 17 Am. Dec. 423; *Brackett v. Hoyt*, 29 N. H. 264; *Gregory v. Wilson*, 36 N. J. L. 315, 13 Am. Rep. 448; *Covington v. Threadgill*, 88 N. C. 186; *Bloom v. Richards*, 2 Ohio St. 387, 395; *Pennsylvania Co. v. Wentz*, 37 Ohio St. 333, 338; *McConnell v. Kitchens*, 20 S. C. 430; *Elkins v. Parkhurst*, 17 Vt. 105; *Bancroft v. Dumas*, 21 Vt. 456.

³⁶ *Bank v. Owens*, 2 Pet. 527, 539, 7 L. ed. 508; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 9 S. Ct. 553, 32 L. ed. 979; *Penn v. Bornman*, 102 Ill. 523, 530; *Greenough v. Balch*, 7 Me. 461; *White v. Buss*, 3 Cush. 448; *Downing v. Ringer*, 7 Mo. 585; *Hill v. Spear*, 50 N. H. 253, 277, 9 Am. Rep. 205; *Rossman v. McFarland*,

9 Ohio St. 369, 379; *Holt v. Green*, 73 Pa. St. 198, 13 Am. Rep. 737; *Melchoir v. McCarty*, 31 Wis. 252, 11 Am. Rep. 605.

³⁷ In *Dunlop v. Mercer*, 156 Fed. Rep. 545, 555, 86 C. C. A. 435, the court said: "The general rule that an illegal contract is void and unenforceable is, however, not without exception. It is not universal in its application. It is qualified by the exception that where a contract is not evil in itself, and its validity is not denounced as a penalty by the express terms of or by rational implication from the language of the statute which it violates, and that statute prescribes other specific penalties, it is not the province of the courts to do so, and they will not thus affix an additional penalty not directed by the lawmaking power. *Fritts v. Palmer*, 132 U. S. 282, 289, 293, 10 S. Ct. 93, 33 L. ed. 317; *National Bank v. Matthews*, 98 U. S. 621, 629, 25 L. ed. 188; *Logan County Bank v. Townsend*, 139 U. S. 67, 76, 11 S. Ct. 496, 35 L. ed. 107; *Thompson v. St. Nicholas Nat. Bank*, 146 U. S. 240, 13 S. Ct. 66, 36 L. ed. 956; *Blodgett v. Lanyon Zinc Co.*, 120 Fed. Rep. 893, 896, 897, 58 C. C. A. 79, 82, 83; *Sioux City, etc., Co. v. Trust Co.*, 82 Fed. Rep. 124, 134, 49 U. S. App. 523, 27 C. C. A. 73,

§ 669. **Illustrations of prohibitory statutes.**—In accordance with the principles thus enunciated, it has been held that the price of goods sold cannot be recovered when sold in violation of a liquor license law,³⁸ or a law requiring weights and measures to be sealed,³⁹ or requiring coal⁴⁰ or lumber⁴¹ to be weighed or surveyed by a public officer, or requiring goods to be marked to indicate their character or composition.⁴² Or a statute may prohibit altogether the sale of certain goods.⁴³ Where a statute requires a license to be obtained before sales of the kind in question can be

83; *Hanover Bank v. First Nat. Bank of Burlingame*, 109 Fed. Rep. 421, 426, 48 C. C. A. 482, 487; *Speer v. Board of County Commrs.*, 88 Fed. Rep. 749, 758, 60 U. S. App. 38, 32 C. C. A. 101, 110; *National Bank of Xenia v. Stewart*, 107 U. S. 676, 2 S. Ct. 778, 27 L. ed. 592; *Gold Mining Co. v. National Bank*, 96 U. S. 640, 24 L. ed. 648; *O'Hare v. Bank*, 77 Pa. St. 96; *Pangborn v. Westlake*, 36 Iowa, 546; *Chattanooga R. & C. R. Co. v. Evans*, 14 C. C. A. 116, 121, 122, 66 Fed. Rep. 809, 815, 31 U. S. App. 432."

³⁸ *Miller v. Ammon*, 145 U. S. 421, 12 S. Ct. 844, 36 L. ed. 759; *Lang v. Lynch*, 38 Fed. Rep. 489; *O'Bryan v. Fitzpatrick*, 48 Ark. 487, 3 S. W. 527; *Dolson v. Hope*, 7 Kans. 161; *Vannoy v. Patton*, 5 B. Mon. 248; *Cobb v. Billings*, 23 Me. 470; *Loranger v. Jardine*, 56 Mich. 518, 23 N. W. 203; *Niagara Falls Brewing Co. v. Wall*, 98 Mich. 158, 57 N. W. 99; *Solomon v. Dreschler*, 4 Minn. 278; *Lewis v. Welch*, 14 N. H. 294; *Coldwell v. Wentworth*, 14 N. H. 431; *Covington v. Threadgill*, 88 N. C. 186; *Griffith v. Wells*, 3 Denio, 226; *Bancroft v. Dumas*, 21 Vt. 456; *Aiken v. Blaisdell*, 41 Vt. 655; *Bach v. Smith*, 2 Wash. Terr. 145, 3 Pac. 831; *Gorsuth v. Butterfield*, 2 Wis. 237; *Melchoir v. McCarty*, 31 Wis. 252, 11 Am. Rep. 605.

³⁹ *Miller v. Post*, 1 Allen, 434; *Bisbee v. McAllen*, 39 Minn. 143, 39 N. W. 299; *Finch v. Barclay*, 87

Ga. 393, 13 S. E. 566; *Smith v. Arnold*, 106 Mass. 269; *Sawyer v. Smith*, 109 Mass. 220; *Eaton v. Kegan*, 114 Mass. 433.

⁴⁰ *Little v. Poole*, 9 B. & C. 192; *Libby v. Downey*, 5 Allen, 299.

⁴¹ *Richmond v. Foss*, 77 Me. 590, 1 Atl. 830; *Prescott v. Battersby*, 119 Mass. 285; *Pray v. Burbank*, 10 N. H. 377.

⁴² The following cases relate to fertilizers: *Pacific Guano Co. v. Mullen*, 66 Ala. 582; *Merriman v. Knox*, 99 Ala. 93, 11 So. 741; *Brown v. Adair*, 104 Ala. 652, 16 So. 439; *Brown v. Raisin Fertilizer Co.*, 124 Ala. 221, 26 So. 891; *Kleckley v. Leyden*, 63 Ga. 215; *Johnston v. McConnell*, 65 Ga. 129; *Lorentz v. Conner*, 69 Ga. 761; *Vanmeter v. Spurrier*, 94 Ky. 22, 21 S. W. 337; *McConnell v. Kitchens*, 20 S. C. 430. But see *Niemeyer v. Wright*, 75 Va. 239, 40 Am. Rep. 720. The same rule was applied where the statute in question related to other goods. *Forster v. Taylor*, 5 B. & Ad. 887 (butter); *Buxton v. Hamblen*, 32 Me. 448 (hay).

⁴³ Thus in Massachusetts a sale of milk below a certain standard is an illegal sale. *Miller v. Post*, 1 Allen, 434; *Copeland v. Boston Dairy Co.*, 184 Mass. 207, 68 N. E. 201. In Maine the seller of cattle infected with tuberculosis cannot recover the price, though ignorant that the cattle were diseased. *Church v. Knowles*, 101 Me. 264, 63 Atl. 1042. The sale

made, there is no doubt that if such a sale is made by one acting as a broker without the required license, he can recover no compensation for his services.⁴⁴ And even the price of the goods sold cannot be recovered when the seller was required under statutory penalty to take out a license, if the purpose of the statute was, in part at least, for the protection of the public and not solely for purposes of revenue.⁴⁵ It may be observed, however, that a statute which requires a license to be paid for by a traveling salesman is void, at least so far as concerns salesmen from another State, as violating the provision of the Federal Constitution giving Congress exclusive control over interstate and foreign commerce.⁴⁶

§ 670. **Statutes purely for revenue.**—Statutes sometimes impose a tax upon the transaction of certain business merely for the

of imported second-hand clothing is prohibited in Georgia. *Smith v. Evans*, 125 Ga. 109, 53 S. E. 589. In *Law v. Hodson*, 11 East, 300, recovery was denied the seller of bricks because of the statute requiring bricks to be of certain dimensions to which the bricks sold did not conform. In *Wheeler v. Russell*, 17 Mass. 258, a note calling for shingles of illegal size was similarly unenforceable. In *Eaton v. Kegan*, 114 Mass. 433, the price of oats sold by the bag was held not recoverable because of a statute requiring such goods to be sold by the bushel; but in *Eldredge v. McDermott*, 178 Mass. 256, 59 N. E. 806, the court held that if a custom was proved that a bag of oats contained two bushels, the price of oats sold in bags could be recovered, being in effect a sale by the bushel. See also *Durgin v. Dyer*, 68 Me. 143.

Cope v. Rowlands, 2 M. & W. 149; *Hustis v. Picklands*, 27 Ill. App. 270; *Richardson v. Brix*, 94 Iowa, 626, 63 N. W. 325; *Black v. Security Mutual Assn.*, 95 Me. 35, 49 Atl. 51, 54 L. R. A. 939; *Buckley v. Humason*, 50 Minn. 195, 52 N. W. 385, 16 L. R. A. 423, 36 Am. St. Rep. 437; *Holt v. Green*, 73 Pa. St.

198, 13 Am. Rep. 737; *Johnson v. Hulings*, 103 Pa. St. 498, 49 Am. Rep. 131; *Stevenson v. Ewing*, 87 Tenn. 46, 9 S. W. 230. So an unlicensed physician (*Gardner v. Tatum*, 81 Cal. 370, 22 Pac. 880; *Taliaferro v. Moffett*, 54 Ga. 150; *Deaton v. Lawson*, 40 Wash. 486, 82 Pac. 879, 2 L. R. A. (N. S.) 392, 111 Am. St. Rep. 922) or lawyer (*Tedrick v. Hiner*, 61 Ill. 189; *East St. Louis v. Freels*, 17 Ill. App. 339) cannot recover for his services.

Bull v. Harragan, 17 B. Mon. 349 (peddler). And see decisions cited *supra*, note 38, of unlicensed sales of liquor. In *Mabry v. Bullock*, 7 Dana, 337, it appears that the statute expressly provided that all contracts for the sale of clocks should be void unless the seller had a license. See also *Stevenson v. Ewing*, 87 Tenn. 46, 9 S. W. 230. But compare *Jones v. Berry*, 33 N. H. 209. See also *Smith v. Lindo*, 4 C. B. (N. S.) 395, where an unlicensed broker was allowed to recover from his principal money paid in executing a purchase for him.

Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 S. Ct. 229, and cases cited.

purpose of revenue, and not with any view of limiting or regulating the trade itself. If such statutes merely impose a penalty for failure to comply with their provisions, contracts made without paying the requisite tax or obtaining the requisite license are not thereby made unenforceable. It is to be observed, however, that a statute, though purely for revenue, may, in order to make more certain collection of the revenue, absolutely prohibit and make unlawful all contracts or sales made without compliance with the law.⁴⁷ It is not always easy to determine whether a statute is purely for revenue and whether, if this is so, the statute prohibits and renders unlawful all contracts and sales made without satisfying its requirements. A number of cases arose under the United States Internal Revenue Laws passed during the Civil War, and it was generally held that these laws were merely for the purpose of revenue and did not render the contract itself unlawful.⁴⁸ But there are contrary decisions.⁴⁹ Instances may be found of other penal laws which have been held to be so exclusively for revenue as not to invalidate contracts, made by persons who had not satisfied the statutory requirements,⁵⁰ but generally on a true construction even a revenue

⁴⁷ *Smith v. Mawhood*, 14 M. & W. 452; *Hall v. Bishop*, 3 Daly, 109; *Stevenson v. Ewing*, 87 Tenn. 46, 9 S. W. 230.

⁴⁸ *Larned v. Andrews*, 106 Mass. 435, 8 Am. Rep. 346; *Corning v. Abbott*, 54 N. H. 469; *Ruckman v. Bergholz*, 37 N. J. L. 437; *Woodward v. Stearns*, 10 Abb. Pr. (N. S.) 395; *Rahter v. First Nat. Bank*, 92 Pa. St. 393; *Aiken v. Blaisdell*, 41 Vt. 655.

⁴⁹ *Creekmore v. Chitwood*, 7 Bush, 317; *Harding v. Hagar*, 60 Me. 340, 63 Me. 515; *Hall v. Bishop*, 3 Daly, 109; *Best v. Bauder*, 29 How. Pr. 489; *Holt v. Green*, 73 Pa. St. 198, 13 Am. Rep. 737.

⁵⁰ *Johnson v. Hudson*, 11 East, 180 (tobacco dealer without license); *Brown v. Duncan*, 10 B. & C. 93 (grain dealer who contrary to revenue

regulations carried on a retail business within two miles of a distillery and did not have his name inserted in the excise book as one of the partners in the distillery); *Smith v. Mawhood*, 14 M. & W. 452 (tobacco dealer without a license); *Harris v. Runnels*, 12 How. (U. S.) 79, 13 L. ed. 901 (slave brought into Mississippi and sold there without formalities required by law); *Pangborn v. Westlake*, 36 Iowa, 546 (real estate sold before plat recorded as required by law); *Mandlebaum v. Gregovich*, 17 Nev. 87, 28 Pac. 121, 45 Am. Rep. 433 (traveling salesman sold goods without a license); *Strong v. Darling*, 9 Ohio, 201 (real estate sold before plat recorded); *Fairly v. Wappoo Mills*, 44 S. C. 227, 253, 22 S. E. 108, 118, 29 L. R. A. 215, 225 (sale by unlicensed broker).

statute will be found to prohibit contracts made without satisfying the requirements of the law. There certainly can be no doubt that a contract or sale is illegal which, irrespective of the persons who take part in it, itself necessarily involves a breach of a revenue law—as a contract to sell liquor without paying the government tax;⁵¹ or goods without payment of customs duties.⁵²

§ 671. **Statutes for the protection of the parties.**— Besides contracts in violation of a statute purely for revenue, there are other statutes which, though they make transactions in violation of them unenforceable, do not make them illegal, properly speaking. These statutes are intended for the protection of the individual parties to a transaction, rather than for the general protection of the public. Such a statute is the Statute of Frauds; and such is the statute of the United States, requiring contracts with the government to be “reduced to writing and signed by the contracting parties with their names at the end thereof.”⁵³ A contract made without complying with the requirements of these statutes is as completely unenforceable as if it were illegal.⁵⁴ But unlike illegal contracts, if the contract is carried out by either party, legal redress may be had for the nonperformance by the other party. In the section of the Statute of Frauds relating to the sale of goods, part performance on either side is in terms made a satisfaction of the statute, and, therefore, after such part performance, recovery may be had on the contract itself. Under

⁵¹ *Creekmore v. Chitwood*, 7 Bush, 317; *Curren v. Downs*, 3 Mo. App. 468. In *North Carolina v. Vanderford*, 35 Fed. Rep. 376, it was held that a purchaser of whiskey without the stamps or brands required by law had no title which the law would protect and one who destroyed such whiskey was not criminally liable.

⁵² *Biggs v. Lawrence*, 3 T. R. 454; *Clugas v. Penaluna*, 4 T. R. 466; *Waymell v. Reed*, 5 T. R. 599; *Condon v. Walker*, 1 Yeates, 483; *Mullen v. Kerr*, 6 U. C. Q. B. (O. S.) 171. In the case last cited a seller in the United States furnished false invoices for the purpose of evading the Canadian customs duties. Recovery

of the price was not allowed. Such a case as *Holman v. Johnson*, 1 Cowp. 341, where the actual transaction involved no breach of law, but the seller knew the buyer intended to break the law thereafter, must be distinguished. See *infra*, § 672.

⁵³ U. S. Rev. St., § 3744.

⁵⁴ See as to the Statute of Frauds, *supra*, § 71. As to the Federal statute referred to, see *Clark v. United States*, 95 U. S. 539, 24 L. ed. 518; *South Boston Iron Co. v. United States*, 118 U. S. 37, 6 S. Ct. 928, 30 L. ed. 69; *St. Louis Hay & Grain Co. v. United States*, 191 U. S. 159, 24 S. Ct. 47, 48 L. ed. 130.

⁵⁵ See *supra*, § 73 *et seq.*

the Federal statute referred to, the contract remains unenforceable even after full performance by the seller, but as the provisions of the statute are held to be rather for the purpose of compelling governmental officials to comply with statutory directions for the formation of contracts than to render illegal a contract made otherwise, one who has performed a contract where the required formalities were not observed may recover on a *quantum meruit* or *quantum valebat*.⁵⁶ Reference may also be made here to *ultra vires* contracts of corporations.⁵⁷

§ 672. **Contracts of corporations doing business illegally.**—The laws of the several States almost invariably prescribe certain conditions which must be satisfied before foreign corporations are authorized to do business within the State. In some instances the statutes do not expressly state that no action can be maintained upon contracts or sales made without satisfying the statutory conditions for doing business legally. Such statutes may either provide a specific penalty for doing business illegally or no consequence may be expressed in the statute as a result of violation of the law. A plausible argument has been made in some cases for a different construction of these two types so far as concerns the right of a corporation to sue upon a contract made by it, though it has not complied with the statute. It is suggested that when a penalty is expressly imposed it may fairly be regarded as the only consequence the law meant to impose for violation of the law, but that where the statute merely prohibits without penalty, unless the contract is thereby made unenforceable, no detrimental consequences follow the breach of the law.⁵⁸ Though careful consideration must be given in each case to the words of the statute in question, the conflicting decisions of the courts do not seem, generally, based on very secure or sound distinctions. In a number of cases it has been held that recovery may be had upon contracts made in violation of laws prohibiting the transaction of business without observance of certain formalities, either with a penalty attached or without such a penalty.⁵⁹

⁵⁶ *Clark v. United States*, 95 U. S. 539, 24 L. ed. 518; *St. Louis Hay & Grain Co. v. United States*, 191 U. S. 159, 24 S. Ct. 47, 48 L. ed. 130.

⁵⁷ See *supra*, § 49.

⁵⁸ See 24 L. R. A. 315, note.

⁵⁹ *Northwestern Mutual Life Ins. Co. v. Overholt*, 4 Dill. 287; *Rogers & Co. v. Simmons*, 155 Mass. 259, 29 N. E. 580; *Kelley v. Rice-Blake*

Other authorities, however, hold that contracts made under such circumstances cannot be enforced.⁶⁰ So insurance companies have been denied the right to recover premiums when the business was done in violation of local statutes.⁶¹ Modern statutes in regard to foreign corporations frequently expressly provide, in effect, that no action shall be maintainable on the contracts of the corporation if it has not satisfied the requirements of the statute. Even where such is the form of the statute, the contracts are generally held, not void, but merely unenforceable until the satisfaction of the statute. The statute may, therefore, be satisfied so as to make a contract or sale enforceable, not only after the contract or sale has been entered into, but even after action has been brought upon it.⁶² In some jurisdictions a different result has been

Lumber Co., 167 Mass. 28, 44 N. E. 1090; *Enterprise Brewing Co. v. Grime*, 173 Mass. 252, 53 N. E. 855; *Clark v. Middleton*, 19 Mo. 53; *King v. National Mining Co.*, 4 Mont. 1, 1 Pac. 727; *Wright v. Lee*, 4 S. Dak. 237, 55 N. W. 931; *Eastern Building Assn. v. Snyder*, 98 Va. 710, 37 S. E. 298; *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67, 31 Pac. 327; *Edison General Electric Co. v. Canadian Pacific Navigation Co.*, 8 Wash. 370, 36 Pac. 260, 24 L. R. A. 315, 40 Am. St. Rep. 910; *Toledo Tie & Lumber Co. v. Thomas*, 33 W. Va. 566, 11 S. E. 37, 25 Am. St. Rep. 925.

⁶⁰ *Dudley v. Collier*, 87 Ala. 431, 6 So. 304, 13 Am. St. Rep. 55; *Boulden v. Estey Organ Co.*, 92 Ala. 182, 9 So. 283; *Dundee Mortgage & Trust Investment Co. v. Nixon*, 95 Ala. 318, 10 So. 311; *Cook v. Rome Brick Co.*, 98 Ala. 409, 12 So. 918; *Pennington v. Townsend*, 7 Wend. 276; *Cary-Lombard Lumber Co. v. Thomas*, 92 Tenn. 587, 22 S. W. 743.

⁶¹ *The Manistee*, 5 Biss. 382; *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626; *Franklin Ins. Co. v. Louisville & A. Packet Co.*, 9 Bush, 590; *Ameri-*

can Ins. Co. v. Stoy, 41 Mich. 385, 1 N. W. 877; *American Ins. Co. v. Smith*, 73 Mo. 368; *Stewart v. Northampton Mutual Live Stock Ins. Co.*, 38 N. J. L. 436.

⁶² *Buffalo Zinc & Copper Co. v. Crump*, 70 Ark. 525, 534, 69 S. W. 572, 91 Am. St. Rep. 87; *Sutherland-Innes Co. v. Chaney*, 72 Ark. 327, 80 S. W. 152; *Woolfort v. Dixie Cotton Oil Co.*, 77 Ark. 203, 91 S. W. 306, 113 Am. St. Rep. 139; *Crefeld Mills v. Goddard*, 69 Fed. Rep. 141; *Blodgett v. Lanyon Zinc Co.*, 120 Fed. Rep. 893, 897, 58 C. C. A. 79; *Wetzel & T. Ry. v. Tennis Bros. Co.*, 145 Fed. Rep. 458, 75 C. C. A. 266; *California Savings & Loan Soc. v. Harris*, 111 Cal. 133, 43 Pac. 525; *State v. American Book Co.*, 69 Kans. 1, 76 Pac. 411; *John Deere Plow Co. v. Wyland*, 69 Kans. 255, 261, 76 Pac. 863; *Hamilton v. Reeves*, 69 Kans. 844, 76 Pac. 418; *Ryan Livestock & Feeding Co. v. Kelly*, 71 Kans. 874, 81 Pac. 470; *National Fertilizer Co. v. Fall River Savings Bank*, 196 Mass. 458; *Carson-Rand Co. v. Stern*, 129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420; *Hastings Industrial Co. v. Moran*, 143 Mich. 679, 107 N. W. 706; *Neuchatel Asphalte*

reached, and such bargains have been held permanently unenforceable by the offending corporation.⁶³ As has been said, however, the statutes in the various States are not identical and must in each case be examined. In a few States contracts of the kind in question are so plainly declared void, that no other inference is possible except that they are permanently unenforceable.⁶⁴ It is beyond the power of a State, however, to prohibit a foreign corporation from maintaining an action in the Federal courts.⁶⁵ It should be added also that even though a corporation does business in violation of a statute, and in consequence thereof becomes unable to enforce the obligation of the other party, it is not itself excused from liability upon its own obligation.⁶⁶ A related question arises under a New York statute which makes it a penal offense for one doing business to add the words "& Company" to his name as a business designation unless those words represent an actual partner or partners. It has been repeatedly held in construing the statute that a contract made by a person doing business in violation of the statute may be enforced by him unless in the formation of the contract the defendant was deceived and relied on the credit of other partners supposed to exist.⁶⁷ Another analogous question arises where corporations

Co. v. Mayor of New York, 155 N. Y. 373, 49 N. E. 1043; Swift v. Little, 28 R. I. 108, 65 Atl. 615; Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122, 624, 32 Pac. 1073, 34 Pac. 774. See also Singer Mfg. Co. v. Brown, 64 Ind. 548; Smith v. Little, 67 Ind. 549.

⁶³Thompson Co. v. Whithed, 185 Ill. 454, 56 N. E. 1106, 76 Am. St. Rep. 51; United Lead Co. v. Reedy Elevator Mfg. Co., 222 Ill. 199, 78 N. E. 567; Heileman Brewing Co. v. Peimeisl, 85 Minn. 121, 88 N. W. 441.

⁶⁴Halsey v. Jewett Dramatic Co., 114 N. Y. App. Div. 420, 99 N. Y. Suppl. 1122; Cary-Lombard Co. v. Thomas, 92 Tenn. 587, 22 S. W. 743; Allen v. Milwaukee, 128 Wis. 678,

106 N. W. 1099, 5 L. R. A. (N. S.) 680, 116 Am. St. Rep. 54.

⁶⁵Dunlop v. Mercer, 156 Fed. Rep. 545, 86 C. C. A. 435.

⁶⁶Diamond Glue Co. v. U. S. Glue Co., 187 U. S. 611, 47 L. ed. 328, 23 S. Ct. 206, and authorities therein referred to.

⁶⁷Gay v. Seibold, 97 N. Y. 472, 49 Am. Rep. 533; Sinnott v. German-American Bank, 164 N. Y. 386, 58 N. E. 286 (see also 165 N. Y. 646, 59 N. E. 1130); Taylor v. Bell & Bogart Soap Co., 18 N. Y. App. Div. 175, 45 N. Y. Suppl. 939; Loeb v. Firemen's Ins. Co., 78 N. Y. App. Div. 113, 79 N. Y. Suppl. 510; Vandergrift v. Bertron, 83 N. Y. App. Div. 548, 82 N. Y. Suppl. 153; Hopp v. McWhirter, 107 N. Y. Suppl. 823.

are doing business in violation of anti-trust laws, or similar statutes. Unless these statutes expressly provide that no recovery shall be had by such corporations upon their contracts, it is held that recovery may be had upon such bargains as are in themselves lawful.⁶⁸ In a few States, however, statutes expressly provide that no recovery shall be allowed.⁶⁹ And such is the effect of the National (Sherman) Anti-trust Law.^{67a}

§ 673. **What constitutes doing business within a State.**—It is a difficult question to determine what constitutes doing business within a State by a foreign corporation and the difficulty is increased in regard to sales of goods by the provision of the Federal Constitution which intrusts to the National Congress the regulation of interstate and foreign commerce. "The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the Federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the Federal government, is not to be restricted by State authority."⁷⁰ In construing State statutes regulating foreign corpora-

⁶⁸ *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 20 S. Ct. 311, 43 L. ed. 423; *Connolly v. Union Pipe Co.*, 184 U. S. 540, 22 S. Ct. 431, 46 L. ed. 679; *The Charles E. Wiswall*, 86 Fed. Rep. 671, 57 U. S. App. 179, 42 L. R. A. 85, 30 C. C. A. 339; *Dennehy v. McNulta*, 86 Fed. Rep. 825, 59 U. S. App. 264, 41 L. R. A. 609, 30 C. C. A. 422; *Wiley v. National Paper Co.*, 70 Ill. App. 543; *Barton v. Mulvane*, 59 Kans. 313, 52 Pac. 883; *Globe Tobacco Warehouse Co. v. Leach*, 19 Ky. L. Rep. 1287; *Houck v. Wright*, 77 Miss. 476, 27 So. 616, 43 S. W. 423; *Taylor v. Bell & Bogart Soap Co.*, 18 N. Y. App. Div. 175; 45 N. Y. Suppl. 939; *National Distilling Co. v. Cream City Importing Co.*, 86 Wis. 352, 56 N. W.

864, 39 Am. St. Rep. 902. See also *General Electric Co. v. Wise*, 119 Fed. Rep. 922.

⁶⁹ *National Lead Co. v. S. E. Grote Co.*, 80 Mo. App. 247; *Pasteur Vaccine Co. v. Buckley*, 22 Tex. Civ. App. 232, 54 S. W. 804. In *Drake v. Siebold*, 81 Hun, 178, it was held that though a seller who had illegally agreed with others to raise the price of coal could not recover the price illegally fixed, he might recover on a *quantum meruit* since selling coal was not itself illegal.

^{69a} *Continental Wall Paper Co. v. Voigt* (U. S. Supr. Ct. Feb. 1909).

⁷⁰ *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, 190, 31 L. ed. 650, 8 S. Ct. 737.

tions the courts endeavor to give such a construction as will be in accordance with the Federal Constitution, and if such a construction is not possible, the statutes themselves so far as they go beyond the permitted limits are unconstitutional and void. A foreign corporation, therefore, without conforming to local statutes may ship its goods into another State to purchasers; and may also solicit orders in such State by advertisement or by traveling salesmen.⁷¹ Upon similar principles a buyer for an unlicensed foreign corporation may solicit goods for shipment to his principal.⁷² The only qualification of the exclusive power of Congress in dealing with interstate commerce is imposed by the police power of the several States. By virtue of this power deceptive or dangerous and unhealthful goods may be excluded, but the test of what is deceptive or dangerous and unhealthful does not depend on the opinion of the State Legislature. Thus intoxicating

⁷¹ *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. ed. 1137, 5 S. Ct. 739; *Wagner v. Meakin*, 92 Fed. Rep. 76, 63 U. S. App. 477, 33 C. C. A. 577; *Atlas Engine Works v. Parkinson*, 161 Fed. Rep. 223; *Ware v. Hamilton Brown Shoe Co.*, 92 Ala. 145, 9 So. 136; *Cook v. Rome Brick Co.*, 98 Ala. 409, 12 So. 918; *Gunn v. White Sewing Mach. Co.*, 57 Ark. 24, 20 S. W. 591, 18 L. R. A. 206, 38 Am. St. Rep. 223; *Kindel v. Beck, etc., Lithographing Co.*, 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311; *Belle City Mfg. Co. v. Frizzell*, 11 Idaho, 1, 81 Pac. 58; *Ware Cattle Co. v. Anderson*, 107 Iowa, 231, 77 N. W. 1026; *Coit v. Sutton*, 102 Mich. 324, 60 N. W. 690, 25 L. R. A. 819 (see also *Wilcox Cordage, etc., Co. v. Mosher*, 114 Mich. 64, 72 N. W. 117); *Rock Island Plow Co. v. Peterson*, 93 Minn. 356, 101 N. W. 616; *Maxwell v. Edens*, 65 Mo. App. 439; *Henderson Woolen Mills v. Edwards*, 84 Mo. App. 448; *McNaughton Co. v. McGirl*, 20 Mont. 124, 49 Pac. 651, 38 L. R. A. 367, 63 Am.

St. Rep. 610; *Zion Co-operative Mercantile Assn. v. Mayo*, 22 Mont. 100, 55 Pac. 915; *People v. Wemple*, 131 N. Y. 64, 29 N. E. 1002, 27 Am. St. Rep. 542; *Wrought Iron Range Co. v. Campen*, 135 N. C. 506, 47 S. E. 658; *Toledo Commercial Co. v. Glen Mfg. Co.*, 55 Ohio St. 217, 45 N. E. 197; *Mearshon v. Pottsville Lumber Co.*, 187 Pa. St. 12, 40 Atl. 1019, 67 Am. St. Rep. 560; *Wolff Dryer Co. v. Bigler*, 192 Pa. St. 466, 43 Atl. 1092. But see *Elliott v. Parlin*, 71 Kans. 665, where the court relying on *Pennsylvania Lumbermen's Ins. Co. v. Meyer*, 197 U. S. 407, 49 L. ed. 810, 25 S. Ct. 483, apparently failed to notice that a State Legislature cannot impose the same restrictions on the sale of goods within its borders by citizens of other States that it can in regard to insurance contracts and other business which does not fall within the designation of interstate commerce.

⁷² *McNaughton v. McGirl*, 20 Mont. 124, 49 Pac. 651, 38 L. R. A. 367, 63 Am. St. Rep. 610.

liquors cannot be excluded,⁷³ nor can oleomargarine,⁷⁴ but artificially colored oleomargarine may be excluded.⁷⁵ And a State may limit or prohibit the sale of goods, such as cigarettes (which, though legitimate articles of commerce and not to be classed with diseased meat or decayed fruit, are yet thought by many to be harmful), after they have been taken from the original packages or are no longer in the hands of the original buyer, provided no discrimination is made between goods which are imported and those produced within the State.⁷⁶ Game laws prohibiting the possession and sale of game at certain seasons including that taken in other States or in foreign countries are also constitutional.⁷⁷ Subject to the slight qualification thus imposed by the police power, a corporation in one State may not only sell its goods for delivery in another State but collect the price in the latter State.⁷⁸ And goods may be sent to a factor in another State for sale on commission, the title to remain in the foreign corporation until the goods are sold, without thereby violating statutes prohibiting the doing of business within the State by unlicensed foreign corporations.⁷⁹ And even though a corporation of one State maintain a storehouse in another, to which goods are shipped as ordered and from which they are distributed, the laws of the latter State cannot affect its business, for it is interstate commerce.⁸⁰ But if it is an agent's duty to sell and deliver, as resident agent of a foreign corporation, it seems that the latter is not engaged in interstate commerce, but is doing business within the State, and is, therefore, subject to local laws.⁸¹

⁷³ *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 10 S. Ct. 681; *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 S. Ct. 664.

⁷⁴ *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 S. Ct. 757.

⁷⁵ *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 15 S. Ct. 154.

⁷⁶ *Austin v. Tennessee*, 179 U. S. 343, 44 L. ed. 224, 21 S. Ct. 132.

⁷⁷ *New York v. Hesterberg*, U. S. , L. ed. , 29 S. Ct. 10.

⁷⁸ *Kirven v. Virginia, etc., Co.*, 145 Fed. Rep. 288, 76 C. C. A. 172; *New York, etc., Co. v. Williams*, 102 N. Y. App. Div. 1; *affd.*, 184 N. Y. 579. And see cases cited in note 71. *supra*.

⁷⁹ *Atlas Engine Works v. Parkinson*, 161 Fed. Rep. 223.

⁸⁰ *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. ed. 336, 23 S. Ct. 229; *Rock Island Plow Co. v. Peterson*, 93 Minn. 356, 101 N. W. 616.

⁸¹ *John Dere Plow Co. v. Wyland*, 69 Kans. 255, 76 Pac. 863; *Com-*

§ 674. **Contracts and sales against public policy at common law.**

—There are contracts to sell and sales in their character so opposed to public policy that no enforcement of them will be allowed irrespective of whether they are criminal or forbidden by statute; such is a sale or contract to sell anything in itself immoral or obscene,⁸² or any article of food which is so deleterious to public health as to be inimical to the public welfare.⁸³ A contract or sale made with a view of violating the laws of another country falls within the same principle. Though no statute either of the forum or of the place where the contract arose is violated, out of comity the courts will treat bargains as against public policy which have for their object the violation of the laws of a sister State.⁸⁴ Trading

monwealth v. Read Phosphate Co., 113 Ky. 32, 23 Ky. L. Rep. 2284, 67 S. W. 45; *Neyens v. Worthington*, 150 Mich. 580, 114 N. W. 404; *Vaughn Machine Co. v. Lighthouse*, 64 N. Y. App. Div. 138, 71 N. Y. Suppl. 799; *Lacy v. Armour Packing Co.*, 134 N. C. 567, 47 S. E. 53. See also *Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611, 47 L. ed. 328, 23 S. Ct. 206.

⁸² In *Fores v. Johnes*, 4 Esp. 97, the court said: "For prints whose objects are general satire or ridicule of prevailing fashions or manners, I think the plaintiff may recover; but I cannot permit him to do so for such whose tendency is immoral or obscene; nor for such as are libels on individuals and for which the plaintiff might have been rendered criminally answerable for a libel." So of an obscene book. *Poplett v. Stockdale, Ry. & Moo.* 337.

⁸³ *Church v. Proctor*, 66 Fed. Rep. 240, 33 U. S. App. 1, 13 C. C. A. 426 (contract to sell menhaden to be sold as mackerel); *Materne v. Horwitz*, 101 N. Y. 469, 5 N. E. 331 (a contract for the sale of falsely labelled sardines).

⁸⁴ *Graves v. Johnson*, 156 Mass. 211, 30 N. E. 818, 15 L. R. A. 834, 32 Am. St. Rep. 446 (again before the

court in 179 Mass. 53, 60 N. E. 383, 88 Am. St. Rep. 355), was an action for the price of intoxicating liquors, which were sold and delivered in Massachusetts by the plaintiffs to the defendant, a Maine hotel-keeper, with a view to their being resold by the defendant in Maine, against the laws of that State. Holmes, J., delivering the opinion of the court, said: "The question is to be decided on principles which we presume would prevail generally in the administration of the common law in this country. Not only should it be decided in the same way in which we should expect a Maine court to decide upon a Maine contract presenting a similar question, but it should be decided as we think that a Maine court ought to decide this very case if the action were brought there. It is noticeable, and it has been observed by Sir F. Pollock, that some of the English cases which have gone farthest in asserting the right to disregard the revenue laws of a country other than that where the contract is made and is to be performed have had reference to the English revenue laws. *Holman v. Johnson*. 1 Cowp. 341; *Pollock, Contract* (5th ed.), 308. See also *McIntyre v. Parks*, 3 Metc. 207. The assertion of that right, how-

with the enemy in time of war also is illegal; since "the object of war is as much to cripple the enemy's commerce as to capture his property."⁸⁵ Contracts and sales in an enemy's country between

ever, no doubt was in the interest of English commerce (*Pellecat v. Angell*, 2 Cr. M. & R. 311, 313), and has not escaped criticism (*Story*, *Conf. Laws*, §§ 257, 264, note 3; *Kent*, *Comm.*, 265, 266, and *Wharton*, *Conf. Laws*, § 484), although there may be a question how far the actual decisions go beyond what would have been held in the case of an English contract affecting only English laws. See *Hodgson v. Temple*, 5 Taunt. 181; *Brown v. Duncan*, 10 B. & C. 93, 98, 99; *Harris v. Runnels*, 12 How. 79, 83, 81, 13 L. ed. 901. Of course it would be possible for an independent State to enforce all contracts made and to be performed within its territory, without regard to how much they might contravene the policy of its neighbors' laws. But in fact no State pursues such a course of barbarous isolation. As a general proposition it is admitted that an agreement to break the laws of a foreign country would be invalid. *Pollock*, *Comm.* (5th ed.) 308. The courts are agreed on the invalidity of a sale when the contract contemplates a design on the part of the purchaser to resell contrary to the laws of a neighboring State, and requires an act on the part of the seller in furtherance of the scheme. *Waymell v. Reed*, 5 T. R. 599; *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154; *Fisher v. Lord*, 63 N. H. 514, 3 Atl. 927; *Hull v. Ruggles*, 56 N. Y. 424, 429. [See also *Cambioso v. Maffett*, 2 Wash. C. C. 98; *Kohn v. Schooner Renaissance*, 5 La. Ann. 25, 52 Am. Dec. 577; *Ivey v. Lalland*, 42 Miss. 444, 2 Am. Rep. 606, 97 Am. Dec. 475; *Rocco v. Frapoli*, 50 Neb. 665, 70 N. W. 236; *Rosenbaum v. United*

States Credit System Co., 60 N. J. L. 294, 37 Atl. 595, 64 N. J. L. 34, 44 Atl. 966, 65 N. J. L. 255; *Marshall v. Sherman*, 148 N. Y. 9, 25, 42 N. E. 419, 34 L. R. A. 757, 51 Am. St. Rep. 654]. On the other hand, plainly, it would not be enough to prevent a recovery of the price that the seller had reason to believe that the buyer intended to resell the goods in violation of law; he must have known the intention in fact. *Finch v. Mansfield*, 97 Mass. 89, 92; *Adams v. Coulliard*, 102 Mass. 167, 173. As in the case of torts, a man has a right to expect lawful conduct from others. In order to charge him with the consequences of the act of an intervening wrongdoer, you must show that he actually contemplated the act. *Hayes v. Hyde Park*, 153 Mass. 514, 515, 516, 27 N. E. 522, 12 L. R. A. 249."

⁸⁵ *Esposito v. Bowden*, 7 E. & B. 763. In *Kershaw v. Kelsey*, 100 Mass. 561, 572, 573, 1 Am. Rep. 142, 97 Am. Dec. 124, the court said: "The law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries; and this includes any act of voluntary submission to the enemy, or receiving his protection, as well as any act or contract which tends to increase his resources; and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders, for the delivery of either, between the two countries, whether directly or indirectly, or through the intervention of third persons or partnerships, or by insurances upon trade with or by the enemy." See also *Scholefield v. Eickelberger*, 7

persons there domiciled, however, are not illegal.⁸⁶ And citizens of a loyal State may sell to one another goods which are situated in the enemy's country, provided no agreement is made for the transportation or delivery of the goods from the enemy's country.⁸⁷ An agreement which contemplates a wrong to a third person, whether trespass, breach of trust, or fraud, is illegal.⁸⁸ Thus a contract to sell goods, known to be held by the seller in trust for a third person, could not be enforced by the buyer if he was cog-

Pet. 586, 8 L. ed. 793; *Coppell v. Hall*, 7 Wall. 542, 554, 19 L. ed. 244; *United States v. Quigley*, 103 U. S. 595, 26 L. ed. 524; *Carson v. Dunham*, 121 U. S. 421, 7 S. Ct. 1030, 30 L. ed. 992; *The Rapid*, 8 Cranch, 155, 3 L. ed. 520; *Philips v. Hatch*, 1 Dill. 571; *Habricht v. Alexander's Exrs.*, 1 Woods, 413; *Perkins v. Rogers*, 35 Ind. 124, 9 Am. Rep. 639; *Hill v. Baker*, 32 Iowa, 302, 7 Am. Rep. 193; *Hennen v. Gilman*, 20 La. Ann. 241, 96 Am. Dec. 396; *Shacklett v. Polk*, 51 Miss. 378, 391; *Rhodes v. Summerhill*, 4 Heisk. 204; 1 Kent, Comm. *66. The particular contracts, however, relating to real estate, in *Kershaw v. Kelsey*, 100 Mass. 561, 1 Am. Rep. 142, 97 Am. Dec. 124, and *Brown v. Gardner*, 4 Lea, 145. were held to be lawful. See also *Williams v. Paine*, 169 U. S. 55, 72, 42 L. ed. 658.

⁸⁶ In *Conrad v. Waples*, 96 U. S. 279, 286, 24 L. ed. 721, the court said: "The character of the parties as rebels or enemies did not deprive them of the right to contract with and to sell to each other. As between themselves, all the ordinary business between people of the same community in buying, selling, and exchanging property, movable and immovable, could be lawfully carried on, except in cases where it was expressly forbidden by the United States, or where it would have been inconsistent with or have tended to weaken their authority. It was com-

mmercial intercourse and correspondence between citizens of one belligerent and those of the other, the engaging in traffic between them, which were forbidden by the laws of war and by the President's proclamation of nonintercourse. So long as the war existed, all intercourse between them inconsistent with actual hostilities was unlawful. But commercial intercourse and correspondence of the citizens of the enemy's country among themselves were neither forbidden nor interfered with, so long as they did not impair or tend to impair the supremacy of the national authority or the rights of loyal citizens. No people could long exist without exchanging commodities, and, of course, without buying, selling, and contracting. And no belligerent has ever been so imperious and arbitrary as to attempt to forbid the transaction of ordinary business by its enemies among themselves. No principle of public law and no consideration of public policy could be subserved by any edict to that effect; and its enforcement, if made, would be impossible." This passage was quoted with approval in *Briggs v. United States*, 143 U. S. 346, 352, 12 S. Ct. 391, 36 L. ed. 180.

⁸⁷ *Briggs v. United States*, 143 U. S. 346, 12 S. Ct. 391, 36 L. ed. 180.

⁸⁸ *Wald's Pollock, Contracts* (3d ed.), 376.

nizant of the facts. Similarly an agreement to sell goods in fraud of creditors is illegal.⁸⁹ And an agent can recover no commissions for negotiating a sale by illegal means.⁹⁰ Whether an agreement to sell goods which to the buyer's knowledge the seller was under contract to sell to another would be illegal and unenforceable is not so clear.⁹¹ A contract whereby the purchaser of a copyrighted book agrees not to resell it within a year is not against public policy.⁹² Nor is a system of contracts, by which wholesale druggists agree with the manufacturer of a proprietary medicine not to resell below a certain price, and only to retail dealers designated by him.⁹³

§ 675. **Knowledge of or promotion of another's unlawful purpose.**—Frequently a sale or contract to sell goods is not in itself unlawful, but the purpose of the buyer or seller is unlawful. It

⁸⁹ This is clear on principle and by the weight of authority, but there are a number of cases which hold an agreement in fraud of creditors enforceable between the parties. See *supra*, § 651.

⁹⁰ *Oscanyan v. Winchester Arms Co.*, 103 U. S. 261, 26 L. ed. 539. In this case the plaintiff had contracted for a commission for inducing the Turkish government, whose consul in the United States he was, to buy arms of the defendant company. He was denied recovery. See also *Findlay v. Pertz*, 66 Fed. Rep. 427, 31 U. S. App. 340, 13 C. C. A. 559, 29 L. R. A. 188; *Hayward v. Nordberg Mfg. Co.*, 85 Fed. Rep. 4, 54 U. S. App. 639, 29 C. C. A. 438. And see *Wald's Pollock, Contracts* (3d ed.), 377, note. Compare *Clark v. American Coal Co.*, 86 Iowa, 436, 53 N. W. 291, 17 L. R. A. 557.

⁹¹ Sir Frederick Pollock apparently regards such an agreement as illegal. *Wald's Pollock, Contracts* (3d ed.), 376. In *Rhoades v. Malta Vita Pure Food Co.*, 149 Mich. 235, 112 N. W. 940, the plaintiff sued for a promised salary. It appeared that at the

time of his employment by the defendant he was under an unexpired contract of employment with the Force Food Company, a rival in business, and that the purpose of the defendant in inducing the plaintiff to enter into its service was to further a plan to "put Force out of business." It was held that the plaintiff could not recover, because the contract on which he sued was illegal. It may perhaps be assumed that the same result would have been reached had the defendant for the purpose of embarrassing the Force Food Company induced a manufacturer to contract to sell machinery, which he was under previous contract to sell to the Force Food Company.

⁹² *Authors' & Newspapers' Assn. v. O'Gorman Co.*, 147 Fed. Rep. 616. See also *Bobbs-Merrill Co. v. Straus*, 139 Fed. Rep. 155, 147 Fed. Rep. 15, 77 C. C. A. 607, 210 U. S. 339, 28 S. Ct. 722, 52 L. ed. 1086, and *supra*, § 8.

⁹³ *Hartman v. Park & Sons Co.*, 145 Fed. Rep. 358, citing many authorities relating to restrictions imposed in sales of articles manufactured under patents or by a secret process.

is held in England that mere knowledge of an illegal purpose of the other party to the transaction will render a bargain so opposed to public policy that no recovery can be had upon it.⁹⁴ And an equally severe rule has been enforced in a number of decisions in this country.⁹⁵ But the weight of authority in the United States does not support so strict a rule. In a recent Massachusetts decision,⁹⁶ Holmes, C. J., in delivering the opinion of the court, said, in speaking of a sale of liquor in Massachusetts which the buyer intended to resell in Maine contrary to the law of the latter State: "In our opinion a sale otherwise lawful is not connected with subsequent unlawful conduct by the mere fact that the seller correctly divines the buyer's unlawful intent closely enough to make the sale unlawful. It will be observed that the finding puts the plaintiff's knowledge of the defendant's intent no higher than an uncommunicated inference as to what the defendant was likely to do. Of course the defendant was free to change his mind, and there was no communicated desire of the plaintiff's to co-operate with the defendant's present intent, such as was supposed in the former decision, but on the contrary an understood indifference to everything beyond an ordinary sale in Massachusetts. It may be that, as in the case of attempts,⁹⁷ the line of proximity will vary somewhat according to the gravity of the evil apprehended,⁹⁸ and

⁹⁴ *Pearce v. Brooks*, L. R. 1 Ex. 213. The seller of a brougham to a prostitute who knew that it was to be used as part of the latter's display was held debarred from recovering the price.

⁹⁵ *Milner v. Patton*, 49 Ala. 423; *Oxford Iron Co. v. Spradley*, 51 Ala. 171; *Ware v. Jones*, 61 Ala. 288; *Lewis v. Latham*, 74 N. C. 283 (compare *Lang v. Lynch*, 38 Fed. Rep. 489); *Plank v. Jackson*, 128 Ind. 424, 26 N. E. 568, 27 N. E. 1117; *Williamson v. Baley*, 78 Mo. 636; *Fisher v. Lord*, 63 N. H. 514, 3 Atl. 927; *Jones v. Surprise*, 64 N. H. 243, 9 Atl. 384 (compare *Durkee v. Moses*, 67 N. H. 115, 23 Atl. 793); *Hull v. Ruggles*, 56 N. Y. 424; *Arnot v. Pittston Coal Co.*, 68 N. Y. 558, 23

Am. Rep. 190; *Materne v. Horwitz*, 101 N. Y. 469, 5 N. E. 331; *Spurgeon v. McElwain*, 6 Ohio, 442, 27 Am. Dec. 266; *Mordecai v. Dawkins*, 9 Rich. L. 262; *Oliphant v. Markham*, 79 Tex. 543, 15 S. W. 569, 23 Am. St. Rep. 363; *Aiken v. Blaisdell*, 41 Vt. 655; *Mound v. Barker*, 71 Vt. 253, 44 Atl. 346. See also *Johns v. Reed*, Neb., 109 N. W. 738.

⁹⁶ *Graves v. Johnson*, 179 Mass. 53, 60 N. E. 383, 88 Am. St. Rep. 355.

⁹⁷ Citing *Commonwealth v. Peaslee*, 177 Mass. 267, 59 N. E. 55; *Commonwealth v. Kennedy*, 170 Mass. 18, 22, 48 N. E. 770.

⁹⁸ Citing *Steele v. Curle*, 4 Dana, 381, 385, 388; *Hanauer v. Doane*, 12 Wall. 342, 446, 20 L. ed. 439; *Bickel v. Sheets*, 24 Ind. 1, 4 (to which may

in different courts with regard to the same or similar matters.⁹⁹ But the decisions tend more and more to agree that the connection with the unlawful act in cases like the present is too remote."¹ At all events mere reasonable cause of belief without actual knowledge, on the part of the seller of the goods, that the purchaser buys for an unlawful use, does not prevent recovery of the price.² But if the vendor does anything beyond making the sale to aid the unlawful purpose of the vendee, he cannot recover.³ A com-

be added *Green v. Collins*, 3 Cliff. 494; *Tracy v. Talmage*, 14 N. Y. 162, 215, 67 Am. Dec. 132).

⁹⁹ Compare *Hubbard v. Moore*, 24 La. Ann. 591, 13 Am. Rep. 128; *Michael v. Bacon*, 49 Mo. 474, 8 Am. Rep. 138, with *Pearce v. Brooks*, L. R. 1 Ex. 213.

¹ Citing *McIntyre v. Parks*, 3 Mete. 207; *Sortwell v. Hughes*, 1 Curt. C. C. 244, 247; *Green v. Collins*, 3 Cliff. 494; *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205; *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132; *Distilling Co. v. Nutt*, 34 Kans. 724, 729, 10 Pac. 163; *Webber v. Donnelly*, 33 Mich. 469; *Tuttle v. Holland*, 43 Vt. 542; *Braunn v. Keally*, 146 Pa. St. 519, 524, 23 Atl. 389, 28 Am. St. Rep. 811; *Wallace v. Lark*, 12 S. C. 576, 578, 32 Am. Rep. 516; *Rose v. Mitchell*, 6 Colo. 102, 45 Am. Rep. 520; *Jameson v. Gregory's Exr.*, 4 Mete. (Ky.) 363, 370; *Bickel v. Sheets*, 24 Ind. 1; *Hubbard v. Moore*, 24 La. Ann. 591, 13 Am. Rep. 128; *Michael v. Bacon*, 49 Mo. 474, 8 Am. Rep. 138 (to which may be added *Hollenberg Music Co. v. Berry*, 85 Ark. 9, 106 S. W. 1172; *Longnecker v. Shields*, 1 Colo. App. 264, 28 Pac. 659; *Singleton v. Bank of Monticello*, 113 Ga. 527, 38 S. E. 947; *Sondheim v. Gilbert*, 117 Ind. 71, 18 N. E. 687, 5 L. R. A. 432, 10 Am. St. Rep. 23; *Jackson v. City Bank*, 125 Ind. 347, 25 N. E. 430, 9 L. R. A. 657; *Brunswick v. Valteau*, 50 Iowa, 120, 32 Am. Rep. 119; *Feineman v. Sachs*, 33

Kans. 621, 7 Pac. 222, 52 Am. Rep. 547; *Tyler v. Carlisle*, 79 Me. 210, 9 Atl. 356, 1 Am. St. Rep. 301; *Gambs v. Sutherland's Est.*, 101 Mich. 355, 59 N. W. 652; *Chamberlin v. Fisher*, 117 Mich. 428, 75 N. W. 931; *Delavina v. Hill*, 65 N. H. 94, 19 Atl. 1000; *Bryson v. Haley*, 68 N. H. 337, 38 Atl. 1006; *Amey v. Granite State Ins. Co.*, 68 N. H. 446, 44 Atl. 601; *Waugh v. Beck*, 114 Pa. St. 422, 6 Atl. 923; *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154. See also *Corbin v. Wachhorst*, 73 Cal. 411, 15 Pac. 22).

² *Ramsey v. Smith*, 138 Ala. 333, 35 So. 325; *Brunswick v. Valteau*, 50 Iowa, 120, 32 Am. Rep. 119; *Ely v. Webster*, 102 Mass. 304; *Adams v. Coulliard*, 102 Mass. 167.

³ *Kohn v. Melcher*, 43 Fed. Rep. 641 (furnishing false invoices of liquor sold to deceive authorities); *Feineman v. Sachs*, 33 Kans. 621, 7 Pac. 222, 52 Am. Rep. 547 (packing liquor deceptively to aid the buyer's purpose); *Bancher v. Mansel*, 47 Me. 58 (taking precautions on behalf of the buyer against seizure of liquor sold); *Foster v. Thurston*, 11 Cush. 322 (giving the sale the appearance of being made to a third person); *Storz v. Finklestein*, 46 Neb. 577, 65 N. W. 195, 30 L. R. A. 644, 48 Neb. 27, 66 N. W. 1020 (participation in illegal purpose and profits); *Skiff v. Johnson*, 57 N. H. 475 (putting up and labelling goods in packages so that they might be conveniently used

mon application of these principles is in regard to leases and sales to proprietors of houses of prostitution.⁴ The same doctrines also

in illegal lottery scheme); *Fisher v. Lord*, 63 N. H. 514, 3 Atl. 927 (packing liquor so as to conceal its character); *Hull v. Ruggles*, 56 N. Y. 424 (putting up packages with tickets in them for use in illegal lottery scheme); *Arnot v. Pittston Coal Co.*, 68 N. Y. 558, 23 Am. Rep. 190 (agreeing not to make competitive sales, thereby aiding defendant's purpose to gain an illegal monopoly); *Chimene v. Pennington* (Tex. Civ. App.), 79 S. W. 63 (using materials sold in construction of combustible building within fire limits of a city in violation of law); *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154 (marking casks of liquor with no name, but merely a diamond inclosing a letter S, in order to prevent seizure); *Aiken v. Blaisdell*, 41 Vt. 655 (marking kegs of liquor "benzine" or "cider vinegar," and packing them in barrels or boxes). See also *Biggs v. Lawrence*, 3 T. R. 454; *Clugas v. Penaluna*, 4 T. R. 466; *Waymell v. Reed*, 5 T. R. 599, where a seller who had packed goods for the purpose of facilitating smuggling was held debarred from recovering the price.

⁴ See *Hollenberg Music Co. v. Berry*, 85 Ark. 9, 106 S. W. 1172 (seller of piano recovered price, though he knew the character of the place where it was to be used); *Ramsey v. Smith*, 138 Ala. 333 (knowledge of buyer's illegal purpose apparently regarded as sufficient to prevent conditional seller or his assignee with notice recovering piano on buyer's default); *Postelle v. Rivers*, 112 Ga. 850, 38 S. E. 109 (recovery not allowed for board and lodging furnished to defendant to maintain her in a life of prostitution); *Hubbard*

v. Moore, 24 La. Ann. 591, 13 Am. Rep. 128 (seller of furniture, knowing the character of the place where it was to be used, recovered the price); *Sampson v. Townsend*, 25 La. Ann. 78 (to the same effect, though the plea alleged the seller delivered and put up the furniture for the express purpose of enabling the defendant to fit up her house); *Mahood v. Tealza*, 26 La. Ann. 108 (to the same effect as *Hubbard v. Moore*, *supra*); *McDonald v. Born*, 135 Mich. 177, 97 N. W. 693 (money paid to enable defendant to conduct her illegal business cannot be recovered); *Anheuser-Busch Brewing Assn. v. Mason*, 44 Minn. 318, 46 N. W. 558, 9 L. R. A. 506 (seller of beer sold with knowledge of the character of the place where it was to be used recovered the price); *Sprague v. Rooney*, 82 Mo. 493, 52 Am. Rep. 383, 104 Mo. 349, 16 S. W. 505 (specific performance of agreement in form a sale with monthly payments denied, it appearing that transaction was so made to evade statute forbidding leases of premises for houses of prostitution); *Ernst v. Crosby*, 140 N. Y. 364, 35 N. E. 603 (lessor of premises which he knows or intends shall be used for unlawful purposes cannot recover rent); *Bishop v. Honey*, 34 Tex. 245 (mechanic's lien may be enforced against premises which lienor knew when taking part in building them were to be used for immoral purposes); *Reed v. Brewer*, 90 Tex. 144, 37 S. W. 418 (the plaintiff was not allowed to recover the price for furniture supplied on a conditional sale to the keeper of a brothel, the court inferring from the large credit given and instalment payments provided for that the plaintiff must have ex-

find frequent application where contracts or conveyances are made in fraud of creditors.⁵ Though a seller who knows the illegal purposes of a buyer of goods may not on that account be denied a right to recover the price of the goods, he may, nevertheless, while the contract is still executory, refuse to carry it out. While the buyer's illegal purpose will not protect him against an action for the price, it will certainly deprive him of his cause of action against the seller if the latter was ignorant at the time the contract was made of the buyer's illegal purpose;⁶ and even though the seller was then cognizant of the illegal purpose it seems that the result should be the same. The buyer is equally guilty in both cases, and it is his guilt which should determine whether he can recover.

§ 676. **Time of illegality, when important.**— It may sometimes happen that a contract is illegal at the time when it is made either because of the illegal purpose of the parties to the contract, or because of extrinsic circumstances, and that at the time the contract is performed by the sale of the goods the transaction has become lawful either because the purpose of the parties has changed or because a change in the law or other external circumstances have made that lawful which was previously unlawful. In such a case it does not impair the validity of the sale that the original con-

pected the price to be realized from the immoral business. The court declined to express an opinion whether mere knowledge by the plaintiff of the defendant's unlawful purpose would have precluded recovery. It was further held that the fact that the notes in suit were not those originally given for the price, but were new notes given to compromise suits brought on the original notes did not help the plaintiff. The original illegality tainted the whole transaction); *Hunstock v. Palmer*, 4 Tex. Civ. App. 459, 23 S. W. 294 (rent of premises known by the landlord to be used for immoral purposes cannot be recovered); *Standard Furniture Co. v. Van Alstine*, 22 Wash.

670, 62 Pac. 145, 51 L. R. A. 889, 79 Am. St. Rep. 960 (seller of goods on conditional sale not allowed to recover them on buyer's default. The court held that such a sale necessarily involved participation in the immoral business, distinguishing the case from an absolute sale on credit); *Washington Liquor Co. v. Shaw*, 38 Wash. 398, 80 Pac. 536 (seller of liquor sold with knowledge of the character of the place where it was to be used recovered the price).

⁵ See *supra*, § 651.

⁶ See *Cowan v. Milbourn*, L. R. 2 Ex. 230; *Church v. Proctor*, 66 Fed. Rep. 240, 244, 33 U. S. App. 1, 13 C. C. A. 426. But see *O'Brien v. Brietenbach*, 1 Hilt. 304.

tract was illegal.⁷ In the converse case where the contract was originally legal, but because of a change in purpose of the parties, or a change in the law, performance has become illegal, a sale in performance of the contract would be against public policy and the obligations of the contract would be unenforcible.⁸ After a sale has been completely carried out, however, the subsequent agreement of the parties to utilize the goods for an illegal purpose will not deprive the seller of his right to recover the price.⁹ It has been laid down on high authority that "When it is sought to avoid an agreement not being in itself unlawful on the ground of its being meant as part of an unlawful scheme, or to carry out an unlawful object, it must be shown that such was the intention of the parties at the time of making the agreement."¹⁰ The cor-

⁷ See cases of contracts made on Sunday, and subsequently performed on a secular day. *Supra*, § 667, note 32; *Cones v. The United States*, 8 Ct. Cl. 421. In this case a contract was made for the sale of cotton within the enemy's country, but the sale was subsequently carried out within the Union lines. The sale was legal and the property passed.

⁸ Thus it is laid down as to contracts generally by Sir Frederick Pollock: "Where the performance of a contract lawful in its inception is made unlawful by any subsequent event, the contract is thereby dissolved." *Wald's Pollock, Contracts* (3d ed.), 514. Citing *Atkinson v. Ritchie*, 10 East, 530; *Esposito v. Bowden*, 4 E. & B. 963; *Gates v. Goodloe*, 101 U. S. 612, 619-621, 25 L. ed. 895; *Gray v. Sims*, 3 Wash. C. C. 276, 280; *United States v. Dietrich*, 126 Fed. Rep. 671; *Chicago v. Railroad Co.*, 105 Ill. 73; *Jamieson v. Indiana Gas Co.*, 128 Ind. 555, 28 N. E. 76; *Brown v. Delano*, 12 Mass. 370; *Cordes v. Miller*, 39 Mich. 581, 33 Am. Rep. 430 (with this case last cited compare *David v. Ryan*, 47 Iowa, 642); *Bradford v. Jenkins*, 41 Miss. 328; *Bullard v. Northern Pac.*

Ry. Co., 10 Mont. 168, 25 Pac. 120; *Hillyard v. Mutual Benefit Ins. Co.*, 35 N. J. L. 415, 418, 422; *Brick Presb. Church v. City of New York*, 5 Cow. 538; *Baltimore, etc., R. Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. 476.

⁹ This may be inferred from *Ware v. Curry*, 67 Ala. 274; *Pond v. Smith*, 4 Conn. 297. In *Ware v. Curry*, the vendor's lien on real estate sold by him was held not lost by aid given the buyer after the sale in the illegal purposes of manufacturing iron for the Confederate government. In *Pond v. Smith*, a part owner of the ship who fitted the ship out was held entitled to reimburse in spite of a subsequent agreement that the vessel should be illegally employed as a privateer. See also *Johns v. Reed* (Neb.), 109 N. W. 738.

¹⁰ Lord Howden *v. Simpson*, 10 A. & E. 793, 818, quoted by Sir Frederick Pollock, *Wald's Pollock, Contracts* (3d ed.), 493. And see *Church v. Proctor*, 66 Fed. Rep. 240, 33 U. S. App. 1, 13 C. C. A. 426; *Pape v. Wright*, 116 Ind. 502, 507, 19 N. E. 459; *Sawyer v. Taggart*, 14 Bush, 727, 734; *Wall v. Schneider*, 59 Wis. 352, 359, 18 N. W. 443.

rectness of this rule seems, however, questionable. Public policy certainly requires that the illegal intent whenever conceived should not be carried into execution. According to the rule stated in the text, an innocent party may be bound to aid in the execution of an illegal purpose or be liable for breach of contract. There seems no theoretical difficulty in saying that the change of purpose subsequent to the formation of the contract gives rise to a defense which did not previously exist.

§ 677. **Executory and executed illegal contracts.**—The illegality of a contract or sale may result either from the illegality of the promise or from the illegality of the consideration given for the promise. A promise to do an illegal thing for a legal consideration is unenforceable,¹¹ and equally so a promise to do a legal thing for an illegal consideration.¹² If the agreement is bilateral and the promise on either side is unlawful, both promises are unenforceable; for one promise is itself unlawful and the other is given for unlawful consideration. If an illegal contract has been partly executed, the parties are in effect left as they stand, for all relief for nonperformance of the rest of the obligation is denied; therefore, a seller cannot recover possession of goods illegally sold on a conditional sale, though the condition has been broken.¹³

§ 678. **Rescission of illegal contracts.**—It is doubtless possible for the law to make even an executed sale with transfer of possession so absolutely void that no title passes to the buyer; but the mere fact that a sale is against public policy or in violation of statute does not have this effect. The distinction is less important than it might seem at first sight, because even though the buyer is held to acquire no title the seller on account of his illegality is precluded from attacking the conveyance, and if no other person has a claim to the goods or other property conveyed, the buyer's possession necessarily remains undisturbed. Whatever the

¹¹ For instance, a promise to make an illegal sale in return for a legal consideration of money paid in advance.

¹² For example, a promise to pay the price for goods illegally sold.

¹³ *Singer Mfg. Co. v. Draper*, 103 Tenn. 262, 52 S. W. 879; *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670, 62 Pac. 145, 51 L. R. A. 889, 79 Am. St. Rep. 960.

reason for this result, the result itself is clear.¹⁴ Though the seller is thus unable to rescind where the property and possession have both been parted with, it seems that if possession is retained even though the property has passed, the seller may virtually rescind the transaction. For the buyer cannot establish a right to the goods, and by virtue of his former ownership the seller can maintain an undisturbed possession against the world.¹⁵ To the general rule that an executed transfer cannot be set aside, there are, however, exceptions which may be included either under the head of an unexecuted illegal purpose or of parties not *in pari delicto*.

¹⁴ *Ayerst v. Jenkins*, L. R. 16 Eq. 275; *Dent v. Ferguson*, 132 U. S. 50, 33 L. ed. 242, 10 S. Ct. 13; *St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.*, 145 U. S. 393, 407, 36 L. ed. 738, 12 S. Ct. 953; *Savings, etc., Trust Co. v. Bear Valley Co.*, 112 Fed. Rep. 693, 702; *Dunkin v. Hodge*, 46 Ala. 523; *Hubbard v. Sayre*, 105 Ala. 440, 17 So. 17; *Branham v. Stallings*, 21 Colo. 211, 40 Pac. 396, 52 Am. St. Rep. 213; *Johnston v. Allen*, 22 Fla. 224; *Adams v. Barrett*, 5 Ga. 404, 414; *Thompson v. Cummings*, 68 Ga. 124; *St. Louis I. & C. R. Co. v. Mathers*, 71 Ill. 592, 598; *Tobey v. Robinson*, 99 Ill. 222; *Bishop v. American Preservers Co.*, 157 Ill. 284, 41 N. E. 765, 48 Am. St. Rep. 317; *Dumont v. Dufore*, 27 Ind. 263; *Winchester Electric Light Co. v. Veal*, 145 Ind. 506, 41 N. E. 334, 44 N. E. 353; *Setter v. Alvey*, 15 Kans. 157; *Rateliffe v. Smith*, 13 Bush, 172; *Myers v. Meinrath*, 101 Mass. 366, 3 Am. Rep. 368; *Traders' Nat. Bank v. Steere*, 165 Mass. 389, 43 N. E. 187; *Moore v. Adams*, 8 Ohio, 372, 32 Am. Dec. 723; *Thomas v. Cronise*, 16 Ohio, 54; *Hooker v. De Palos*, 28 Ohio St. 251; *Perkins v. Savage*, 15 Wend. 412; *Booker v. Wingo*, 29 S. C. 116, 7 S. E. 49;

Singer Mfg. Co. v. Draper, 103 Tenn. 262, 52 S. W. 879; *Beer v. Landman*, 88 Tex. 450, 31 S. W. 805; *Dixon v. Olmstead*, 9 Vt. 310, 31 Am. Dec. 629; *Miller v. Larson*, 19 Wis. 463; *Cohn v. Heimbauch*, 86 Wis. 176, 56 N. W. 638. But see *Savings Bank v. National Bank*, 38 Fed. Rep. 800; *Harrison v. Hatcher*, 44 Ga. 638; *Kirkpatrick v. Clark*, 132 Ill. 342, 24 N. E. 71, 8 L. R. A. 511, 22 Am. St. Rep. 531; *Lockren v. Rustan*, 9 N. Dak. 43, 81 N. W. 60; *Drinkall v. Movius Bank*, 11 N. Dak. 10, 88 N. W. 724, 57 L. R. A. 341, 95 Am. St. Rep. 693; *Still v. Buzzell*, 60 Vt. 478, 12 Atl. 209; *Heckman v. Swartz*, 50 Wis. 267, 6 N. W. 891. Many of the foregoing cases relate to real estate, but there seems no reason to distinguish in this respect between real property and personal property. A dictum of Martin, B., in *Pearce v. Brooks*, L. R. 1 Ex. 213, 217, to the effect that an executed illegal sale of chattels might be rescinded seems clearly erroneous, and opposed to the view ordinarily taken in England. See *Taylor v. Chester*, L. R. 4 Q. B. 309, 311, 315.

¹⁵ *Wald's Pollock, Contracts* (3d ed.), 488; *Singer Mfg. Co. v. Draper*, 103 Tenn. 262, 52 S. W. 879. See also *supra*, § 666.

§ 679. Rescission allowed when illegal agreement unexecuted.—

Where money has been paid or goods have been delivered in part performance of an illegal agreement, the money may be recovered so long as the illegal part of the agreement is wholly unexecuted.¹⁶ A common application of this doctrine is in regard to wagers. Money deposited in the hands of a stakeholder (and doubtless the rule would be the same if the money were intrusted to the other party) may be recovered before the determination of the wager. In regard to money deposited with a stakeholder the doctrine goes further than this, and on the ground that the stakeholder is merely the agent of each party as to the money deposited by him, it may be recovered until it has been actually paid over.¹⁷ In

¹⁶ *Tappenden v. Randall*, 2 B. & P. 467; *Taylor v. Bowers*, 1 Q. B. D. 291; *Kearley v. Thomson*, 24 Q. B. D. 742; *Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. ed. 347; s. c., *contra*, 57 N. Y. 518; *Block v. Darling*, 140 U. S. 234, 35 L. ed. 476, 11 S. Ct. 832; *Wassermann v. Sloss*, 117 Cal. 425, 49 Pac. 566, 38 L. R. A. 176, 59 Am. St. Rep. 209; *De Leonis v. Walsh*, 140 Cal. 175, 73 Pac. 813; *White v. Franklin Bank*, 22 Pick. 181; *Skinner v. Henderson*, 10 Mo. 205; *Brown v. Timmany*, 20 Ohio, 81; *Deaton v. Lawson*, 40 Wash. 486, 82 Pac. 879, 2 L. R. A. (N. S.) 392, 111 Am. St. Rep. 922.

¹⁷ *O'Sullivan v. Thomas*, [1895] 1 Q. B. 698; *Burge v. Ashley*, [1900] 1 Q. B. 744; *Lewis v. Bruton*, 74 Ala. 317, 49 Am. Rep. 816; *Thornhill v. O'Rear*, 108 Ala. 299, 19 So. 382, 31 L. R. A. 792; *Wheeler v. Spencer*, 15 Conn. 28; *Hale v. Sherwood*, 40 Conn. 332, 16 Am. Rep. 37; *Colson v. Meyers*, 80 Ga. 499; s. c., *sub nom.*, *Myers v. Colson*, 5 S. E. 504; *Petillon v. Hipple*, 90 Ill. 420, 32 Am. Rep. 31; *Frybarger v. Simpson*, 11 Ind. 59; *Burroughs v. Hunt*, 13 Ind. 178; *Adkins v. Flemming*, 29 Iowa, 122; *Pollock v. Agner*, 54 Kans. 618, 38 Pac. 781; *Hutchings v. Stilwell*,

18 B. Mon. 776; *Stacey v. Foss*, 19 Me. 335, 36 Am. Dec. 755; *McDonough v. Webster*, 68 Me. 530; *Gilmore v. Woodcock*, 69 Me. 118, 31 Am. Rep. 255, 70 Me. 494; *Fisher v. Hildreth*, 117 Mass. 558; *Morgan v. Beaumont*, 121 Mass. 7; *Whitwell v. Carter*, 4 Mich. 329; *Wilkinson v. Tousley*, 16 Minn. 299, 10 Am. Rep. 139; *Pabst Brewing Co. v. Liston*, 80 Minn. 473, 83 N. W. 448; *Weaver v. Harlan*, 48 Mo. App. 319; *White v. Gilleland*, 93 Mo. App. 310; *Deaver v. Bennett*, 29 Neb. 812, 46 N. W. 161, 26 Am. St. Rep. 415; *Perkins v. Eaton*, 3 N. H. 152; *Hoit v. Hodge*, 6 N. H. 104, 25 Am. Dec. 451; *Hensler v. Jennings*, 62 N. J. L. 209, 41 Atl. 918; *Stoddard v. McAuliffe*, 81 Hun, 524; *affd.*, without opinion, 151 N. Y. 671, 46 N. E. 1151; *Wood v. Wood's Exr.*, 3 Murph. 172; *Forrest v. Hart*, 3 Murph. 458; *Dunn v. Drummond*, 4 Okla. 461, 51 Pac. 656; *Willis v. Hoover*, 9 Or. 418; *Conklin v. Conway*, 18 Pa. St. 329; *Dauler v. Hartley*, 178 Pa. St. 23, 35 Atl. 857; *McGrath v. Kennedy*, 15 R. I. 209, 2 Atl. 438; *Bledsoe v. Thompson*, 6 Rich. L. 44, 57 Am. Dec. 777; *Guthman v. Parker*, 3 Head, 233; *Lillard v. Mitchell* (Tenn.), 37 S. W. 702; *Lewy v. Crawford*, 5 Tex. Civ.

a few States demand must be made upon the stakeholder before the wager has been decided.¹⁸ If a stakeholder pays the winner, before receiving notice of repudiation of the wager, he is not liable;¹⁹ unless made so by statute.²⁰ Repudiation must be absolute. A notification not to pay the winner until further notice has been held sufficient.²¹ If notwithstanding notice not to do so, the stakeholder pays the money to the winner, the loser may recover his deposit from the winner.²² But if after the wager is decided against one of the parties, he, contending that he is the winner, demands the whole sum deposited by both parties and forbids its payment to the other party, he cannot, after payment of the whole deposit to the other party, recover from the stakeholder for the amount deposited by himself.²³ Some decisions, however, allow even this.²⁴ It will be observed that the right of rescission and recovery of the consideration by a plaintiff must be confined to cases where it is the defendant's promise that is illegal, not the consideration for it. Where the consideration is illegal,

App. 293; *Tarleton v. Baker*, 18 Vt. 9, 44 Am. Dec. 358; *West v. Holmes*, 26 Vt. 530. See also *Trenery v. Goudie*, 106 Iowa, 693, 77 N. W. 467; *Jones v. Cavanaugh*, 149 Mass. 124, 21 N. E. 306. But in *Sutphin v. Crozer*, 32 N. J. L. 462, it was held that no action could be maintained by either party against the stakeholder to recover money illegally staked.

¹⁸ *Johnston v. Russell*, 37 Cal. 670; *Davis v. Holbrook*, 1 La. Ann. 176; *Hickerson v. Benson*, 8 Mo. 8, 11, 40 Am. Dec. 115, 118; *Connor v. Black*, 132 Mo. 150, 154, 33 S. W. 783. In Missouri this doctrine has been enacted by statute. See *Weaver v. Harlan*, 48 Mo. App. 319; *White v. Gilleland*, 93 Mo. App. 310; *Dooley v. Jackson*, 104 Mo. App. 21, 78 S. W. 330.

¹⁹ *Colson v. Meyers*, 80 Ga. 499; s. c., *sub nom.*, *Myers v. Colson*, 5 S. E. 504; *Frybarger v. Simpson*, 11 Ind. 59; *Adkins v. Flemming*, 29 Iowa, 122; *Goldberg v. Feiga*, 170

Mass. 146, 48 N. E. 1073; *Riddle v. Perry*, 19 Neb. 505, 27 N. W. 721; *Bates v. Lancaster*, 10 Humph. 134, 51 Am. Dec. 696.

²⁰ See *Hensler v. Jennings*, 62 N. J. L. 209, 41 Atl. 918; *Ruckman v. Pitcher*, 1 N. Y. 392, 20 N. Y. 9; *Columbia Bank v. Haldeman*, 7 W. & S. 233, 42 Am. Dec. 229; *Harnden v. Melby*, 90 Wis. 5, 62 N. W. 535.

²¹ *Trenery v. Goudie*, 106 Iowa, 693, 77 N. W. 467. See also *Maher v. Van Horn*, 15 Colo. App. 14, 60 Pac. 949. But see *Pabst Brewing Co. v. Liston*, 80 Minn. 473, 83 N. W. 448.

²² *McKee v. Manice*, 11 Cush. 357; *Love v. Harvey*, 114 Mass. 80.

²³ *Okerson v. Crittenden*, 62 Iowa, 297, 17 N. W. 528; *Patterson v. Clark*, 126 Mass. 531.

²⁴ *Hale v. Sherwood*, 40 Conn. 332, 16 Am. Rep. 37; *Perkins v. Hyde*, 6 Yerg. 288. See also *Shoolbred v. Roberts*, [1899] 2 Q. B. 560; [1900] 2 Q. B. 497.

under the terms of the rule, it is clear there cannot be recovery, for an illegal part of the transaction has then been executed.

§ 680. **Parties not in pari delicto.**—In some cases rescission of an illegal transaction and recovery of consideration is allowed beyond the limits stated in the preceding section. This is true where the parties are said not to be *in pari delicto*. The typical case is where one party acts under compulsion of the other. The doctrine originated in cases where a creditor by pressure induced his debtor to enter into transactions fraudulent as to other creditors.²⁵ In some cases also the guilt of the parties is differentiated for other reasons. Probably no more exact principle can be laid down than this, that if a plaintiff though culpable has not been guilty of moral turpitude, and the loss he will suffer by being denied relief is wholly out of proportion to the requirements either of public policy or appropriate individual punishment, he may be allowed to recover back the consideration with which he has parted.²⁶ The nature or terms of a statute or rule of law will also sometimes indicate that it is intended for the protection of one class of individuals against another, and where this is the case a party belonging to the class whose protection was intended may recover what he has paid.²⁷ If the illegal transaction was entered

²⁵ See *Atkinson v. Denby*, 6 H. & N. 778, 7 H. & N. 934, citing earlier decisions.

²⁶ Thus in *White v. Franklin Bank*, 22 Pick. 181, the plaintiff had made a deposit in the defendant bank on terms which violated the Banking Law. Though the court admitted that the defendant was blameworthy, it regarded the bank as more seriously guilty, and allowed the plaintiff to recover his money. See also *Reynall v. Sprye*, 1 De G. M. & G. 660; *Lowell v. Boston & L. R. R. Corp.*, 23 Pick. 24, 34 Am. Dec. 33.

²⁷ *Thomas v. City of Richmond*, 12 Wall. 349, 20 L. ed. 453; *Parkersburg v. Brown*, 106 U. S. 487, 503, 27 L. ed. 238, 1 S. Ct. 442; *Logan County Bank v. Townsend*, 139 U. S. 67, 35 L. ed. 107, 11 S. Ct. 496;

Scotten v. State, 51 Ind. 52; *Deming v. State*, 23 Ind. 416; *Smart v. White*, 73 Me. 332, 40 Am. Rep. 356; *White v. Franklin Bank*, 22 Pick. 181; *Morville v. Amer. Tract. Soc.*, 123 Mass. 129, 137, 138, 25 Am. Rep. 40; *Bateman v. Robinson*, 12 Neb. 508, 11 N. W. 736; *Becker v. Wilcox*, Neb. , 116 N. W. 160, 16 L. R. A. (N. S.) 571; *Manchester R. Co. v. Concord R. Co.*, 66 N. H. 100, 131, 20 Atl. 383; *Schermerhorn v. Talman*, 14 N. Y. 93, 123; *Tracy v. Talmage*, 14 N. Y. 162, 181, 199, 67 Am. Dec. 132; *Oneida Bank v. Ontario Bank*, 21 N. Y. 490; *Irwin v. Curie*, 171 N. Y. 409, 64 N. E. 161, 58 L. R. A. 830; *Duval v. Wellman*, 124 N. Y. 156, 26 N. E. 343; *Webb v. Fulchire*, 3 Ired. L. 485, 40 Am. Dec. 419; *Reinhard v. City*, 49 Ohio

into by a trustee or guardian so that any penal consequences visited upon the transaction will fall, not upon the guilty fiduciary, but upon his beneficiary, relief would be afforded either by the enforcement of the agreement because of the innocence of the beneficial plaintiff,²⁸ or if in the particular case this seemed against public policy as amounting to allowing the ratification of an illegal transaction, the innocent beneficiary or the fiduciary in his behalf would at least be allowed to rescind and recover any consideration paid.²⁹ Creditors, however, have no such large rights. The transfer of money or property under an unlawful act "does not necessarily give creditors a right to pursue the property after the contract has been fully executed. Such a contract may or may not be fraudulent as against creditors. If it is, they may set it aside. If it is not, they cannot."³⁰ And a trustee in bankruptcy cannot for the benefit of the estate enforce an illegal contract, as a wager, under which the bankrupt, and, therefore, his trustee, would be entitled to money or property had the contract been legal.³¹ Where one party to the bargain has been fraudulently induced to enter into the transaction, it is frequently said he is not *in pari delicto*, and the case has sometimes been classed with duress or coercion, but a distinction is to be observed. If the fraud consisted in deceiving the plaintiff as to the unlawful character of the transaction, doubtless the analogy with duress is sound. And even though the fraud consisted in depriving the plaintiff of the use of his faculties or judgment, the same principle might apply.³² But if the fraud only consisted of representations inducing the plaintiff to believe that the proposed illegal transaction would be

St. 257, 31 N. E. 35; Insurance Co. v. Hull, 51 Ohio St. 270, 37 N. E. 1116, 46 Am. St. Rep. 571; Smith v. Blachley, 188 Pa. St. 550, 41 Atl. 619, 68 Am. St. Rep. 887, 198 Pa. St. 173, 47 Atl. 985, 53 L. R. A. 849; Deaton v. Lawson, 40 Wash. 486, 82 Pac. 879, 2 L. R. A. (N. S.) 392, 111 Am. St. Rep. 922.

²⁸ See *supra*, § 663.

²⁹ Lee v. Boyd, 86 Ala. 283.

³⁰ Traders' Nat. Bank v. Steere, 165 Mass. 389, 43 N. E. 187, quoted with

approval and followed in Johns v. Reed (Neb.), 109 N. W. 738.

³¹ Shoolbred v. Roberts, [1899] 2 Q. B. 560, [1900] 2 Q. B. 497.

³² In Block v. McMurry, 56 Miss. 217, 31 Am. Rep. 357, the defendant fraudulently induced the plaintiff to become intoxicated and then induced him to make a sale of his horse on Sunday. The seller was allowed to recover. See also Bell v. Campbell, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505.

more profitable than it actually turned out to be, it seems hard to discover any reason which should induce a court to favor him.³³ It has been indeed decided by the Supreme Court of the United States³⁴ that a fraudulent illegal transaction might be rescinded on the broad ground that "a person does not become an outlaw and lose all rights by doing an illegal act. The right not to be led by fraud to change one's situation is anterior to and independent of the contract. The fraud is a tort. Its usual consequence is that as between the parties one who is defrauded has a right, if possible, to be restored to his former position. That right is not taken away because the consequence of its exercise will be the undoing of a forbidden deed." While the decision of the case may be supported on the ground of the slight guilt of the plaintiff, it is believed that the broad statement just quoted cannot be accepted as a statement of general principle. Certainly where the illegality is of a serious character the consequences may well be expressed by saying that as to that transaction the parties engaged in it become outlaws. For instance, if a purchase of stolen silver known by both parties to be such was induced by fraudulent misrepresentations of circumstances affecting its value, it is submitted that not only could the bargain not be enforced if executory, but it could not be rescinded if executed, nor would an action of tort for deceit lie in favor of the defrauded party. The broad principle *ex dolo malo non oritur actio* is not confined in its terms nor in its reason to an action on the contr⁴ct.³⁵

³³ See decisions under Sunday laws, *supra*, § 666, note.

³⁴ *National Bank & Loan Co. v. Petrie*, 189 U. S. 423, 23 S. Ct. 512, 47 L. ed. 879. In this case the plaintiff bought bonds of the National Bank & Loan Co., the defendant below. The court assumed that the transaction was forbidden by law. The plaintiff alleged that the sale was induced by fraud and sought in the action to rescind the sale and recover the money paid for the bonds, tender of which was made and kept good. The court held the action maintainable.

³⁵ In *Tracy v. Talmage*, 14 N. Y. 162, 181, 67 Am. Dec. 132, Selden, J., said: "The cases in which the courts will give relief to one of the parties on the ground that he is not *in pari delicto* form an independent class entirely distinct from those cases which rest upon a disaffirmance of the contract before it is executed. It is essential to both classes that the contract be merely *malum prohibitum*. If *malum in se* the courts will in no case interfere to relieve either party from any of its consequences. But where the contract neither involves *moral turpitude* nor

§ 681. **Enforcement of legal portion of illegal contract.**—It was early decided,³⁶ that where some covenants of an indenture are legal and others illegal, the legal covenants may be enforced. This is the simplest form of the problem of partly illegal contracts. If legal consideration has actually been given and a unilateral contract formed, or if the promises are under seal and binding without consideration, the rule thus early established has never been questioned.³⁷ For the same reason where one of two things is promised in the alternative, and one is lawful and the other unlawful, the lawful promise may be enforced.³⁸ But a qualification must be added to the broad statement of the rule. If the whole transaction was for an illegal purpose, or probably if the illegal covenants showed gross moral turpitude, the other covenants, though in themselves perfectly legal, would not be enforced. Perhaps the commonest application of this principle is to contracts in restraint of trade. If such a covenant can be divided and one division is within the limits allowed by law, it may be enforced, although the rest of the covenant extends the proposed restraint beyond permissible limits.³⁹ The problem of

violates any *general principle* of public policy, and money or property has been advanced upon it, relief will be granted to the party making the advance: 1. Where he is not *in pari delicto*; or, 2. In some cases where he elects to disaffirm the contract while it remains executory. In cases belonging to the first of these classes, it is of no importance whether the contract has been executed or not; and in those belonging to the second it is equally unimportant that the parties are *in pari delicto*." Whatever may be said in regard to any absolute distinction between a bargain which is *malum prohibitum* and one which is *malum in se*, it is certainly true that some consequences flow from the comparative enormity of illegal transactions.

³⁶ Pigot's Case, 11 Coke, 266, 276.

³⁷ Gelpcke v. Dubuque, 1 Wall. 221, 17 L. ed. 530; McCullough v. Vir-

ginia, 172 U. S. 102, 115, 43 L. ed. 382, 19 S. Ct. 134; Western Union Tel. Co. v. B. & S. W. Ry. Co., 3 McCrary, 130; Sims v. Alabama Brewing Co., 132 Ala. 311, 31 So. 35; Osgood v. Bauder, 75 Iowa, 550, 39 N. W. 887, 1 L. R. A. 655; Presbury v. Fisher, 18 Mo. 50; Erie Ry. Co. v. Union L. & E. Co., 35 N. J. L. 240; Leavitt v. Palmer, 3 N. Y. 19, 37, 51 Am. Dec. 333; Ohio v. Board of Education, 35 Ohio St. 519, 527; Pennsylvania Co. v. Wentz, 37 Ohio St. 333, 339. Compare Santa Clara Co. v. Hayes, 76 Cal. 387, 18 Pac. 391, 9 Am. St. Rep. 211; Lindsay v. Smith, 78 N. C. 328, 24 Am. Rep. 463.

³⁸ Hanauer v. Gray, 25 Ark. 350, 99 Am. Dec. 226.

³⁹ Price v. Green, 16 M. & W. 346; Dubowski v. Goldstein, [1896] 1 Q. B. 478; Haynes v. Doman, [1899] 2 Ch. 13, 24; Oregon S. N. Co. v.

partly illegal contracts more commonly arises where it is not a promise which is illegal but part of the consideration. Where there is a single consideration for one or more promises and any part of the consideration is illegal, the promises are wholly unenforceable.⁴⁰ And the same result must follow even though there are several considerations, some of which are legal, if the legal considerations are not apportioned to corresponding promises, for otherwise it is impossible to maintain an action on any of the promises without basing it to some degree upon the illegal portion of the consideration. Where, however, not only is the consideration separable into legal and illegal portions, but also the promises are correspondingly apportioned; that is, where the contract may properly be called divisible, it has been held that recovery may

Winsor, 20 Wall. 64, 22 L. ed. 315; Western Union Tel. Co. v. B. & S. W. Ry. Co., 3 McCrary, 130; Dean v. Emerson, 102 Mass. 480; Peltz v. Eichele, 62 Mo. 171; Lange v. Werk, 2 Ohio St. 520; Smith's Appeal, 113 Pa. St. 579, 6 Atl. 251. Compare More v. Bonnet, 40 Cal. 251, 6 Am. Rep. 621; Franz v. Bieler, 126 Cal. 176, 56 Pac. 249, 58 Pac. 466; Fishell v. Gray, 60 N. J. L. 5, 37 Atl. 606. See also United States v. Bradley, 10 Pet. 343, 9 L. ed. 155; Gelpcke v. Dubuque, 1 Wall. 221, 17 L. ed. 530.

⁴⁰Pickering v. Ilfracombe Ry. Co., L. R. 3 C. P. 235, 250; Harrington v. Victoria Graving Dock Co., 3 Q. B. D. 549; McMullen v. Hoffman, 174 U. S. 639, 43 L. ed. 1117, 19 S. Ct. 839; Hazelton v. Sheckells, 202 U. S. 71, 50 L. ed. 939, 26 S. Ct. 567; Pettit's Admr. v. Pettit's Distributees, 32 Ala. 288; Railroad Co. v. Taylor, 6 Colo. 1; Giles v. De Cow, 30 Colo. 412, 70 Pac. 681; Chandler v. Johnson, 39 Ga. 85; Ramsay's Est. v. Whitbeck, 183 Ill. 550, 56 N. E. 322; James v. Jellison, 94 Ind. 292, 48 Am. Rep. 151; Baird v. Boehmer, 77 Iowa, 622, 42 N. W. 454; Koster v. Seney, 99 Iowa, 584, 68 N. W. 824; Gerlach v. Skinner,

34 Kans. 86, 8 Pac. 257, 55 Am. Rep. 240; Collins v. Merrell, 2 Met. (Ky.) 163; Kimbrough v. Lane, 11 Bush, 556; Perkins v. Cummings, 2 Gray, 258; Bishop v. Palmer, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339; Stewart v. Thayer, 168 Mass. 519, 47 N. E. 420, 60 Am. St. Rep. 407, 170 Mass. 560, 49 N. E. 1020; Snider v. Willey, 33 Mich. 483; Carleton v. Whitchee, 5 N. H. 196; Clark v. Ricker, 14 N. H. 44; Bixby v. Moor, 51 N. H. 402; Saratoga County Bank v. King, 44 N. Y. 87; Foley v. Speir, 100 N. Y. 552, 3 N. E. 477; Woodruff v. Hinman, 11 Vt. 592, 34 Am. Dec. 712; Covington v. Threadgill, 88 N. C. 186; McQuade v. Rosenerans, 36 Ohio St. 442. Filson's Trustee v. Himes, 5 Pa. St. 452, 47 Am. Dec. 422; Pearce v. Wilson, 111 Pa. St. 14, 2 Atl. 99, 56 Am. Rep. 243; Sullivan v. Horgan, 17 R. I. 109, 20 Atl. 232, 9 L. R. A. 110; Columbia Carriage Co. v. Hatch, 19 Tex. Civ. App. 120, 47 S. W. 288. Compare Pierce v. Pierce, 17 Ind. App. 107, 46 N. E. 480. And see Royal Exchange Assurance Corporation v. Sjörforsakrings Aktiebolaget Vega, [1901] 2 K. B. 567, 573.

be had upon the promises which are supported by the legal portions of the consideration. This doctrine has been especially applied in the law of sales to cases where several lots of goods have been sold and separate prices affixed to each lot, and as to some of the goods sold, the transaction has been legal, but as to others, illegal. If wholly separate agreements are made for each article there is no difficulty in enforcing the legal sales.⁴¹ It may be supposed, however, that but a single bargain has been made for a number of articles but a different price has been affixed to each. It might seem at first sight that no recovery could be allowed here even for the legal items of the bargain, for it cannot be assumed that the defendant would have paid the same price for some of the goods if the whole transaction was not to be carried out, nor that the seller would otherwise sell them for the same price. If there were no question of illegality in the case, it cannot be doubted that the buyer might refuse to take part of the goods if the seller refused to give all and if part were taken on the assumption that the rest were to follow, the buyer might return what he had received.⁴² Nevertheless, it has been held that the seller may recover the price of the articles legally sold,⁴³ and it seems rightly; for by the delivery of each of the articles at a specified price a separate debt arises for the price of that article, and a count for goods sold and delivered could be maintained without further evidence. It is not open to the defendant to set up that owing to an illegal contract the price was fixed at a different figure than it otherwise might have been. The illegal contract will serve no better as a defense than as a cause of action. But where the articles legally sold were merely incidental to the execution of an illegal purpose, no recovery even for them can be had.⁴⁴ If a note is given in settlement of an account, some items which are legal and some illegal, though the

⁴¹ *Towle v. Blake*, 38 Me. 528; *Goodwin v. Clark*, 65 Me. 280; *Robinson v. Green*, 3 Metc. 159; *Rundlett v. Weeber*, 3 Gray, 263; *Holt v. O'Brien*, 15 Gray, 311; *Chase v. Burkholder*, 18 Pa. St. 48.

⁴² See *Barrie v. Earle*, 143 Mass. 1, 8 N. E. 639, 58 Am. Rep. 126.

⁴³ *Boyd v. Eaton*, 44 Me. 51, 69

Am. Dec. 83; *Walker v. Lovell*, 28 N. H. 138, 61 Am. Dec. 605; *Carleton v. Woods*, 28 N. H. 290.

⁴⁴ *Wirth v. Roche*, 92 Me. 383, 42 Atl. 794 (bottles in which beer was illegally sold); *Bligh v. James*, 6 Allen, 570 (casks in which liquor was illegally sold).

creditor may disregard the note, if dishonored by the maker, and sue upon the legal items of the account, the note itself is wholly unenforceable.⁴⁵ The same rule applies to an account stated. Though where the parties fix on an agreed sum as that which is due, the amount is recoverable even if it is not the exact amount for which a court would have given judgment in a suit on the original liability, yet if the basis of the account stated is in part illegal items, no recovery can be had upon it, and the creditor must base his action on the legal items of the account.⁴⁶ A note in part payment of an account is enforceable if the amount of the note is less than the amount of the legal items of the account.⁴⁷ Renewal notes are subject to the same infirmities which affected the original note.⁴⁸ Care must be taken to distinguish illegal consideration from consideration which is merely bad for insufficiency. Consideration of the latter sort will not invalidate a contract, though not of itself sufficient to support a promise. If other consideration exists and there is mutual assent to the bargain, recovery may be had.⁴⁹ Thus far in this section reference has been made to unilateral contracts exclusively. In bilateral contracts a further element complicates the problem. In such contracts the consideration must be good on both sides. If, therefore, a promise is made by A. to do something lawful while B. promises to do two things, one lawful and one unlawful, there can be no recovery on either side. B. cannot recover because part of the consideration for the defendant A.'s promise is unlawful. A. cannot recover even on B.'s lawful promise because since his own promise

⁴⁵ *Pacific Guano Co. v. Mullen*, 66 Ala. 582; *Deering v. Chapman*, 22 Me. 488, 39 Am. Dec. 592; *Cotten v. McKenzie*, 57 Miss. 418; *Carleton v. Woods*, 28 N. H. 290; *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664. But see the contrary decision of *Shaw v. Carpenter*, 54 Vt. 155, 41 Am. Rep. 837. See also *Daniel*, *Neg. Inst.*, § 195 *et seq.*

⁴⁶ *Cocking v. Ward*, 1 C. B. 858, 877; *Kennedy v. Broun*, 13 C. B. (N. S.) 677; *Dunbar v. Johnson*, 108 Mass. 519.

⁴⁷ *Warren v. Chapman*, 105 Mass. 87.

⁴⁸ *Daniel*, *Neg. Inst.*, § 206.

⁴⁹ See *Pierce v. Pierce*, 17 Ind. App. 107; *King v. King*, 63 Ohio St. 363, 369, 59 N. E. 111, 52 L. R. A. 157, 81 Am. St. Rep. 635. It is to be observed that the portion of the consideration which is insufficient as such must, nevertheless, be given in order to make the bargain enforceable. Otherwise a bargain would be enforced to which the defendant had never assented.

is unenforceable, it is itself insufficient consideration for B.'s promise. If, however, A. performs his promise, the situation becomes the same as if the contract had originally been unilateral, and A. could recover on B.'s lawful promise.⁵⁰

⁵⁰ See *Kearney v. Whitehaven Colliery Co.*, [1893] 1 Q. B. 700; *More v. Bonnet*, 40 Cal. 251, 6 Am. Rep. 621; *Siddall v. Clark*, 89 Cal. 321, 26 Pac. 829; *Hynds v. Hays*, 25 Ind. 31; *Bishop v. Palmer*, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339; *Fishell v. Gray*, 60 N. J. L. 5, 37 Atl. 606; *Lindsay v. Smith*, 78 N. C. 328, 24 Am. Rep. 463, 12 Harv. L. Rev. 424. See also an article by Prof.

William P. Rogers, 17 Yale L. Jour. 338. It has been suggested, also (Wald's *Pollock*, Contracts [3d ed.], 484), that if A., even before performing himself, elected to sue on B.'s lawful promise and take judgment upon it alone, this would operate as an assent by A. as an agreement to perform his promise in return for B.'s lawful promise, thereby binding both parties.

APPENDIX.

SALES ACT.

AN ACT to Make Uniform the Law Relating to the Sale of Goods.

As approved by the Commissioners on Uniform State Laws, and enacted in Arizona, Laws of 1907, c. 99; Connecticut, Acts of 1907, c. 212; New Jersey, Laws of 1907, c. 132; Massachusetts, Acts of 1908, c. 237; Rhode Island, Laws of 1908, c. 1548; Ohio, Laws of 1908, p. 413.

PART I.

FORMATION OF THE CONTRACT.

Section 1.— [*Contracts to Sell and Sales.*] (1.) A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

(2.) A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

(3.) A contract to sell or a sale may be absolute or conditional.

(4.) There may be a contract to sell or a sale between one part owner and another.

Section 2.— [*Capacity — Liabilities for Necessaries.*] Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Where necessaries are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section means goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery.

Formalities of the Contract.

Section 3.— [*Form of Contract or Sale.*] Subject to the provisions of this act and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties.

Section 4.— [*Statute of Frauds.*] (1.) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars¹ or

¹ Amended in the Connecticut statute to one hundred dollars and in the Ohio statute to twenty-five hundred dollars.

upward shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

(2.) The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

(3.) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods.

Subject Matter of Contract.

Section 5.— [*Existing and Future Goods.*] (1.) The goods which from the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract to sell, in this act called "future goods."

(2.) There may be a contract to sell goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3.) Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods.

Section 6.— [*Undivided Shares.*] (1.) There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer, by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares.

(2.) In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight or measure of the goods in the mass, and though the number, weight or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share or the mass as the number, weight or measure bought bears to the number, weight or measure of the mass. If the mass contains less than the number, weight or measure

bought, the buyer becomes the owner of the whole mass and the seller is bound to make good the deficiency from similar goods unless a contrary intent appears.

Section 7.— [*Destruction of Goods Sold.*] (1.) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have wholly perished at the time when the agreement is made, the agreement is void.

(2.) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have perished in part or have wholly or in a material part so deteriorated, in quality as to be substantially changed in character, the buyer may at his option treat the sale —

(a.) As avoided, or

(b.) As transferring the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the sale was indivisible or to pay the agreed price for the goods in which the property passes if the sale was divisible.

Section 8.— [*Destruction of Goods Contracted to be Sold.*]

(1.) Where there is a contract to sell specific goods, and subsequently but before the risk passes to the buyer, without any fault on the part of the seller or the buyer, the goods wholly perish, the contract is thereby avoided.

(2.) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault of the seller or the buyer, part of the goods perish or the whole or a material part of the goods so deteriorate in quality as to be substantially changed in character, the buyer may at his option treat the contract —

(a.) As avoided, or

(b.) As binding the seller to transfer the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the contract was indivisible, or to pay the agreed price for so much of the goods as the seller, by the buyer's option, is bound to transfer if the contract was divisible.

The Price.

Section 9.— [*Definition and Ascertainment of Price.*] (1.) The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties.

(2.) The price may be made payable in any personal property.

(3.) Where transferring or promising to transfer any interest in real estate constitutes the whole or part of the consideration for transferring or for promising to transfer the property in goods, this act shall not apply.

(4.) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Section 10.— [*Sale at a Valuation.*] (1.) Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person, without fault of the seller or the buyer, cannot or does not fix the price or terms, the contract or the sale is thereby avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2.) Where such third person is prevented from fixing the price or terms by fault of the seller or the buyer, the party not in fault may have such remedies against the party in fault as are allowed by Parts IV and V of this act.

Conditions and Warranties.

Section 11.— [*Effect of Conditions.*] (1.) Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to proceed with the contract or sale or he may waive performance of the condition. If the other party has promised that the condition should happen or be performed, such first-mentioned party may also treat the non-performance of the condition as a breach of warranty.

(2.) Where the property in the goods has not passed, the buyer may treat the fulfillment by the seller of his obligation to furnish goods as described and as warranted expressly or by implication in the contract to sell as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods.

Section 12.— [*Definition of Express Warranty.*] Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

Section 13.— [*Implied Warranties of Title.*] In a contract to sell or a sale, unless a contrary intention appears, there is —

(1.) An implied warranty on the part of the seller that in case of a sale he has a right to sell the goods, and that in case of a contract to sell he will have a right to sell the goods at the time when the property is to pass.

(2.) An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale.

(3.) An implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made.

(4.) This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other person professing to sell by virtue of authority in fact or law goods in which a third person has a legal or equitable interest.

Section 14.— [*Implied Warranty in Sale by Description.*] Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

Section 15.— [*Implied Warranties of Quality.*] Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

(1.) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

(2.) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

(3.) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

(4.) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

(5.) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(6.) An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith.

Sale by Sample.

Section 16.— [*Implied Warranties in Sale by Sample.*] In the case of a contract to sell or a sale by sample:

(a.) There is an implied warranty that the bulk shall correspond with the sample in quality.

(b.) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in section 47 (3).

(c.) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

PART II.

TRANSFER OF PROPERTY AND TITLE.

Transfer of Property as Between Seller and Buyer.

Section 17.— [*No Property Passes until Goods are Ascertained.*] Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in section 6.

Section 18.— [*Property in Specific Goods Passes When Parties so Intend.*] (1.) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2.) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case.

Section 19.— [*Rules for Ascertaining Intention.*] Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of put-

ting them into a deliverable state, the property does not pass until such thing be done.

Rule 3. (1.) When goods are delivered to the buyer "on sale or return," or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.

(2.) When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer —

(a.) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction:

(b.) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 4. (1.) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

(2.) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section 20. This presumption is applicable, although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "collect on delivery" or their equivalents.

Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.

Section 20.— [*Reservation of Right of Possession or Property when Goods are Shipped.*] (1.) Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve

the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer.

(2.) Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

(3.) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods as against the buyer.

(4.) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading together to the buyer to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading he acquires no added right thereby. If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is indorsed in blank, or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill of lading, or goods from the buyer will obtain the property in the goods, although the bill of exchange has not been honored, provided that such purchaser has received delivery of the bill of lading indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful.

Section 21. [*Sale by Auction*]. In the case of sale by auction —

(1.) Where goods are put up for sale by auction in lots, each lot is the subject of a separate contract of sale.

(2.) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve.

(3.) A right to bid may be reserved expressly by or on behalf of the seller.

(4.) Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ or induce any person to bid at

such sale on his behalf, or for the auctioneer to employ or induce any person to bid at such sale on behalf of the seller or knowingly to take any bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer.

Section 22.— [*Risk of Loss.*] Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except that —

(a.) Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligation under the contract, the goods are at the buyer's risk from the time of such delivery.¹

(b.) Where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Transfer of Title.

Section 23.— [*Sale by a Person not the Owner.*] (1.) Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2.) Nothing in this act, however, shall affect —

(a.) The provisions of any factors' acts, recording acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.

(b.) The validity of any contract to sell or sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

Section 24.— [*Sale by one Having a Voidable Title.*] Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title.

Section 25.— [*Sale by Seller in Possession of Goods already Sold.*] Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposi-

tion thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

Section 26.— [*Creditors' Rights against Sold Goods in Seller's Possession.*] Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, and such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void.

Section 27.— [*Definition of Negotiable Document of Title.*] A document of title in which it is stated that the goods referred to therein will be delivered to the bearer, or to the order of any person named in such document is a negotiable document of title.

Section 28.— [*Negotiation of Negotiable Documents by Delivery.*] A negotiable document of title may be negotiated by delivery:

(a.) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the bearer, or

(b.) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the document has indorsed it in blank or to bearer.

Where by the terms of a negotiable document of title the goods are deliverable to bearer or where a negotiable document of title has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the document shall thereafter be negotiated only by the indorsement of such indorsee.

Section 29.— [*Negotiation of Negotiable Documents by Indorsement.*] A negotiable document of title may be negotiated by the indorsement of the person to whose order the goods are by the terms of the document deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner.

Section 30.— [*Negotiable Documents of Title Marked "Not Negotiable."*] If a document of title which contains an undertaking by a carrier, warehouseman or other bailee to deliver the goods to the bearer, to a specified person or order, or to the order of a specified person, or which contains words of like import, has placed upon it

the words "not negotiable," "non-negotiable" or the like, such a document may nevertheless be negotiated by the holder and is a negotiable document of title within the meaning of this act. But nothing in this act contained shall be construed as limiting or defining the effect upon the obligations of the carrier, warehouseman, or other bailee issuing a document of title of placing thereon the words "not negotiable," "non-negotiable," or the like.

Section 31.— [*Transfer of Non-Negotiable Documents.*] A document of title which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A non-negotiable document cannot be negotiated and the indorsement of such a document gives the transferee no additional right.

Section 32.— [*Who May Negotiate a Document.*] A negotiable document of title may be negotiated—

(a.) By the owner thereof, or

(b.) By any person to whom the possession or custody of the document has been entrusted by the owner, if, by the terms of the document the bailee issuing the document undertakes to deliver the goods to the order of the person to whom the possession or custody of the document has been entrusted, or if at the time of such entrusting the document is in such form that it may be negotiated by delivery.

Section 33.— [*Rights of Person to Whom Document Has Been Negotiated.*] A person to whom a negotiable document of title has been duly negotiated acquires thereby,

(a.) Such title to the goods as the person negotiating the document to him had or had ability to convey to a purchaser in good faith for value and also such title to the goods as the person to whose order the goods were to be delivered by the terms of the document had or had ability to convey to a purchaser in good faith for value, and

(b.) The direct obligation of the bailee issuing the document to hold possession of the goods for him according to the terms of the document as fully as if such bailee had contracted directly with him.

Section 34.— [*Rights of Person to Whom Document Has Been Transferred.*] A person to whom a document of title has been transferred, but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor.

If the document is non-negotiable, such person also acquires the right to notify the bailee who issued the document of the transfer

thereof, and thereby to acquire the direct obligation of such bailee to hold possession of the goods for him according to the terms of the document.

Prior to the notification of such bailee by the transferor or transferee of a non-negotiable document of title, the title of the transferee to the goods and the right to acquire the obligation of such bailee may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to such bailee by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

Section 35.— [*Transfer of Negotiable Document without Indorsement.*] Where a negotiable document of title is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the document unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made.

Section 36.— [*Warranties on Sale of Document.*] A person who for value negotiates or transfers a document of title by indorsement or delivery, including one who assigns for value a claim secured by a document of title unless a contrary intention appears, warrants:

- (a.) That the document is genuine,
- (b.) That he has a legal right to negotiate or transfer it,
- (c.) That he has knowledge of no fact which would impair the validity or worth of the document, and
- (d.) That he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a document of title the goods represented thereby.

Section 37.— [*Indorser not a Guarantor.*] The indorsement of a document of title shall not make the indorser liable for any failure on the part of the bailee who issued the document or previous indorsers thereof to fulfill their respective obligations.

Section 38.— [*When Negotiation not Impaired by Fraud, Mistake or Duress.*] The validity of the negotiation of a negotiable document of title is not impaired by the fact that the negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the document was induced by fraud, mistake or duress to entrust the possession or custody thereof to such person, if the person to whom the document was negotiated or a person to whom the document was subsequently negotiated paid value

therefor, without notice of the breach of duty, or fraud, mistake or duress.

Section 39.— [*Attachment or Levy upon Goods for which a Negotiable Document Has Been Issued.*] If goods are delivered to a bailee by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner and a negotiable document of title is issued for them they cannot thereafter, while in the possession of such bailee, be attached by garnishment or otherwise or be levied upon under an execution unless the document be first surrendered to the bailee or its negotiation enjoined. The bailee shall in no case be compelled to deliver up the actual possession of the goods until the document is surrendered to him or impounded by the court.

Section 40.— [*Creditors' Remedies to Reach Negotiable Documents.*] A creditor whose debtor is the owner of a negotiable document of title shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such document or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process.

PART III.

PERFORMANCE OF THE CONTRACT.

Section 41.— [*Seller Must Deliver and Buyer Accept Goods.*] It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale.

Section 42.— [*Delivery and Payment are Concurrent Conditions.*] Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

Section 43.— [*Place, Time and Manner of Delivery.*] (1.) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business if he have one, and if not his residence; but in case of a contract to sell

or a sale of specific goods, which to the knowledge of the parties when the contract or the sale was made were in some other place, then that place is the place of delivery.

(2.) Where by a contract to sell or a sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3.) Where the goods at the time of sale are in the possession of a third person, the seller has not fulfilled his obligation to deliver to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf; but as against all others than the seller the buyer shall be regarded as having received delivery from the time when such third person first has notice of the sale. Nothing in this section, however, shall affect the operation of the issue or transfer of any document of title to goods.

(4.) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5.) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

Section 44.— [*Delivery of Wrong Quantity.*] (1.) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received.

(2.) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3.) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4.) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

Section 45.— [*Delivery in Instalments.*] (1.) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2.) Where there is a contract to sell goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken.

Section 46.— [*Delivery to a Carrier on Behalf of the Buyer.*] (1) Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in the cases provided for in section 19, Rule 5, or unless a contrary intent appears.

(2.) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3.) Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows or ought to know that it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such transit.

Section 47.— [*Right to Examine the Goods.*] (1.) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2.) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

(3.) Where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words “collect on delivery,” or other-

wise, the buyer is not entitled to examine the goods before payment of the price in the absence of agreement permitting such examination.

Section 48.— [*What Constitutes Acceptance.*] The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

Section 49.— [*Acceptance Does not Bar Action for Damages.*] In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.

Section 50.— [*Buyer is not Bound to Return Goods Wrongly Delivered.*] Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them.

Section 51.— [*Buyer's Liability for Failing to Accept Delivery.*] When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. If the neglect or refusal of the buyer to take delivery amounts to a repudiation or breach of the entire contract, the seller shall have the rights against the goods and on the contract hereinafter provided in favor of the seller when the buyer is in default.

PART IV.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

Section 52.— [*Definition of Unpaid Seller.*] (1.) The seller of goods is deemed to be an unpaid seller within the meaning of this act—

- (a.) When the whole of the price has not been paid or tendered;
- (b.) When a bill of exchange or other negotiable instrument has

been received as conditional payment, and the condition on which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer, or otherwise.

(2.) In this part of this act the term "seller" includes an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price, or any other person who is in the position of a seller.

Section 53.— [*Remedies of an Unpaid Seller.*] (1.) Subject to the provisions of this act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has —

(a.) A lien on the goods or right to retain them for the price while he is in possession of them;

(b.) In case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them;

(c.) A right of resale as limited by this act;

(d.) A right to rescind the sale as limited by this act.

(2.) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and coextensive with his rights of lien and stoppage "*in transitu*" where the property has passed to the buyer.

Unpaid Seller's Lien.

Section 54.— [*When Right of Lien may be Exercised.*] (1.) Subject to the provisions of this act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:

(a.) Where the goods have been sold without any stipulation as to credit;

(b.) Where the goods have been sold on credit, but the term of credit has expired;

(c.) Where the buyer becomes insolvent.

(2.) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

Section 55.— [*Lien after Part Delivery.*] Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an intent to waive the lien or right of retention.

Section 56.— [*When Lien is Lost.*] (1.) The unpaid seller of goods loses his lien thereon —

(a.) When he delivers the goods to a carrier or other bailee for the

purpose of transmission to the buyer without reserving the property in the goods or the right to the possession thereof;

(b.) When the buyer or his agent lawfully obtains possession of the goods;

(c.) By waiver thereof.

(2.) The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained judgment or decree for the price of the goods.

Stoppage in Transitu.

Section 57.—[*Seller may Stop Goods on Buyer's Insolvency.*]

Subject to the provisions of this act, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them *in transitu*, that is to say, he may resume possession of the goods at any time while they are in transit, and he will then become entitled to the same rights in regard to the goods as he would have had if he had never parted with the possession.

Section 58.—[*When Goods Are in Transit.*] (1.) Goods are in transit within the meaning of section 57—

(a.) From the time when they are delivered to a carrier by land or water, or other bailee for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee;

(b.) If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, even if the seller has refused to receive them back.

(2.) Goods are no longer in transit within the meaning of section 57:

(a.) If the buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination;

(b.) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent; and it is immaterial that a further destination for the goods may have been indicated by the buyer;

(c.) If the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf.

(3.) If goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.

(4.) If part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped *in transitu*, unless such part delivery has been made under such circumstances as to show an agreement with the buyer to give up possession of the whole of the goods.

Section 59.— [*Ways of Exercising the Right to Stop.*] (1.) The unpaid seller may exercise his right of stoppage *in transitu* either by obtaining actual possession of the goods or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may prevent a delivery to the buyer.

(2.) When notice of stoppage *in transitu* is given by the seller to the carrier, or other bailee in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such redelivery must be borne by the seller. If, however, a negotiable document of title representing the goods has been issued by the carrier or other bailee, he shall not be obliged to deliver or justified in delivering the goods to the seller unless such document is first surrendered for cancellation.

Resale by the Seller.

Section 60.— [*When and How Resale May be Made.*] (1.) Where the goods are of a perishable nature, or where the seller expressly reserves the right of resale in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid seller having a right of lien or having stopped the goods *in transitu* may resell the goods. He shall not thereafter be liable to the original buyer upon the contract to sell or the sale or for any profit made by such resale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2.) Where a resale is made, as authorized in this section, the buyer acquires a good title as against the original buyer.

(3.) It is not essential to the validity of a resale that notice of an intention to resell the goods be given by the seller to the original buyer. But where the right to resell is not based on the perishable nature of the goods or upon an express provision of the contract or the sale, the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the resale was made.

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(4.) It is not essential to the validity of a resale that notice of the time and place of such resale should be given by the seller to the original buyer.

(5.) The seller is bound to exercise reasonable care and judgment in making a resale, and subject to this requirement may make a resale either by public or private sale.

Rescission by the Seller.

Section 61.— [*When and How the Seller May Rescind the Sale.*]

(1.) An unpaid seller having a right of lien or having stopped the goods *in transitu*, may rescind the transfer of title and resume the property in the goods, where he expressly reserved the right to do so in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2.) The transfer of title shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer or by some other overt act an intention to rescind. It is not necessary that such overt act should be communicated to the buyer, but the giving or failure to give notice to the buyer of the intention to rescind shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the right of rescission was asserted.

Section 62.— [*Effect of Sale of Goods Subject to Lien or Stoppage in Transitu.*] Subject to the provisions of this act, the unpaid seller's right of lien or stoppage *in transitu* is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

If, however, a negotiable document of title has been issued for goods, no seller's lien or right of stoppage *in transitu* shall defeat the right of any purchaser for value in good faith to whom such document has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier or other bailee who issued such document, of the seller's claim to a lien or right of stoppage *in transitu*.

PART V.

ACTIONS FOR BREACH OF THE CONTRACT.

Remedies of the Seller.

Section 63.— [*Action for the Price.*] (1.) Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the

goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

(2.) Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it.

(3.) Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 64 (4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price.

Section 64.— [*Action for Damages for Non-Acceptance of the Goods.*] (1.) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2.) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3.) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

(4.) If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages.

Section 65.— [*When Seller May Rescind Contract or Sale.*] Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his in-

ability to perform his obligations thereunder, or has committed a material breach thereof, the seller may totally rescind the contract or the sale by giving notice of his election so to do to the buyer.

Remedies of the Buyer.

Section 66.— [*Action for Converting or Detaining Goods.*] Where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld.

Section 67.— [*Action for Failing to Deliver Goods.*] (1.) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for non-delivery.

(2.) The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract.

(3.) Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the markets or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

Section 68.— [*Specific Performance.*] Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as to the court may seem just.

Section 69.— [*Remedies for Breach of Warranty.*] (1.) Where there is a breach of warranty by the seller, the buyer may, at his election —

(a.) Accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price;

(b.) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty;

(c.) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty;

(d.) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.

(2.) When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.

(3.) Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale.

(4.) Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price.

(5.) Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section 53.

(6.) The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(7.) In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

Section 70.— [*Interest and Special Damages.*] Nothing in this act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

PART VI.

INTERPRETATION.

Section 71.— [*Variation of Implied Obligations.*] Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale.

Section 72.— [*Rights May be Enforced by Action.*] Where any right, duty or liability is declared by this act, it may, unless otherwise by this act provided, be enforced by action.

Section 73.— [*Rule for Cases not Provided for by this Act.*] In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall continue to apply to contracts to sell and to sales of goods.

Section 74.— [*Interpretation Shall Give Effect to Purpose of Uniformity.*] This act shall be so interpreted and construed, if possible, as to effectuate its general purpose to make uniform the laws of those states which enact it.

Section 75.— [*Provisions not Applicable to Mortgages.*] The provisions of this act relating to contracts to sell and to sales do not apply, unless so stated, to any transaction in the form of a contract to sell or a sale which is intended to operate by way of mortgage, pledge, charge, or other security.

Section 76.— [*Definitions.*] (1.) In this act, unless the context or subject matter otherwise requires—

“Action” includes counterclaim, set-off and suit in equity.

“Buyer” means a person who buys or agrees to buy goods or any legal successor in interest of such person.

“Defendant” includes a plaintiff against whom a right of set-off or counterclaim is asserted.

“Delivery” means voluntary transfer of possession from one person to another.

“Divisible contract to sell or sale” means a contract to sell or a sale in which by its terms the price for a portion or portions of the goods less than the whole is fixed or ascertainable by computation.

“Document of title to goods” includes any bill of lading, dock warrant, warehouse receipt or order for the delivery of goods, or any

other document used in the ordinary course of business in the sale or transfer of goods, as proof of the possession or control of the goods, or authorizing or purporting to authorize the possessor of the document to transfer or receive, either by indorsement or by delivery, goods represented by such document.

“Fault” means wrongful act or default.

“Fungible goods” means goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit.

“Future goods” means goods to be manufactured or acquired by the seller after the making of the contract of sale.

“Goods” include all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

“Order” in sections of this act relating to documents of title means an order by indorsement on the document.

“Person” includes a corporation or partnership or two or more persons having a joint or common interest.

“Plaintiff” includes defendant asserting a right of set-off or counterclaim.

“Property” means the general property in goods, and not merely a special property.

“Purchaser” includes mortgagee and pledgee.

“Purchases” includes taking as a mortgagee or as a pledgee.

“Quality of goods” includes their state or condition.

“Sale” includes a bargain and sale as well as a sale and delivery.

“Seller” means a person who sells or agrees to sell goods, or any legal successor in interest of such person.

“Specific goods” means goods identified and agreed upon at the time a contract to sell or a sale is made.

“Value” is any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, constitutes value where goods or documents of titles are taken either in satisfaction thereof or as security therefor.

(2.) A thing is done “in good faith” within the meaning of this act when it is in fact done honestly, whether it be done negligently or not.

(3.) A person is insolvent within the meaning of this act who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he is solvent within the meaning of the federal bankruptcy law or not.

(4.) Goods are in a “deliverable state” within the meaning of this

act when they are in such a state that the buyer would, under the contract, be bound to take delivery of them.

Section 77.—[*Inconsistent Legislation Repealed.*] All acts or parts of acts inconsistent with this act are hereby repealed.

Section 78.—[*Time when the Act Takes Effect.*] This act shall take effect on the day of one thousand nine hundred and .

Section 79.—[*Name of Act.*] This act may be cited as the Sales Act.

SALE OF GOODS ACT.

AN ACT for Codifying the Law Relating to the Sale of Goods.

(Chapter 71 of 56 & 57 Victoria, February 20, 1894.)

PART I.

FORMATION OF THE CONTRACT.

Contract of Sale.

1.—(1.) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part-owner and another.

(2.) A contract of sale may be absolute or conditional.

(3.) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4.) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

2. Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Provided that where necessaries are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery.

Formalities of the Contract.

3. Subject to the provisions of this Act and of any statute in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.

Provided that nothing in this section shall affect the law relating to corporations.

4.—(1.) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

(2.) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

(3.) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.

(4.) The provisions of this section do not apply to Scotland.

Subject-Matter of Contract.

5.—(1.) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called “future goods.”

(2.) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3.) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

6. Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.

7. Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.

The Price.

8.—(1.) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.

(2.) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

9.—(1.) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided; provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2.) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.

Conditions and Warranties.

10.—(1.) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

(2.) In a contract of sale “month” means *prima facie* calendar month.

11.—(1.) In England or Ireland—

(a.) Where a contract of sale is subject to any condition to be fulfilled by the seller the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

(b.) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

(c.) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.

(2.) In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat

the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.

(3.) Nothing in this section shall affect the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise.

12. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is —

- (1.) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass:
- (2.) An implied warranty that the buyer shall have and enjoy quiet possession of the goods:
- (3.) An implied warranty that the goods shall be free from any charge or encumbrance in favor of any third party, not declared or known to the buyer before or at the time when the contract is made.

13. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

14. Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—

- (1.) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose:
- (2.) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed:

- (3.) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade:
- (4.) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

Sale by Sample.

15.—(1.) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2.) In the case of a contract for sale by sample —

- (a.) There is an implied condition that the bulk shall correspond with the sample in quality:
- (b.) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample:
- (c.) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

PART II.

EFFECTS OF THE CONTRACT.

Transfer of Property as between Seller and Buyer.

16. Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

17.—(1.) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2.) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

18. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1.—Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Rule 4.—When goods are delivered to the buyer on approval or “on sale or return” or other similar terms the property therein passes to the buyer:—

(a.) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction:

(b.) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 5.—(1.) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made:

(2.) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

19.—(1.) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2.) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

(3.) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

20. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodian of the goods of the other party.

Transfer of Title.

21.—(1.) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2.) Provided also that nothing in this Act shall affect —

(a.) The provisions of the Factors Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof;

(b.) The validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

22.—(1.) Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

(2.) Nothing in this section shall affect the law relating to the sale of horses.

(3.) The provisions of this section do not apply to Scotland.

23. When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer ac-

quires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

24.—(1.) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise.

(2.) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

(3.) The provisions of this section do not apply to Scotland.

25.—(1.) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

(2.) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

(3.) In this section the term "mercantile agent" has the same meaning as in the Factors Acts.

26.—(1.) A writ of *fiery facias* or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ to indorse upon the back thereof the hour, day, month, and year when he received the same.

Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the

execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff.

(2.) In this section the term "sheriff" includes any officer charged with the enforcement of a writ of execution.

(3.) The provisions of this section do not apply to Scotland.

PART III.

PERFORMANCE OF THE CONTRACT.

27. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

28. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

29.—(1.) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence; Provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.

(2.) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3.) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf; provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4.) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5.) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

30.—(1.) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but

if the buyer accepts the goods so delivered he must pay for them at the contract rate.

(2.) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3.) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4.) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

31.—(1.) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2.) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

32.—(1.) Where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *prima facie* deemed to be a delivery of the goods to the buyer.

(2.) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3.) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.

33. Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer

must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

34.—(1.) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2.) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

35. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

36. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

37. When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

PART IV.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

38.—(1.) The seller of goods is deemed to be an “unpaid seller” within the meaning of this Act—

- (a.) When the whole of the price has not been paid or tendered;
- (b.) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonor of the instrument or otherwise.

(2.) In this part of this Act the term “seller” includes any person who is in the position of a seller, as, for instance, an agent of the

seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

39.—(1.) Subject to the provisions of this Act, and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law —

(a.) A lien on the goods or right to retain them for the price while he is in possession of them;

(b.) In case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them;

(c.) A right of re-sale as limited by this Act.

(2.) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage *in transitu* where the property has passed to the buyer.

40. In Scotland a seller of goods may attach the same while in his own hands or possession by arrestment or poinding; and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party.

Unpaid Seller's Lien.

41.—(1.) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely: —

(a.) Where the goods have been sold without any stipulation as to credit;

(b.) Where the goods have been sold on credit, but the term of credit has expired;

(c.) Where the buyer becomes insolvent.

(2.) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodier for the buyer.

42. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.

43.—(1.) The unpaid seller of goods loses his lien or right of retention thereon —

(a.) When he delivers the goods to a carrier or other bailee or custodier for the purpose of transmission to the buyer without reserving the right of disposal of the goods;

(b.) When the buyer or his agent lawfully obtains possession of the goods;

(c.) By waiver thereof.

(2.) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

Stoppage in Transitu.

44. Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them *in transitu*, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

45.— (1.) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodian for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodian.

(2.) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3.) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodian acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee or custodian for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4.) If the goods are rejected by the buyer, and the carrier or other bailee or custodian continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5.) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer.

(6.) Where the carrier or other bailee or custodian wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

(7.) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped *in transitu*, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

46.— (1.) The unpaid seller may exercise his right of stoppage *in transitu* either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodian in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2.) When notice of stoppage *in transitu* is given by the seller to the carrier, or other bailee or custodian in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such redelivery must be borne by the seller.

Re-sale by Buyer or Seller.

47. Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage *in transitu* is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee.

48.— (1.) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage *in transitu*.

(2.) Where an unpaid seller who has exercised his right of lien or retention or stoppage *in transitu* resells the goods, the buyer acquires a good title thereto as against the original buyer.

(3.) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to resell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

(4.) Where the seller expressly reserves a right of resale in case the buyer should make default, and on the buyer making default, resells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

PART V.

ACTIONS FOR BREACH OF THE CONTRACT.

Remedies of the Seller.

49.—(1.) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

(2.) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.

(3.) Nothing in this section shall prejudice the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be.

50.—(1.) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2.) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3.) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

Remedies of the Buyer.

51.—(1.) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

(2.) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3.) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

52. In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just, and the application by the plaintiff may be made at any time before judgment or decree.

The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific implement in Scotland.

53.—(1.) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may

(a.) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b.) maintain an action against the seller for damages for the breach of warranty.

(2.) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3.) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

(4.) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

(5.) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act.

54. Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

PART VI.

SUPPLEMENTARY.

55. Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.

56. Where, by this Act, any reference is made to a reasonable time the question what is a reasonable time is a question of fact.

57. Where any right, duty, or liability is declared by this Act, it may, unless otherwise by this Act provided, be enforced by action.

58. In the case of a sale by auction —

(1.) Where goods are put up for sale by auction in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale:

(2.) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid:

(3.) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person: Any sale contravening this rule may be treated as fraudulent by the buyer:

(4.) A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller.

Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction.

59. In Scotland where a buyer has elected to accept goods which he might have rejected, and to treat a breach of contract as only giving rise to a claim for damages, he may, in an action by the seller for the price, be required, in the discretion of the court before which the action depends, to consign or pay into court the price of the goods, or part thereof, or to give other reasonable security for the due payment thereof.

60. The enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned.

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the

commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

61.—(1.) The rules in bankruptcy relating to contracts of sale shall continue to apply thereto, notwithstanding anything in this Act contained.

(2.) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods.

(3.) Nothing in this Act or in any repeal effected thereby shall affect the enactments relating to bills of sale, or any enactment relating to the sale of goods which is not expressly repealed by this Act.

(4.) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.

(5.) Nothing in this Act shall prejudice or affect the landlord's right of hypothec or sequestration for rent in Scotland.

62.—(1.) In this Act, unless the context or subject matter otherwise requires,—

“Action” includes counterclaim and set off, and in Scotland condescendence and claim and compensation:

“Bailee” in Scotland includes custodier:

“Buyer” means a person who buys or agrees to buy goods:

“Contract of sale” includes an agreement to sell as well as a sale:

“Defendant” includes in Scotland defender, respondent, and claimant in a multiple-poin ding:

“Delivery” means voluntary transfer of possession from one person to another:

“Document of title to goods” has the same meaning as it has in the Factors Acts:

“Factors Acts” means the Factors Act, 1889, the Factors (Scotland) Act, 1890, and any enactment amending or substituted for the same:

“Fault” means wrongful act or default:

“Future goods” means goods to be manufactured or acquired by the seller after the making of the contract of sale:

“Goods” include all chattels personal other than things in action and money, and in Scotland all corporeal movables except money. The term includes emblements, industrial growing crops, and things

attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale:

“Lien” in Scotland includes right of retention:

“Plaintiff” includes pursuer, complainer, claimant in a multiple-poining and defendant or defender counterclaiming:

“Property” means the general property in goods, and not merely a special property:

“Quality of goods” includes their state or condition:

“Sale” includes a bargain and sale as well as a sale and delivery:

“Seller” means a person who sells or agrees to sell goods:

“Specific goods” means goods identified and agreed upon at the time a contract of sale is made.

“Warranty” as regards England and Ireland means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

As regards Scotland a breach of warranty shall be deemed to be a failure to perform a material part of the contract.

(2.) A thing is deemed to be done “in good faith” within the meaning of this Act when it is in fact done honestly, whether it be done negligently or not.

(3.) A person is deemed to be insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he has become a notour bankrupt or not.

(4.) Goods are in a “deliverable state” within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

63. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-four.

64. This act may be cited as the Sale of Goods Act, 1893.

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